

Department of Energy

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

PUBLIC AFFAIRS

June 6, 2010

In reply refer to: DK-7

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

RE: FOIA #BPA-2010-00335-F

Dear Mr. Seligman:

This letter is a partial response to your Freedom of Information Act (FOIA) request that you made to the Bonneville Power Administration (BPA) for the following:

A copy of all communications since August 27, 2009 between BPA and the U.S. Department of Energy regarding BPA's existing or proposed contracts with Alcoa and Columbia Falls Aluminum Co. ("CFAC")

The majority of the responsive records are enclosed. Some records were sent to Alcoa and/or CFAC for comment as required under Executive Order 12,600, because they may contain commercial or financial confidential information protected under Exemption 4. BPA will complete its final response to your request when the required notification process is complete.

As you know, the responsive records were reviewed by BPA and by the Department of Energy (DOE). BPA and DOE redacted parts of some of the responsive records pursuant to 5 USC § 552(b)(5) (Exemption 5). BPA and DOE reviewed these redacted records to attempt to release to you all reasonably segregable portions of the redacted records.

The redacted portions of the responsive records are pre-decisional and deliberative, have not been released outside of the executive branch of the government, and contain recommendations or opinions concerning policy issues about existing or proposed contracts with Alcoa and CFAC. The redacted portions do not reflect a final agency decision.

In addition, some of the redacted material is protected by the attorney-client privilege. This information contains confidential communications between and among BPA and DOE attorneys and its employees for the purpose of obtaining legal advice on issues involving existing or proposed contracts with Alcoa and CFAC. These communications have not been released outside of BPA or DOE.

BPA and DOE have reviewed the redactions information for a discretionary release. Here, however, a release will not further the public interest because a disclosure will inhibit BPA and DOE employees and attorneys to making honest and open recommendations concerning legal and policy matters that are essential to BPA programs.

You may appeal, pursuant to 10 CFR 1004.8, the redactions by BPA and DOE. The appeal must be made within thirty (30) calendar days of receipt of a letter denying any portion of the request. The appeal should be sent to the Director, Office of Hearings and Appeals, HG-1, U.S. L'Enfant Plaza Building, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-1615.

Sincerely,

/s/ Christina J. Munro

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

Enclosure(s): Responsive Documents

Stauffer, Nicki - A-7

#103

From: Wright, Stephen J - A-7
Sent: Tuesday, September 15, 2009 2:22 PM
To: 'Daniel Poneman (Daniel.Poneman@hq.doe.gov)'
Cc: 'scott.harris@hq.doe.gov'
Subject: WA delegation calls

I don't normally report the calls I get from Congressional/Governors offices if they are predictable. But given the interest in the Direct Service Industry issues I am passing along that I heard from Sen. Murray and Cantwell offices last week regarding Alcoa, got a call from Norm Dicks over the weekend on Pt. Townsend and a call from Gov. Gregoire on Monday regarding Alcoa. Not surprisingly all were supportive of strategies to retain jobs.

15
b-5

Atterbury, Laura M - DK-7

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Monday, September 21, 2009 4:19 PM
To: Roach, Randy A - L-7
Cc: Fygi, Eric
Subject: RE: Discussion re DSI service

Thanks Randy. I did have most of that, but very much appreciate your keeping us in the loop.

-----Original Message-----

From: Roach, Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Monday, September 21, 2009 7:17 PM
To: Harris, Scott Blake
Cc: Fygi, Eric
Subject: RE: Discussion re DSI service

I know Steve has been in contact with the Dep. Sec., but I'm not sure what has been shared with you!

b-5
DP
AC

more detail if you like, but that's what is going on in a nutshell.

I can provide

Randy

-----Original Message-----

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Wednesday, September 16, 2009 10:13 AM
To: Roach, Randy A - L-7
Cc: Fygi, Eric
Subject: RE: Discussion re DSI service

Much appreciated.

-----Original Message-----

From: Roach, Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Wednesday, September 16, 2009 12:08 PM
To: Harris, Scott Blake
Cc: Fygi, Eric
Subject: RE: Discussion re DSI service

Thanks Scott, I appreciate it.

I will keep you apprised of any developments of real note. Randy

DP
AC
b-5

-----Original Message-----

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Sunday, September 13, 2009 5:55 AM
To: Roach,Randy A - L-7
Cc: Fygi, Eric
Subject: RE: Discussion re DSI service

Randy --

Sorry I have not been in touch with you since Wright met with S-1 and S-2. I assume you are in the loop, but wanted to make sure.

DP
AC
b-5

Let me know if you have any questions.

Scott

-----Original Message-----

From: Roach,Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Thursday, September 10, 2009 2:46 PM
To: Harris, Scott Blake
Cc: Runzler,Kurt W - LP-7; Edwards, Jr. Robert H; Porter, Steven; Lev, Sean; Fygi, Eric
Subject: RE: Discussion re DSI service

DP
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b-5

Dipac 6-5

Randy

-----Original Message-----

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Thursday, September 10, 2009 3:27 AM
To: Roach,Randy A - L-7
Cc: Runzler,Kurt W - LP-7; Edwards, Jr. Robert H; Porter, Steven; Lev, Sean; Fygi, Eric
Subject: RE: Discussion re DSI service

Scott

-----Original Message-----

From: Roach,Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Wednesday, September 09, 2009 8:56 PM
To: Harris, Scott Blake
Cc: Runzler,Kurt W - LP-7; Edwards, Jr. Robert H; Porter, Steven
Subject: RE: Discussion re DSI service

Thanks Scott. I was hoping to hear whether Steve had an opportunity to discuss this with the Deputy Secretary, but haven't heard anything yet.

b-5
DP
AC

For now, given Steve Porter's earlier message, I would share the following:

Randy Roach - L-7
Executive Vice-President and General Counsel Bonneville Power Administration PO Box 3621
Portland, OR 97208-3621
503-230-5178

-----Original Message-----

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Wednesday, September 09, 2009 10:42 AM
To: Roach,Randy A - L-7; Edwards, Jr. Robert H; Porter, Steven
Cc: Runzler,Kurt W - LP-7; Burns,Allen L - D-7; Willard,Barbara M - L-7; Dickerson, Katharine

Subject: RE: Discussion re DSI service

I am eager to discuss this -- but today is not possible. [

Scott Blake Harris
General Counsel
United States Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
(202) 586-5281

-----Original Message-----

From: Roach,Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Wednesday, September 09, 2009 11:45 AM
To: Harris, Scott Blake; Edwards, Jr. Robert H; Porter, Steven
Cc: Runzler,Kurt W - LP-7; Burns,Allen L - D-7; Willard,Barbara M - L-7; Dickerson, Katharine
Subject: Discussion re DSI service
Importance: High

My personal assistant, Barbara Willard, will call Katharine Dickerson to see if it is possible to set up a meeting today of you, me, Allen Burns and Kurt Runzler to discuss this. Allen is the Acting Deputy Administrator, and is the lead negotiator for BPA on the DSI deals. He is flying out to DC tomorrow to try to conclude negotiations on a draft long-term contract with Alcoa, so this would be timely. Kurt Runzler is the lead attorney on the negotiations for us. Thanks much. Randy

-----Original Message-----

From: Porter, Steven [mailto:Steven.Porter@hq.doe.gov]
Sent: Thursday, September 03, 2009 8:02 AM
To: Roach,Randy A - L-7
Cc: Harris, Scott Blake; Edwards, Jr. Robert H
Subject: RE: Latest DSI Ninth Circuit Decision

Randy,

Thank you for the update. You should know that this Court decision has gotten the attention of DOE HQs.

AC

Thanks. Steve

6-5

-----Original Message-----

From: Roach,Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Friday, August 28, 2009 5:38 PM
To: Porter, Steven
Subject: Latest DSI Ninth Circuit Decision

Hi Steve, The 9th Circuit issued the attached decision today

That, at least, is my take on the decision.

The court concludes its decision by recognizing the Administrator's dilemma:

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DP
6-5

Randy

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC NORTHWEST GENERATING
COOPERATIVE; BLACHY-LANE
COUNTY COOPERATIVE ELECTRIC
ASS.; CENTRAL ELECTRIC
COOPERATIVE INC.; CLEARWATER
POWER COMPANY; CONSUMERS
POWER INC.; COOS-CURRY ELECTRIC
COOP., INC.; DOUGLAS ELECTRIC
COOPERATIVE; FALL RIVER RURAL
ELECTRIC COOPERATIVE, INC.; LANE
ELECTRIC COOPERATIVE INC.; LOST
RIVER ELECTRIC COOPERATIVE INC.;
NORTHERN LIGHTS INC.; OKANOGAN
COUNTY ELECTRIC COOPERATIVE
INC.; RAFT RIVER RURAL ELECTRIC
COOPERATIVE, INC.; SALMON RIVER
ELECTRIC COOPERATIVE INC.;
UMATILLA ELECTRIC; WEST OREGON
ELECTRIC COOPERATIVE INC.,

Petitioners,

ALCOA, INC.; AVISTA CORPORATION;
PUGET SOUND ENERGY, INC.;
PACIFICORP; IDAHO POWER
COMPANY; COLUMBIA FALLS
ALUMINUM COMPANY, LLC,

Intervenors,

v.

BONNEVILLE POWER
ADMINISTRATION; DEPT. OF ENERGY,
Respondents.

No. 09-70228

BPA No.
06-PB-11744

PUBLIC POWER COUNCIL,
Petitioner,

AVISTA CORPORATION; PUGET SOUND
ENERGY, INC.; IDAHO POWER
COMPANY; ALCOA, INC.; COLUMBIA
FALLS ALUMINUM COMPANY, LLC,
Intervenors,

v.

BONNEVILLE POWER
ADMINISTRATION; DEPARTMENT OF
ENERGY,
Respondents.

No. 09-70236
BPA
No. 06-PB-11744

INDUSTRIAL CUSTOMERS OF
NORTHWEST UTILITIES,
Petitioner,

v.

BONNEVILLE POWER
ADMINISTRATION,
Respondent.

No. 09-70988
BPA
No. 06-PB-11744
OPINION

On Petition for Review of an Order of the
Bonneville Power Administration

Argued and Submitted
July 7, 2009—Seattle, Washington

Filed August 28, 2009

Before: Raymond C. Fisher and Marsha S. Berzon,
Circuit Judges, and Barry Ted Moskowitz, * District Judge.

Opinion by Judge Berzon

*The Honorable Barry Ted Moskowitz, District Judge for the Southern District of California, sitting by designation.

COUNSEL

Erick Johnson, Lake Oswego, Oregon, for petitioner Pacific Northwest Generating Cooperative.

Mark R. Thompson, Portland, Oregon, for petitioner Public Power Council.

Melinda J. Davison, Irion Sanger, Davison Van Cleve, P.C., Portland, Oregon, for petitioner Industrial Customers of Northwest Utilities.

Karin J. Immergut, United States Attorney; Stephen J. Odell, Assistant United States Attorney; David J. Adler, J. Courtney Olive, Special Assistant United States Attorneys; Randy A. Roach, General Counsel; Timothy A. Johnson, Assistant General Counsel, Portland, Oregon, for respondent Bonneville Power Administration.

Michael J. Uda, Doney Crowley Bloomquist Payne Uda P.C., Helena, Montana, for intervenor Columbia Falls Aluminum Company.

Michael C. Dotten, Lake Oswego, Oregon, for intervenor Alcoa Inc.

Jay T. Waldron, William J. Ohle, Sara Kobak, Schwabe Williamson & Wyatt P.C., Portland, Oregon, for intervenors PacificCorp *et al.*

OPINION

BERZON, Circuit Judge:

In *Pacific Northwest Generating Coop. v. Dep't of Energy* (“PNGC”), 550 F.3d 846 (9th Cir. 2008), *amended on denial of reh'g*, No. 05-75638, 2009 WL 2386294 (9th Cir. Aug. 5, 2009), this court held invalid a central provision of a five-year contract between the Bonneville Power Administration (“BPA”) and the aluminum company Alcoa, Inc. (“Alcoa”). Less than a month after we issued the PNGC opinion, BPA announced that it and Alcoa had agreed to an amended version of the invalidated provision that would govern the nine-month period ending September 30, 2009 (the original five-year contract would have expired in September 2011). Petitioners Pacific Northwest Generating Cooperative (“PNGC”), Public Power Council (“PPC”), and Industrial Customers of Northwest Utilities (“ICNU”) challenge BPA’s decision to execute the amended contract.

We agree with the petitioners’ challenge and therefore grant their petitions for review. Although under no obligation to contract with Alcoa, BPA agreed voluntarily to make a nearly \$32 million cash “benefit” payment to the aluminum company, so that the company could purchase power from one of BPA’s competitors. BPA’s justifications for this unusual transaction, under which the agency received nothing directly in exchange for its \$32 million, do not demonstrate that the transaction was “consistent with sound business prin-

ciples,” as required by BPA’s governing statutes. We therefore hold that BPA exceeded its statutory authority when it agreed to the Alcoa contract amendment.

I. BACKGROUND

A. The *PNGC* Opinion

In *PNGC*, we invalidated a central provision of a five-year contract (the “2007 Contract”) between the Bonneville Power Administration and Alcoa, one of BPA’s Direct Service Industrial (“DSI”) customers. Under the invalidated provision, BPA had agreed to “sell” power to Alcoa at a mutually agreed-upon rate, below both the market rate and the statutorily authorized Industrial Firm Power (IP) rate. *See PNGC*, 550 F.3d at 854-58. The provision at issue did not, however, require BPA to sell physical power to Alcoa. Rather, BPA had agreed to “monetize” the power sale by making cash “benefit” payments to Alcoa in an amount approximately equal to the difference between the higher wholesale market rate for power and the lower contract rate multiplied by the amount of power consumed by Alcoa each month.¹ *See id.* at 854-55. The idea was that Alcoa could use the monetary benefit payments to subsidize its purchase of power on the wholesale market, such that the aluminum company’s net power costs would be approximately equal to the agreed-upon contract rate (assuming that various caps on the monetary benefit were not triggered). *See id.*

We held this monetization provision invalid on the ground that “[t]he decision to monetize embodied in the agreements

¹The monetary benefit payments in the 2007 Contract were subject to several caps. For example, BPA agreed to pay no more than \$24/MWh for each MWh of power that Alcoa consumed. Thus, if the wholesale rate for power exceeded the agreed-upon rate by more than \$24/MWh, Alcoa was required to pay the overage. For a more thorough discussion of the various caps and relevant examples, *see PNGC*, 550 F.3d at 855 & n.11.

violated [BPA's] statutory obligation[] . . . to provide 'the lowest possible rates to consumers consistent with sound business principles.' § 838g." *Id.* at 875. We explained:

In essence, BPA has voluntarily agreed to forgo revenues by charging the DSIs a rate below what is authorized by statute (i.e., the IP rate) and below what is available on the open market. These foregone revenues result in higher rates for all other customers. This outcome is in apparent and direct conflict with BPA's statutory mandate, *see* § 838g, and renders BPA's decision to "monetize" the DSI contracts in an amount reflective of those underlying rate decisions — albeit a capped amount — highly suspect.

Id.

We then considered and rejected as "flawed" BPA's three proffered justifications for this decision. *Id.* at 875-78. In so doing, we noted that "[b]y subsidizing the DSIs' smelter operations beyond what it is obligated to do, BPA is simply giving away money," *id.* at 877, and that such an act was "not reflective of a 'business-oriented philosophy,'" *id.* at 878 (quoting *Ass'n of Pub. Agency Customers, Inc. v. BPA ("APAC")*, 126 F.3d 1158, 1171 (9th Cir. 1997)). We also explained that "BPA's authority to *sell* power to the DSIs does not mean that BPA may simply *give* money to the DSIs by calling the agreement a 'power sale' with 'monetized service benefits.'" *PNGC*, 550 F.3d at 878 (emphasis in original).

We concluded our discussion of the validity of the monetary benefit provision of the 2007 Contract with the following summary:

In sum, BPA has not advanced a "reasonable interpretation[] of its governing statutes" that supports its actions. *Golden Nw. Aluminum [Inc. v. BPA]*, 501

F.3d 1037, 1045 (9th Cir. 2007)]. Nor has the agency shown how offering the DSIs rates below the market rate and below what it is statutorily authorized to offer “further[s] BPA’s business interests consistent with its public mission.” *Ass’n of Pub. Agency Customers*, 126 F.3d at 1171. We conclude that BPA’s decision to offer the subsidized rates to the DSIs and then monetize those rates is inconsistent with BPA’s statutory authority under the NWPA, and therefore hold that the monetization provisions of the aluminum contracts are invalid.

Id.

The *PNGC* opinion was filed on December 17, 2008. Two weeks later, on December 31, 2008, BPA sent a letter to its regional customers and stakeholders, including Petitioners. In the letter, BPA informed its customers that, in light of the *PNGC* opinion, the agency would cease making monetary benefit payments to Alcoa.

The agency also announced a proposed amendment to the 2007 Contract “so that service thereunder will conform to the [PNGC] Opinion.” The critical change that BPA proposed was that the parties would begin using the IP rate as the basis for the monetary benefit calculation, rather than the previous contract rate (which, as noted, was below the IP rate). BPA also informed its customers that the amendment would only govern “sales” to Alcoa from January 1, 2009 through September 30, 2009.

BPA concluded its letter by providing a web address where interested parties could view the proposed amended contract. The agency also stated that it would accept public comments about the amendment until January 6, 2009, less than a week later. Although it recognized that it was providing only “a limited time to comment on the proposed amendment,” the agency stated that it “believe[d] that it is important to imple-

ment this amendment in a timely manner to avoid, if possible, any unnecessary interruption of smelter operations, especially given the difficult economic times and potential loss of additional jobs in the region.”

B. The Amended Contract

On January 9, 2009, BPA signed the amended contract. Like the 2007 Contract, the amended contract did not require BPA to deliver physical power to Alcoa. Instead, BPA once again agreed to provide a “monetary benefit” to Alcoa, which Alcoa could then use to offset the cost of purchasing physical power on the open market.

Unlike under the previous contract, however, the monetary benefit in the amended contract is calculated using the IP rate as the base rate, rather than an agreed-upon rate lower than the IP rate. More specifically, BPA agreed in the amended contract to pay Alcoa the difference between a forecasted market rate for power of \$48.05/MWh and the IP rate of \$32.70/MWh — that is, \$15.35/MWh — for every megawatt hour of power purchased by Alcoa on the open market between January 1, 2009 and September 30, 2009, up to a total of \$31.9 million.²

BPA announced the execution of the amended contract in a letter to its customers dated January 13, 2009. In the letter, BPA explained the reasons for its decision to enter into the amended agreement:

BPA decided it was necessary to move quickly to implement the amendment and avoid, if possible, any unnecessary interruption of smelter operations, especially given the difficult economic times and

²The IP rate quoted in *PNGC* was \$45.08/MWh. See *PNGC*, 550 F.3d at 857. That rate was for FY2007. The adjusted FY2009 rate is \$32.70/MWh. Petitioners do not dispute the validity of the 2009 IP rate.

potential loss of additional jobs. Alcoa's announcement of substantial worldwide layoffs and [Columbia Falls Aluminum Company's] announcement of a likely plant closure reinforced our view that it was important to act quickly. As a consequence, a limited amount of time was available for public comment. While we would have preferred to afford customers more time to comment on the proposed amendment, BPA believed it had to move quickly due to the circumstances.

...

This amendment is an interim action that applies to payments through FY 2009 only. We now have time to address the FY 2010-11 period under the 2007 Block Contract, and will use that time to more thoroughly engage with the public on the terms for any amendment or replacement agreement for the FY 2010-11 period.

BPA understands that it must address the look-back issue associated with payments made under the 2007 Block Contract during the FY 2007-2008 period, and intends to engage the region once we have an opportunity to consider all these arrangements more thoroughly.

Two months later, on March 3, 2009, BPA announced that it had executed a nearly identical amendment to its contract with a second aluminum DSI, Columbia Falls Aluminum Company (CFAC). The validity of the amended CFAC contract is not part of this appeal. The announcement of the CFAC deal is relevant, however, because in that announcement, BPA provided more detailed explanations of its reasons for entering into the Alcoa contract amendment. Those reasons included the fact that "DSI loads have historically benefited BPA by taking power in relatively flat blocks that

require little or no shaping; they have taken power from BPA at light load hours, when power has historically been difficult to market; and they have provided the Administrator with additional power reserves.” The agency also averred that “changing technologies in the aluminum and power industries may permit DSI smelters to provide value to BPA in ways that have not yet been imagined.” Thus, the agency concluded, it would be “unwise and imprudent . . . to refuse to provide service to customers that may provide future value to BPA as they have done in the past.” BPA also expressed concern about the short-term impact of a refusal to execute the amended agreement, stating that the “DSIs currently have no viable alternative for its power needs and a decision not to sell power to DSIs would almost surely have the immediate consequence of the plants shutting down and perhaps never resuming production.”

Finally, the agency acknowledged that the monetary benefits offered to Alcoa and CFAC would result in an increase in rates for its other customers. It nonetheless concluded that the contracts were reasonable because the agency did “not believe that the proposed amendment, which covers only a nine month period at a relatively modest cost, causes unreasonable upward pressure on rates.”

C. The Current Petitions

Petitioners PNGC, PPC, and ICNU filed petitions challenging the validity of the amended contracts on January 22, 2009, January 23, 2009, and April 6, 2009, respectively. The petitions were consolidated on April 21, 2009, and are the basis of the current appeal.

II. Standard of Review

We affirm BPA’s actions unless they are “arbitrary, capricious, an abuse of discretion, or in excess of statutory authority.” *PNGC*, 550 F.3d at 860 (quoting *Aluminum Co. of*

America v. BPA, 903 F.2d 585, 590 (9th Cir. 1989)). “In determining whether BPA has acted in accordance with law, we defer to BPA’s reasonable interpretations of its governing statutes. *Golden Nw. Alum. v. BPA*, 501 F.3d 1037, 1045 (9th Cir. 2007); *see also PNGC*, 550 F.3d at 861.

III. Analysis

Petitioners maintain that by entering into the amended Alcoa contract, BPA acted in contravention of its statutory obligation to provide “the lowest possible rates to consumers consistent with sound business principles.” In essence, the Petitioners argue that BPA’s decision to enter into a money-losing contract that required it to pay up to \$31.8 million to a customer the agency was not obligated to serve “is not a transaction that a rational business would enter.” The Petitioners further assert that BPA’s proffered justifications for the decision once again fail to establish that the decision was reasonable.

BPA defends the validity of the amended contract on three grounds. First, the agency contends that it “has no independent obligation under PNGC to demonstrate that a sale of power (or monetization of a sale of power) to the DSIs *at the IP rate* must also satisfy the sound business principles standard.” (Emphasis in original.) In BPA’s view, so long as it offers Alcoa power (or its monetary equivalent) at the IP rate, it has acted within its statutory authority and complied with this court’s holding in *PNGC*. Second, BPA maintains that the “sound business principles” standard is “so suffused with discretion that it cannot supply a basis for a justiciable federal claim because it provides ‘no law to apply.’” In other words, according to BPA, even if the agency has an independent statutory obligation to act in accordance with sound business principles, any decision it makes pursuant to that obligation is not reviewable. Finally, BPA asserts that, assuming its decision to enter into the amended contract is reviewable under the sound business principles standard, the decision comports

with such principles. We address each of these arguments in turn.

A. BPA has an independent obligation to act in a manner consistent with sound business principles.

BPA's argument that it need not independently demonstrate that its decision to sell power to Alcoa at the IP rate was "consistent with sound business principles" hinges on this panel's repeated references in *PNGC* to the agency's improper decision to monetize the sale of power to the DSIs at a "rate below what is authorized by statute (i.e., the IP rate) and below what is available on the open market." See *PNGC*, 550 F.3d at 875. BPA cites the following sentence as particularly clear evidence of this court's "narrow and straightforward" holding:

Because, by its own admission, BPA is not obligated to sell power to the DSIs, its decision to sell power voluntarily at a rate below what it is statutorily required to offer (i.e., the IP rate) and below what it could receive on the open market violates its statutory mandate to act in accordance with "sound business principles." See § 838g.

Id. at 873-74. According to BPA, this statement indicates that, had it used a rate that was equal to the IP rate or the market rate in the 2007 Contract, it would, by definition, not have violated its statutory mandate to act in accordance with "sound business principles." In short, BPA views its decision to premise its "benefits" to Alcoa on the IP rate as a kind of safe harbor that insulates it from a challenge that its decision to enter into the amended contract was not consistent with "sound business principles."

[1] BPA's interpretation of *PNGC* ignores critical aspects of that opinion and is therefore incorrect. First, the panel in *PNGC* agreed with BPA that it has no statutory obligation to

sell power to Alcoa. *See id.* at 866. Second, the court in *PNGC* concluded, and BPA in that case acknowledged, that the agency is subject to a statutory obligation to act in accordance “with sound business principles.” *See id.* at 875. Other panels have similarly recognized that BPA is required by statute “to operate with a business-oriented philosophy” and have reviewed BPA’s compliance with this standard. *See, e.g., Public Power Council, Inc. v. BPA*, 442 F.3d 1204 (9th Cir. 2006); *APAC*, 126 F.3d at 1171; *Dep’t of Water & Power of the City of Los Angeles v. BPA*, 759 F.2d 684, 693 (9th Cir. 1985); *see also Portland Gen. Elec. Co. v. BPA*, 501 F.3d 1009, 1029 (9th Cir. 2007) (noting that BPA is “charg[ed] to function as a business.”)³

[2] Given that BPA is not obligated to sell to the DSIs and that its actions are generally reviewable under the “sound business principles” standard, it follows that a decision by BPA to enter into a contract with a DSI, like other non-obligatory contractual decisions made by the agency, *see APAC*, 126 F.3d at 1171, must also conform to the “sound business principles” standard. BPA would surely have to consider the fact that it must offer DSIs the IP rate when deciding whether to execute a contract with the DSIs. *See PNGC*, 550 F.3d at 861 (holding that “if the agency chooses to offer firm power to the DSIs, . . . it must first offer them the IP rate.”). But the fact that the agency entered into a contract at the IP rate does not insulate from review its voluntary decision to enter into the contract in the first place.

[3] To put it slightly differently, BPA is certainly authorized to sell power to the DSIs at the IP rate. *See PNGC*, 550 F.3d at 867-73. But that authority, like its authority to enter into contracts generally, is cabined by its obligation to “oper-

³We explain in Part III.B *infra*, why the “consistent with sound business principles” standard provides adequate law for a reviewing court to apply, and also conclude, contrary to BPA’s submission, that no prior case has held otherwise.

ate with a business-oriented philosophy.” *APAC*, 126 F.3d at 1169-71 (reviewing BPA’s decision to enter into “Long-Term Extension Agreements” with the DSIs for the sale of unbundled transmission services); *see also PNGC*, 550 F.3d at 878 (“BPA’s authority to sell power to the DSIs does not mean that BPA may simply give money to the DSIs by calling the agreement a ‘power sale’ with ‘monetized service benefits.’” (emphasis omitted)).

Intervenor CFAC, another aluminum DSI, argues that this interpretation of BPA’s governing statutes would render the IP rate a nullity, because it would never make business sense for BPA to sell to the DSIs at the IP rate when market rates exceed the IP rate, and DSIs would never accept the IP rate when market rates fall below the IP rate. We disagree.

We can envision several situations in which BPA might reasonably conclude that a below-market rate sale to the DSIs is a sound business decision. First, as the court alluded to in *PNGC*, BPA’s governing statutes likely require it to offer power within the Pacific Northwest at established rates before the agency may sell power outside the region. *See PNGC*, 550 F.3d at 876 n.35.⁴ If so, BPA might reasonably enter into a contract with the DSIs at the IP rate so as to “free up power to sell outside the Pacific Northwest.” *Id.*

Second, BPA has asserted that the *physical* sale of power to the DSIs has indirect benefits that might offset a below-market rate sale. For example, BPA noted in its letter explaining its justifications for the amended contract with CFAC that “DSI loads have historically benefitted BPA by taking power in relatively flat blocks that require little or no shaping; they have taken power from BPA at light load hours, when power

⁴Because the issue is again not before us, we adopt no holding concerning whether BPA’s governing statutes do, in fact, require it to offer power inside the region at established rates before it may sell power outside the region.

has historically been difficult to market; and they have provided the Administrator with additional power reserves." These and other non-financial benefits to BPA could very well justify a less-than-market rate sale, but they have no direct application when, as here, BPA is not in fact physically selling power to the DSIs.

Third, a soundly run business might reasonably offer a large customer a short-term discount with the expectation that the customer's future business at higher prices will more than make up for the short-term loss of revenue. Similarly, a reasonable business might offer a short-term discount to a customer in order to diversify its customer base or to offload unused capacity.

As these examples illustrate — and they are only examples, not meant to be exhaustive — a decision by BPA to enter into a power sale contract with the DSIs at the IP rate, even if the IP rate is below market rates, could under various circumstances be consistent with sound business principles.⁵ As explained below, however, although we review such a decision by BPA with great deference, *see APAC*, 126 F.3d at 1171, the decision must still be reasonable and have some support in the record before the agency at the time the decision is made.

⁵If BPA can demonstrate that the decision to sell power to the DSIs at the IP rate is a sound business one, even where such a sale would require BPA to incur a short-term loss (either in the form of higher costs or foregone revenues), then the decision to monetize that contract may well be a sound business decision for the reasons discussed in *PNGC*. *See* 550 F.3d at 874-75 (noting, among other things, that "monetization reduces [BPA's] financial costs because it circumvents the risk that a customer will default on payment after power is physically delivered"). There are, of course, situations in which the decision to monetize would undermine the validity of BPA's decision to contract with the DSIs. For example, if, as here, BPA justifies the underlying sale by citing to benefits that would accrue to the agency only from the physical sale of power, then the decision to monetize rather than sell power would likely undercut that justification.

[4] In sum, we hold that BPA's voluntary decision to contract with the DSIs, like its other non-obligatory contractual choices, must conform to the congressionally imposed requirement that the agency act in a manner "consistent with sound business principles." See 16 U.S.C. §§ 838g; 839e(a)(1); 825s. The mere fact that BPA has chosen to contract with a DSI at the statutorily authorized IP rate does not insulate the decision to contract from review under the "sound business principles" standard.⁶

B. The "sound business principles" standard provides adequate law to apply.

BPA next argues that even if its decision to contract with Alcoa is subject to the "sound business principles" standard, that standard is "so suffused with discretion" that it provides "no law to apply" and cannot form the basis of our review.⁷ In forwarding this position, BPA relies on *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), and *Aluminum Co. of America v. BPA* ("*Alcoa*"), 903 F.2d 585 (9th Cir. 1989), cases that BPA claims definitively ruled that judicial review cannot be premised on the "sound business principles" standard.

⁶In neither *PNGC* nor this case did BPA attempt to sell power to the DSIs at a market rate above the IP rate. We do not decide, nor have we decided, whether BPA could offer power to the DSIs at a rate above the IP rate if the agency could demonstrate that offering power to the DSIs at the IP rate was not consistent with sound business principles. See *PNGC*, 550 F.3d at 861.

⁷The Administrative Procedure Act, which governs our review of BPA's actions, see 16 U.S.C. § 839f(e)(2), prohibits judicial review of "agency action[s that are] committed to agency discretion by law." 5 U.S.C. § 701(a)(2). An agency action is "committed to [its] discretion by law" where a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" — i.e., where it is "drawn in such broad terms that in a given case there is no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Although we fully acknowledge that actions taken by BPA in furtherance of its business interests are entitled to particular deference, *see PNGC*, 550 F.3d at 860-61, we reject BPA's argument that such decisions are unreviewable, for several reasons.

[5] First, BPA's contention that its business decisions are entirely unreviewable is directly at odds with this court's precedent, as well as with a Supreme Court case, *United States v. City of Fulton*, 475 U.S. 657 (1986). As already noted, we have, on multiple occasions, held that actions taken by BPA in furtherance of its business interests, while owed significant deference, are nonetheless reviewable. *See PNGC*, 550 F.3d at 861, 877-78; *APAC*, 126 F.3d at 1171; *Public Power Council*, 442 F.3d at 1204; *Bell v. BPA*, 340 F.3d 945, 948-49 (9th Cir. 2003); *Dep't of Water & Power*, 759 F.2d at 693.

In *APAC*, for example, BPA asserted that its decision to begin "wheeling" non-federal power was a valid exercise of its "broad [statutory] authority to contract in [its] best business interests." *APAC*, 126 F.3d at 1169. In evaluating this argument, the court noted that "[t]he statutes governing BPA's operations are permeated with references to the 'sound business principles' Congress desired the Administrator to use in discharging his duties." *Id.* at 1171. In the court's view, these references provided BPA with "an unusually expansive mandate to operate with a business-oriented philosophy." *Id.* This "unusually expansive mandate" did not, however, preclude the court from reviewing the agency's decision for reasonableness. *See id.* After performing this review, the court concluded that the BPA's decision to begin wheeling non-federal power, a decision that was intended to increase BPA's competitiveness in a recently deregulated market, "appear[ed] reasonable" and was therefore entitled to deference. *See id.* at 1171.

In *PNGC*, BPA likewise argued that its decision to provide cash payments to the DSIs furthered its statutory mandate to

operate in accordance with “sound business principles.” See *PNGC*, 550 F.3d at 877-78. As in *APAC*, we noted that this court is “particularly deferential” to BPA when the agency acts in furtherance of its business interests. *Id.* at 861. We nonetheless held that BPA’s conclusion that a specific action was consistent with “sound business principles” was reviewable for reasonableness. See *id.*

BPA’s assertion that the “sound business principles” standard is too vague to support review is also undermined by our decision in *Public Power Council*. In that case, we expressly relied on the “sound business principles” standard to review a decision by BPA to revise upward its previously approved wholesale power rates. *Public Power Council*, 442 F.3d at 1209-11. Ultimately, we concluded that “[i]n light of [the] eximious reasons for BPA’s [acting] in the way it did, we are not able to say that BPA failed to proceed in accordance with ‘sound business principles.’” *Id.* at 1210. Although we affirmed BPA’s actions in *Public Power Council*, our holding clearly indicates that we did not find the “sound business principles” standard too indeterminate to support any review, however deferential.

Finally, in *Bell*, we reviewed BPA’s decision to buy out its contractual obligations to supply suddenly high-cost power to DSIs at uneconomically low prices during a recent energy crisis. See *Bell*, 340 F.3d at 948-49. The court concluded that “BPA’s decision to amend its contract obligations was eminently businesslike, given the probably devastating result of performing the original contract” *Id.* at 949. The court therefore refused to “second-guess the wisdom of BPA’s winning business decision[], especially when it was responding to unprecedented market changes.” *Id.* Implicit in this holding, however, is an assumption that the court would “second-guess” an action by BPA that was not “eminently businesslike.” See also *Dep’t of Water*, 759 F.2d at 693 (citing 16 U.S.C. § 839e(a)(1)’s requirement that rates “be designed consistent with sound business principles” and holding that,

as a result of this and other legislative requirements, a decision by BPA to implement a policy designed to mitigate revenue shortfalls was "not only statutorily authorized but statutorily mandated").

[6] As these cases demonstrate, the law of this circuit is clear: when Congress imposed a duty on BPA to operate in accordance with "sound business principles," *see APAC*, 126 F.3d at 1171, it imposed a requirement that was capable of supporting review.

Our approach in all these cases, like our holding in this case, is consistent with the Supreme Court's approach in *City of Fulton* to review under a different statute containing "sound business principles" language. In *City of Fulton*, the Supreme Court held that Section 5 of the Flood Control Act imposed a statutory obligation on the Secretary of Energy to "protect consumers by ensuring that power is sold 'at the lowest possible rates . . . consistent with sound business principles.'" 475 U.S. at 667-68 (quoting *United States v. Tex-La Elec. Cooperative, Inc.*, 693 F.2d 392, 399-400 (5th Cir. 1982)). The Court then reviewed an action by the Secretary for consistency with that standard, ultimately affirming the Secretary's action on the ground that the action was "reasonable" and "well suited" to meeting this obligation. *See id.* at 668. So, the Supreme Court, too, has recognized that "consistent with sound business principles" language provides a reviewable standard.

[7] Second, precedent aside, there is no basis for concluding that this is one of the "rare instances" where a statute is "drawn in such broad terms that in a given case there is no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (quoting *Citizens to Preserve Overton Park v. Volpe, Inc.*, 401 U.S. 402, 410 (1971)). The statutory requirement that BPA operate in a manner "consistent with sound business principles" is at least as specific as other statutory mandates held sufficient to permit judicial review.

For example, *Keating v. FAA*, 610 F.2d 611 (9th Cir. 1979), held that an FAA Administrator's decision was reviewable where the relevant statute required that the decision be made "in the public[']s interest." *See id.* at 612. Similarly, *City of Los Angeles v. U.S. Dep't. of Commerce*, 307 F.3d 859 (9th Cir. 2002), determined that a statute requiring the Secretary of Commerce to use statistical sampling "if he considers it feasible" provided a meaningful standard for the court to review the Secretary's decision not to use sampling. *See id.* at 869 n.6; *see also Barber v. Widnall*, 78 F.3d 1419, 1423 (9th Cir. 1996) (holding a decision of the Secretary of the Air Force not to correct a military record reviewable where the governing statute allowed the Secretary to make a correction "when the Secretary considers it necessary to correct an error or remove an injustice"). And, of course, it is well-established that courts may review FERC's determination that a given electricity rate is "just and reasonable." *See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733, 2738 (2008); *see also E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1039 (9th Cir. 2007). If we may review whether a decision was "in the public's interest" or whether a particular act was "feasible" or "just and reasonable," we can certainly review whether an action is "consistent with sound business principles."

Moreover, courts routinely review the rationality of business decisions in other contexts. For example, under the common law "business judgment rule," courts are required to defer to business decisions made by a corporation's board of directors, unless "the directors[, among other things,] act in a manner that cannot be attributed to a rational business purpose." *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000); *see also Navellier v. Sletten*, 262 F.3d 923, 946 (9th Cir. 2001) (affirming district court's formulation of the business judgment rule as requiring a director to "[r]ationally believe that the [director's] business judgment is in the best interest of the corporation").

Even more relevantly, the Sixth Circuit, in interpreting a statutory directive very similar to the statutory requirements at issue here, concluded that there was sufficient law to apply. See *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399 (6th Cir. 2006). In *McCarthy*, the Sixth Circuit held that an electric cooperative's decision to incur "non-necessary expenses," if proven true, would "clear[ly]" violate the cooperative's statutory duty under Tennessee law to provide its "members with electricity 'at the lowest cost consistent with sound business principles.'" *Id.* at 410 (citing Tenn. Code Ann. § 65-25-203).

The statute at issue in *Rank v. Nimmo*, 677 F.2d 692 (9th Cir. 1982), which was found *not* to provide law to apply, provides a useful contrast to the statutes held to permit review in the cases just surveyed. In *Rank*, the relevant statute provided that "the Administrator [of the Veterans Administration] may, at the Administrator's option," accept assignment of a veteran's loan. See *id.* at 699-700. According to the court, Congress's use of "the precatory 'may'" and of the phrase "at the Administrator's option" made "clear that Congress intended to vest the widest discretion possible in the Administrator." *Id.* The Administrator's decision to accept or reject assignment of a loan was therefore unreviewable. See *id.*

[8] No such precatory language existed in the statutes in the cases we have reviewed, and none exists in the statutes governing BPA's conduct in this case. Section 838g, for instance, states that BPA "shall" fix and establish rates in a manner consistent with "sound business principles." 16 U.S.C. § 838g; see also 16 U.S.C. § 839e(a)(1) (stating that "rates shall be established . . . in accordance with sound business principles") (emphasis added). Moreover, unlike in *Rank*, BPA's governing statutes do not evince an intention on Congress's part to vest BPA "with the widest discretion possible," by referring to BPA's "option" or "choice" or similar language. To the contrary, by requiring BPA to act in a prescribed manner — i.e., in a manner that "accord[s] with sound

business principles” — Congress clearly intended to limit BPA’s discretion to a degree.

Finally, BPA is incorrect in maintaining that *City of Santa Clara* and *Alcoa* held that the “sound business principles” standard is so vague that it provides no law to apply. Those cases held instead that a congressional directive to sell power “in such a way as ‘to encourage the most widespread use thereof’ ” was “too vague and general” to provide applicable law. See *City of Santa Clara*, 572 F.2d at 668; *Alcoa*, 903 F.2d at 599. Neither case directly precluded reviewability under the “sound business principles” standard at issue here, and neither can be fairly taken to have done so by implication — particularly in light of the already surveyed precedents to the contrary.

In *City of Santa Clara*, the petitioners argued that certain decisions made by the Secretary of the Interior violated Section 5 of the Flood Control Act of 1944. See *City of Santa Clara*, 572 F.2d at 667. Section 5 requires the Secretary to “transmit and dispose of [surplus energy from reservoir projects] in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles.” 16 U.S.C. § 825s. We refused to review the decision, holding that the statute’s “widespread use” requirement was too vague to support judicial review. See *City of Santa Clara*, 572 F.2d at 668. As we explained,

The Flood Control Act’s directive to market power in such a way as to “encourage the most widespread use thereof” could be interpreted in many different ways, such as to require that power be sold to as many different preference entities as possible, thereby fostering the most widespread geographic use of the power, or to mandate sale of the power to those preference entities whose customers present the most diversified mix of agricultural, industrial or

residential users, or to require sale of federal power to those preference entities which serve the largest number of ultimate consumers.

Clearly, the "most widespread use" standard is susceptible of widely divergent interpretations. As we said of another law in *Strickland v. Morton*, *supra*, "(t)he provisions of this statute breathe discretion at every pore." 519 F.2d at 469. The statute permits the exercise of the widest administrative discretion by the Secretary. It does not supply "law to apply."

Id. at 668.

As the above quoted passage reveals, the court in *City of Santa Clara* considered only whether the "widespread use" clause provided law to apply; it did not address the "sound business principles" clause. In this case, we are concerned solely with the "sound business principles" standard, a standard that "permeate[s]" BPA's governing statutes. *See APAC*, 126 F.3d at 1171 (citing 16 U.S.C. §§ 825s, 838g, 839e(a)(1)); *see also* 16 U.S.C. § 839f(b) ("[T]he Administrator shall take such steps as are necessary to assure the timely implementation of this chapter in a sound and businesslike manner."). *City of Santa Clara's* holding is therefore not applicable here.⁸

⁸Even if *City of Santa Clara's* holding was on point, that holding may no longer be good law. *City of Santa Clara* predates both *Heckler v. Chaney*, 470 U.S. 821 (1985), and *Webster v. Doe*, 486 U.S. 592 (1988). In those cases, the Supreme Court clarified "what it means for an action to be 'committed to agency discretion by law.'" *Webster*, 486 U.S. at 599. In doing so, the Supreme Court emphasized that the "committed to agency discretion" exception to judicial review is a "very narrow exception." *See Heckler*, 470 U.S. at 830.

Consistent with the emphasis in *Heckler* and *Webster* on the extreme narrowness of the "committed to agency discretion" exception, the

For similar reasons, this court's holding in *Alcoa* is inapplicable. In *Alcoa*, the petitioners asserted that BPA had violated section 7(k) of the Regional Act when it established certain rates for non-firm power. See *Alcoa*, 903 F.2d at 599. Section 7(k) requires BPA to establish nonfirm energy rates in accordance with a number of statutory provisions, including § 838g. See 16 U.S.C. § 839e(k). Reviewing the various statutory provisions, the court in *Alcoa* concluded that section 7(k) "require[s] that BPA rates for nonfirm energy be drawn:

1. having regard to the recovery of the cost of generation and transmission of such electric energy;
2. so as to encourage the most widespread use of Bonneville power;
3. to provide the lowest possible rates to consumers consistent with sound business principles; and

Supreme Court in *City of Fulton* substantively reviewed the actions of the Secretary of Energy under the part of Section 5 of the Flood Control Act at issue in *City of Santa Clara*. 475 U.S. at 667-68. Although the Court did not specifically reference the "widespread use" phrase of Section 5, it did cite the "lowest possible rates" phrase that immediately follows, and is logically linked to, the "widespread use" language. See *id.* (holding that Section 5 requires the Secretary "to protect consumers by ensuring that power is sold 'at the lowest possible rates . . . consistent with sound business principles.'"); 16 U.S.C. § 825s ("[T]he Secretary of Energy [shall dispose of surplus energy from reservoir projects] in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles."). Unlike the court in *Santa Clara*, the Supreme Court did not conclude that Section 5's "most widespread use" and "lowest possible rates" directives rendered the entire statutory section "so imprecise that its interpretation requires a profound exercise of discretion." See *City of Santa Clara*, 572 F.2d at 668 (quotation marks and citations omitted). To the contrary, it reviewed the Secretary's decision for compliance with Section 5's statutory mandates generally.

4. in a manner that protects the interests of the United States in amortizing its investments in the projects within a reasonable period.”

Alcoa, 903 F.2d at 590-91.

The court then addressed the question “whether there is law to apply here to the four standards section 7(k) incorporates.” *Id.* at 599. Citing *City of Santa Clara*, the court noted that “the ‘widespread use’ requirement provides BPA with . . . so much discretion that there is no law to apply.” *Id.* The court nonetheless held that there was law to apply overall because the first and fourth standards “limit[ed] BPA’s discretion” to set nonfirm energy rates. *Id.* It was careful to note that “[t]his conclusion does not conflict with *City of Santa Clara*, because these two standards were not present in that case.” *Id.* Although the court in *Alcoa* did not apply the “consistent with sound business principles” standard, it did not state that the standard provided no law to apply. Nor was there any need for the case to address that standard, as the court held that other standards set forth in section 7(k) provided adequate law.⁹

[9] In sum, neither *City of Santa Clara* nor *Alcoa* addressed the reviewability of the standard at issue here. As a result, neither decision controls the outcome of this case.

[10] For all the reasons noted above, we hold that the “sound business principles” standard incorporated in BPA’s

⁹Noting that *Alcoa* stated in passing that “this ‘widespread use’ standard [] incorporates two of the four standards BPA must use,” *Alcoa*, 903 F.2d at 599. BPA posits that we must have been including the “sound business principles” standard as one of the two standards, and so must also have meant to include that provision in the earlier statement that “the ‘widespread use’ requirement provides BPA with . . . so much discretion that there is no law to apply.” *Id.* This chain of inferences is simply too thin to constitute a holding, particularly about an issue, the impact of the “sound business principles” standard, that was not necessary to the court’s conclusion that the relevant agency action was reviewable.

governing statutes is sufficiently specific to support judicial review and does not indicate that Congress "committed to agency discretion" decisions concerning compliance with that statutory requirement.

C. BPA's decision to enter into the amended contract does not conform with "sound business principles."

Having determined that the "consistent with sound business principles" standard provides adequate law to apply, we next turn to the question whether BPA's decision to enter into the amended contract conforms with that statutory mandate. For the reasons discussed below, we hold that it does not.

[11] Like its decision to enter into the initial contract, BPA's agreement to the Alcoa contract amendment is, on its face, a "highly suspect" one. *See PNGC*, 550 F.3d at 875. The amended contract requires BPA to pay Alcoa up to almost \$32 million over a nine month period. BPA is to receive nothing in return. In essence, then, BPA has agreed to provide a non-obligatory gift of up to \$32 million. The agency concedes, as it did in *PNGC*, that its decision to provide this voluntary gift will lead to higher rates for its other customers. *See id.* Given that BPA was under no obligation to contract with Alcoa, let alone to pay it over \$30 million in cash, and that the amended contract will inevitably lead to higher prices for all other customers, BPA's decision raises serious questions concerning compliance with its statutory obligation to maintain "the lowest possible rates to consumers consistent with sound business principles." 16 U.S.C. § 838g; *see PNGC*, 550 F.3d at 875; *see also McCarthy*, 466 F.3d at 410 ("If the Cooperatives failed to maintain records and spent their money on non-necessary expenses, it is clear that they were not acting in accordance with their statutory purpose of providing their members with electricity 'at the lowest cost consistent with sound business principles.'").¹⁰

¹⁰We agree with BPA that if the agency's decision to incur the \$32 million expense at issue here was valid, it could lawfully include that cost in

[12] Moreover, the amended contract requires Alcoa to use the \$32 million to purchase power from BPA's competitors (because BPA itself is not selling physical power to Alcoa). In other words, BPA has effectively agreed to subsidize the operations of its competitors, competitors who, in the past, have not hesitated to take business away from BPA. In *Kaiser Aluminum & Chem. Corp. v. BPA*, 261 F.3d 843 (9th Cir. 2001), for instance, the court noted that, as the wholesale price for power in the Northwest began to drop in the mid-1990s, competition for the DSIs' business increased substantially, and "[m]any DSIs were considering offers from alternative power suppliers at prices below BPA's rates." *Id.* at 846. In response, BPA was forced to amend its long-term contracts with the DSIs by adjusting rates downward. *See id.*

[13] At the present time, wholesale market rates are substantially higher than both the PF rate and the IP rate. BPA's competitors are therefore at a price disadvantage and cannot put direct pressure on BPA to lower its prices. BPA's decision, during a time of relative competitive advantage, to transfer \$32 million to these competitors would not appear to make sound business sense.¹¹

the rates it charges its preference customers. *See Golden Nw. Aluminum, Inc. v. BPA*, 501 F.3d 1037, 1045 (9th Cir. 2007) (holding that "nothing in [the relevant section of the Northwest Power Act] precluded BPA from considering the costs of [resources needed to service valid contracts with the DSIs] when calculating its preference rate, even though BPA would not have incurred such costs absent its DSI contracts"). In *Golden Northwest*, however, unlike in this case, petitioners had not filed a timely challenge to the validity of the DSI contracts that generated the costs at issue. *See id.* at 1044-45. As a result, the court was required "to take[] the existence of BPA's contractual obligations to its DSI customers as given." *Id.* at 1045.

In this case, petitioners have filed a timely challenge to the underlying contract. Thus, we are required to address the preliminary issue that the court in *Golden Northwest* took as given.

¹¹Petitioners also maintain that BPA's decision to enter into the amended contract was not consistent with sound business principles

BPA nonetheless argues that the decision to execute the amendment “advances [its] business interest in numerous respects.” First, the agency maintains that the amendment was necessary to avoid “any unnecessary interruption of smelter operations, especially given the difficult economic times and potential loss of additional jobs.” This justification is essentially identical to one we rejected as invalid, while sympathizing with its humanitarian goals, in *PNGC*. 550 F.3d at 877-78. In *PNGC*, BPA had attempted to justify the monetization provision of the 2007 Contract, in part, on the ground that the “monetary benefits” were necessary to ensure the continued operation of the aluminum smelters and to protect “DSI jobs.” *Id.* We held that this goal, while “laudable,” was “simply not reflective of a ‘business-oriented philosophy.’” *Id.* at 878. We also noted that BPA’s counsel had conceded at oral argument that “[i]t’s not Bonneville’s responsibility to ensure that [the DSIs] exist.” *Id.* at 877 n.36 (alterations in original). For these same reasons, BPA’s first justification does not demonstrate that the agency’s decision to enter into the amended contract was a reasonable business decision.

Second, BPA asserts that the monetary benefit payments were necessary to assure the continued existence of the DSI load, and that that was important because “[t]he DSI load has provided enormous value to BPA in the past and it is reasonable to believe that it will do so again.” As evidence of the past value that DSIs have provided, BPA cites the fact that the DSIs purchased “relatively flat blocks” of power, accepted power at “light load hours,” and provided BPA with additional power reserves.

because the agency did not first seek a refund of funds it improperly paid to Alcoa pursuant to the 2007 Contract. As BPA notes, however, there is a significant possibility that the DSIs do not owe BPA a refund. *See infra* Part IV. Given this possibility, the agency’s failure to seek a refund before entering into the amended contract does not, standing alone, render the decision unreasonable.

There are several problems with this rationale. First, it comes fairly close to another justification that the panel rejected in *PNGC*: BPA's "historic relationship with the DSIs [and] the important role the DSIs played in the development of the [federal power systems]." *PNGC*, 550 F.3d at 877 (second alteration in original).

Second, the primary examples of the DSIs' value to the agency that BPA cites result from the sale of *physical* power to the DSIs. Because BPA will not provide Alcoa with physical power under the amended contract, BPA will not receive those benefits from Alcoa, at least in the short term. The fact that the amended contract will not itself provide these benefits suggests that BPA does not value those benefits as highly as it professes.

BPA asserts that its decision to monetize the contract amendment was a sound business one because "monetization [has] certain obvious risk management benefits." These risk management benefits include eliminating both "the risks [to BPA] associated with making the relatively large wholesale market power purchases [at fluctuating prices] BPA would be required to undertake . . . to serve Alcoa's current operating load" and the risk that Alcoa would be unable to pay for physical power that BPA delivered.

[14] Although we do not doubt that monetization provides these benefits, BPA's decision to monetize cannot, on its own, justify the Alcoa contract amendment, for three reasons. First, monetizing a contract only makes sound business sense if the underlying contract is a sound one. For the reasons we discuss above, BPA could not reasonably have concluded that its decision to sell power to Alcoa, and thereby incur a \$32 million loss, was "consistent with sound business principles." If anything, the agency's decision to monetize highlights the fact that the contract amendment amounts to no more than a \$32 million gift to Alcoa.

Second, BPA attempted to justify the contract amendment by citing to benefits that had previously accrued to the agency when it sold physical power to Alcoa and the other DSIs. By monetizing the contract, BPA undermined this justification.

Third, the very reasons BPA provided for its decision to monetize the contract — reducing the significant risk of non-payment by Alcoa and eliminating the market risks that BPA would face if it sold physical power to Alcoa — underscore the unreasonableness of BPA's belief that Alcoa will provide future benefits to the agency that will offset the current \$32 million cash payment. The agency does not explain why, given that the risks of selling power to Alcoa are currently so significant that the agency would rather give the company money to purchase power from a competitor than deliver power to the aluminum company itself, it reasonably believes that the risks will be less significant in the future or that Alcoa's financial situation will improve.

[15] The fourth, and perhaps most important, problem with BPA's contention that Alcoa will provide future benefits to the agency that will offset the \$32 million that BPA voluntarily agreed to pay the aluminum company is that the agency's assertion is without any analytic or evidentiary support. For example, BPA has not quantified the monetary value of the past benefits that the DSIs provided. Nor has the agency analyzed how likely it is that Alcoa (either directly or indirectly through its employees) will be able to provide benefits in the future, when the aluminum company will provide these proposed benefits, and how much those benefits will be worth. Perhaps voluntarily paying \$32 million to help ensure Alcoa's viability at the expense of other customers will lead to higher revenues or lower costs for BPA in the future. BPA, however, has not demonstrated that it has any basis for believing that it will. In short, neither the record in this case nor the record in *PNGC* contains any financial or other business analysis or evidence to support the agency's assertion that future benefits to the agency are (a) likely or (b) sufficiently large to make

the decision to give \$32 million away a sound business decision.

Moreover, the information that the administrative record does contain would lead a rational observer to conclude that Alcoa is not particularly likely to provide significant future benefits to the agency. All of the parties agree that the total DSI load has been steadily declining for many years and now accounts for a relatively small percentage of BPA's power sales. Admin. Record at 76 ("[T]he aggregate DSI load has decreased substantially over the past decade due to adverse global aluminum market forces . . ."). According to figures available on BPA's website, DSI load accounted for 630 aMW, or less than 3%, of BPA's firm power load in 2008, down from 3150 aMW in the early 1990s. *See also APAC*, 126 F.3d at 1164.¹² BPA also asserted, in its letter to constituents, that Alcoa's aluminum smelter might close down for good if the agency failed to make even a single monthly monetary benefit payment. But the agency further noted, in the preamble to the contract amendment itself, that there was "uncertainty that Alcoa will continue operating at existing levels" during the nine-month amendment period even with the benefit of the agency's monetary payment. Given that the only information in the record shows that DSI load has been steadily declining for years and that the current health of the aluminum smelting industry is precarious at best, BPA could not reasonably have concluded that Alcoa will be healthy enough in the future to provide sufficient benefits to BPA to compensate for the tens of millions of dollars that the agency is now giving away. It may be that DSI demand has fluctuated significantly in the past and that the recovery of the aluminum industry can be reasonably anticipated. But nothing in the record of this case or the earlier one, aside from BPA's conclusory assertions, suggests as much.

¹²*See* Bonneville Power Administration, 2007 Pacific Northwest Loads & Resource Study 37 (2007), available at: http://www.bpa.gov/power/pgp/whitebook/2007/Summary_Document_2007_White_Book.pdf

In sum, had BPA at any point performed a reasonable business analysis of its decision to offer one of its customers a \$32 million cash payment which the customer was required to spend on services provided by one of BPA's competitors, we may well have deferred to its business judgment. But the agency has not done so, and so has failed to demonstrate that it had any basis for concluding that its decision to incur a non-obligatory expense of almost \$32 million was a sound business judgment.

As a final justification for the amendment, BPA asserts that "[t]he Alcoa Amendment is nothing more than a temporary solution while BPA and the region engage in a further administrative process to more fully respond to *PNGC*." According to the agency, the short-term nature of the amendment, combined with the agency's need to act quickly, renders its decision to enter into the amendment a sound business judgment.

This rationale is the most plausible of those BPA offers. But even assuming that exigent circumstances could render reasonable BPA's decision to spend millions of dollars it was not obligated to spend, BPA has not established in the record — even barely — that such exigent circumstances exist. BPA explained in its January 13th letter announcing the execution of the amended contract that "it was necessary to move quickly to implement the amendment and avoid, if possible, any unnecessary interruption of smelter operations." But nothing in the administrative record demonstrates that smelter operations would have been threatened absent immediate action on BPA's part. In fact, the available information again suggests otherwise. In its January 13th letter, BPA noted that CFAC had announced a likely plant closure and that this announcement "reinforced [the agency's] view that it was important to act quickly." Yet, the agency did not execute an amended contract with CFAC until March, two months after it agreed to the amended contract with Alcoa and almost three months after we issued our opinion in *PNGC*. This two-to-three month delay indicates that BPA had time to consider

more thoroughly than it did whether its decision to spend tens of millions of dollars was in its business interests.

Moreover, BPA failed to demonstrate why the payment of almost \$32 million over nine months, as opposed to the payment of a lesser amount, was necessary to avoid the interruption of Alcoa's smelter operations. A prudent business would presumably want to minimize its discretionary expenses, even in an emergency. Yet, the administrative record contains no evidence that BPA considered precisely how large (or small) a payment was necessary to buy the company the time it needed so that the agency could fully consider further action.

Because the record contains no information from which BPA could have concluded that it needed to act as quickly as it did or that it needed to pay Alcoa as much as \$32 million to avert an emergency, we hold that BPA cannot reasonably justify its decision to enter into the amended contract on the ground that exigent circumstances required immediate action.

[16] For all of the above reasons, we hold that BPA has failed to demonstrate that it reasonably believed its decision to execute the Alcoa contract amendment consistent with "sound business principles." To be clear, we do not hold that BPA's governing statutes prohibit the agency from selling power to the DSIs at the IP rate or that the agency may not "monetize" such a sale under any circumstances. If the agency provides a rational business justification for a sale (monetized or otherwise) that is supported by the record before the agency, we would be obliged to defer to the agency's expertise. In this case, however, the agency has entered into a transaction that, on its face, is not "eminently businesslike." See *Bell*, 340 F.3d at 949. Moreover, the agency's justifications for its agreement to the transaction fall far short of establishing that its decision to award substantial, non-necessary "benefits" not involving the sale of power was a sound business one. We therefore conclude that the agency has acted in a manner that is not in accordance with its statutory obligations.

IV. Conclusion

We hold that BPA has once again failed to advance “a ‘reasonable interpretation[] of its governing statutes’ that supports its actions.” *PNGC*, 550 F.3d at 878 (alteration in original). More specifically, the agency has failed to show that its decision voluntarily to incur a \$32 million expense that will increase the rates of its preference customers, provides no direct benefit to the agency, and subsidizes the operations of its competitors was a reasonable interpretation of its statutory obligation “to operate with a business-oriented philosophy.” *APAC*, 126 F.3d at 1171. Consequently — and with due regard to our obligation to defer to BPA’s conclusion regarding whether its action comports with the “sound business principles” standard if it is at all reasonable to do so — we hold that the amended Alcoa contract provision is invalid.¹³

In addition to seeking a declaration that the Alcoa contract amendment is unlawful and invalid, Petitioners ask us to issue an order “compel[ling] BPA to seek a recovery from Alcoa of unlawful payments so that they can be refunded or credited to the customers of BPA who bore those costs in their rates.” We decline to do so. Instead, we remand this case to BPA to determine whether and how it will seek a refund from Alcoa. *See Pub. Util. Dist. No. 1 of Snohomish County v. BPA*, 506 F.3d 1145, 1147-48, 1154 (9th Cir. 2007) (remanding case to BIA for the agency to determine in the first instance how to respond to the court’s invalidation of multiple settlement agreements that the agency had entered into improperly).

Among other reasons why a remand is appropriate, BPA has yet to consider the validity and applicability of a damages

¹³Because we conclude that the monetary benefit provision is invalid for the reasons raised by the petitioners, we do not decide whether Alcoa’s alternative argument that the monetary benefit payments were impermissibly low was properly before us, or, if it was, whether that argument is meritorious.

waiver provision that appears in the 2007 Contract and was incorporated by reference into the amended contract. *See PNGC*, 550 F.3d at 881-82 (holding monetization provision of the 2007 Contract invalid, but remanding case “to BPA to determine in the first instance the applicability and construction of . . . the damage waiver” provision of the contract). The agency will also need to consider Alcoa’s argument that no refund is due because the aluminum company, at the agency’s demand, purchased wholesale power at rates well above what it could afford.

Moreover, the agency has informed the court that it has already begun a public process to consider the damage waiver and refund issue with respect to the 2007 Contract. Once that process is complete and BPA has both reached a final conclusion on the refund issue and generated an appropriate administrative record, the issue will be ripe for this court’s review. *See id.*

One final note: We have approached this case with careful regard for the limited judicial role in overseeing BPA’s execution of its obligations and authority. The agency’s role is an essential one in providing power to the Northwest, and it is subjected to competing demands from various constituencies in the region. Reviewing the underlying agency proceedings in this case and in *PNGC*, it becomes apparent that BPA’s peculiarly dual role, as both a federal agency and a power business, can create situations in which it can fulfill neither role very well and so has reasons to test the limits of its statutory authority. Whether the statutory scheme bears revisiting so as to make BPA’s job easier — for example, by providing it with the obligation or authority to provide power to the historic DSIs even when it is not a sound business decision to do so — is not, however, a question judges can answer. Instead, we must determine whether BPA’s actions, however well motivated, are so clearly outside its statutory authority that even taking into account the very large measure of deference

due its decisions, we have no choice but to disapprove its action. That is the case here.

[17] In sum, we GRANT Pacific Northwest Generating Cooperative's, Public Power Council's, and Industrial Customers of Northwest Utilities' petitions as to their challenge to the validity of the Alcoa contract amendment and REMAND to the agency for determination of the applicability of the agreement's damage waiver provision.

PETITIONS GRANTED IN PART, DENIED IN PART,
AND DISMISSED IN PART.

From: Wright, Stephen J - A-7
Sent: Monday, September 21, 2009 6:49 PM
To: 'Scott.Harris@hq.doe.gov'; 'Daniel.Poneman@hq.doe.gov'
Subject: Re: DSI strategy

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From: Harris, Scott Blake <Scott.Harris@hq.doe.gov>
To: Wright, Stephen J - A-7; Poneman, Daniel <Daniel.Poneman@hq.doe.gov>
Sent: Thu Sep 17 18:42:45 2009
Subject: RE: DSI strategy

Scott

-----Original Message-----
From: Wright, Stephen J - A-7 [mailto:sjwright@bpa.gov]
Sent: Thursday, September 17, 2009 8:35 PM
To: Poneman, Daniel; Harris, Scott Blake
Subject: DSI strategy

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I have attached a draft of the letter that we would send, probably on Monday.

the
The Interlake

http://www.dailyinterlake.com/news/local_montana/article_a83d5e08-c5d6-11de-9c36-001cc4c03286.html

The Missoulian

http://missoulian.com/news/local/article_80e88722-c6a0-11de-a2bf-001cc4c002e0.html

The Bellingham Herald

<http://www.bellinghamherald.com/442/story/1137656.html>

-----Original Message-----

From: Poneman, Daniel [mailto:Daniel.Poneman@hq.doe.gov]
Sent: Sunday, November 01, 2009 7:53 PM
To: Wright, Stephen J - A-7
Subject: RE: Gov. Gregoire

Thanks for debrief, Steve. We did have a good conversation, and she did pledge that support, for which I thanked her.

Also spoke to Sens Murray and Cantwell.

How are reactions from Alcoa and other affected parties?

-----Original Message-----

From: Wright, Stephen J - A-7 [mailto:sjwright@bpa.gov]
Sent: Friday, October 30, 2009 3:13 PM
To: Poneman, Daniel
Subject: Gov. Gregoire

Just got a wonderful call from her presumably after your call to her. Not only is she very pleased with the outcome, she's willing to help going forward - seeking to discourage new litigation and filing amicus to support us if and when it occurs.

DP
6-5

From: Wright, Stephen J - A-7
Sent: Wednesday, October 28, 2009 11:18 AM
To: 'Daniel.Poneman@hq.doe.gov'
Subject: Murray call

Talked to Sen. Murray. She said Alcoa wants our answer by no later than the end of the week. I told her we are working through the issues and I think we are close enough that we should conclude soon on what would go out for public comment. She asked that I get back to her if we haven't reached a decision by end of week.

Our folks also talked to Alcoa and walked through schedule once we decide on an option. Basically once we choose an option it's a little more than a month to sign a contract depending on how difficult the public comment is to address in the ROD.

Stauffer, Nicki - A-7

From: Wright, Stephen J - A-7
Sent: Wednesday, October 28, 2009 6:00 PM
To: 'Poneman, Daniel'
Subject: Gregoire/Dicks calls

Gov. Gregoire called. She was very down because Boeing announced today after a long public deliberation that they are going to South Carolina rather than Washington. She's very worried about Alcoa making a decision soon to shutdown. Wanted to express her concern and urge a prompt decision. Gave her same message as Sen. Murray - we understand the importance and are working to resolve issues. She believes she has a good relationship with the Secretary and may be calling him as well.

Talked to Rep. Dicks. He is primarily concerned about Port Townsend. I explained our strategy of working thoughtfully through the comments in order to write the ROD. He understood and that's all he needed.

From: Wright,Stephen J - A-7
Sent: Thursday, October 29, 2009 6:32 PM
To: 'Poneman, Danie!'
Subject: DSI update

CFAC has begun ramping down their operation. They were operating at 38 MW and went down to about half that today. Looks like they will shutdown Nov. 1. They have not responded to our 14 month offer made on Monday.

Alcoa is calling here about every two hours to see if we have made a decision. Our negotiating team met with them today to finish clean-up of details regarding the contract that would implement option 2a (this had originally been mostly negotiated a month ago but was put on hold). If we decide to go with 2a we are ready to post the contract for public comment. We have also discussed the schedule for proceeding to make a final decision with them as they are trying to keep their management informed and have to make decisions about purchasing power between now and when a contract may be signed. If we go with an option other than 2a there would need to be further contract negotiation before we could go out for public comment.

Recall that I made a commitment to get back to Sen. Murray Friday if we have not made a decision.

Stauffer,Nicki - A-7

From: Wright,Stephen J - A-7
Sent: Friday, October 30, 2009 10:02 AM
To: 'Poneman, Daniel'
Subject: Murray/Cantwell

Sen. Cantwell should be available all day. Murray's available after 2. Here's schedulers phone numbers. Still trying to track down Dicks.

Murray: Grace Rooney, 202-224-0217 direct; grace_rooney@murray.senate.gov

Cantwell: Matt MacCarthy, 202-224-3441; Matt_McCarthy@cantwell.senate.gov

From: Wright, Stephen J - A-7
Sent: Friday, October 30, 2009 11:30 AM
To: 'Poneman, Daniel'
Subject: Baucus message

Message for Sen. Baucus

We understand how important the Columbia Falls Aluminum (CFAC) plant is to you (its more than just jobs - he worked there as he was going to college)

We are aware heroic efforts have been made by BPA to keep the plant operating over the years in part due to interest you have expressed

You know that the two negative court decisions we have received have made the challenge of providing affordable power to CFAC significantly harder

Steve Wright and his team at BPA have been in contact with CFAC regularly for the last month. CFAC made an offer to BPA last week that has significant complexity as well as cost and would take months to negotiate. In response the BPA team made an offer earlier this week to provide power at BPA's best rate for industrial customers for 15 months in order to try to keep the plant open but did not get an answer.

It appears as of this morning that the plant is shutdown and is no longer using power for making aluminum.

We are committed to working with them to try to find a solution that keeps the plant operating consistent with the court decision. We think we have found a way to do that with the Alcoa plant in Washington state in a manner where we take some litigation risk in order to preserve jobs. The same offer will be made available to CFAC. But as I know you and Steve Wright have talked about, the decision making process at Glencore (the owner of CFAC) has been opaque. I know you and Steve have worked to try to get more clarity about how decisions are being made, but so far it is still a problem.

Steve and his team are contacting CFAC again today to try to get more information about what they need from a business perspective to stay open.

From: Wright,Stephen J - A-7
Sent: Monday, November 02, 2009 6:23 PM
To: 'Poneman, Daniel'
Subject: thanks

Just wanted to let you know how much I appreciate your expression of trust in my judgment once we had gone through the discussion of the DSI situation. It was very motivating and energizing. I wish we could have given you better options and made this easier and we are going to keep working to try to mitigate the risks we know are out there.

Stauffer, Nicki - A-7

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From: Wright, Stephen J - A-7
Sent: Thursday, November 12, 2009 6:23 PM
To: 'Poneman, Daniel'
Cc: 'Harris, Scott Blake'; Roach, Randy A - L-7
Subject: Port Townsend ready to go

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Comments on the Alcoa contract have just been received and we are beginning the analysis. It appears the commenters focused their efforts and most strenuous objections on Alcoa.

From: Baskerville, Sonya L - DKN-WASH
Sent: Wednesday, October 14, 2009 1:43 PM
To: 'Saavedra, Jerry'; Jones, Sheron M - DKN-WASH
Cc: 'West, Lily'
Subject: RE: BPA Briefing Memo for meeting w/Deputy Secretary tomorrow

Jerry, the DSIs' meeting is not BPA's meeting - we did not request it. Only the pre-brief is BPA's meeting. To the extent the companies have information to share, they will bring it with them. Hope that clarifies things. Thanks!

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

-----Original Message-----

From: Saavedra, Jerry [mailto:Jerry.Saavedra@hq.doe.gov]
Sent: Wednesday, October 14, 2009 4:41 PM
To: Jones, Sheron M - DKN-WASH
Cc: West, Lily; Baskerville, Sonya L - DKN-WASH
Subject: RE: BPA Briefing Memo for meeting w/Deputy Secretary tomorrow

Hi Sheron,

Thank you for the memo. I wanted to ask if future memo's can be written for the actual meeting, not the pre-brief.

Thanks again,

Jerry D. Saavedra
Office of the Secretary
U.S. Department of Energy
Office - 202.586.0954
Cell - 202.329.3973

-----Original Message-----

From: West, Lily
Sent: Wednesday, October 14, 2009 12:59 PM
To: Saavedra, Jerry
Subject: FW: BPA Briefing Memo for meeting w/Deputy Secretary tomorrow

Lily West
Special Assistant to the Deputy Secretary U.S. Department of Energy

-----Original Message-----

From: Jones,Sheron M - DKN-WASH [mailto:smjones@bpa.gov]
Sent: Wednesday, October 14, 2009 12:30 PM
To: Jones, Sheron (BPA); West, Lily
Cc: Baskerville, Sonya
Subject: RE: BPA Briefing Memo for meeting w/Deputy Secretary tomorrow

Lily - I made one small change to the cover memo, please replace the first page.

From: Jones,Sheron M - DKN-WASH
Sent: Wednesday, October 14, 2009 10:59 AM
To: 'West, Lily'
Cc: Baskerville,Sonya L - DKN-WASH
Subject: BPA Briefing Memo for meeting w/Deputy Secretary tomorrow

Lily - Attached is the briefing memo for the meeting tomorrow with the Deputy Secretary. There are three documents embedded in the memo that needs to be printed for the meeting. Please let me know if you need any additional information.

<< File: S2 Meeting Memo for 10-15 Pre Meeting.doc >>

Thank you

Sheron M. Jones
Bonneville Power Administration
Telephone: (202) 586-5640
Fax: (202) 586-6762 or 6763

Atterbury, Laura M - DK-7

From: Wright, Stephen J - A-7
Sent: Saturday, October 03, 2009 8:31 AM
To: 'Daniel.Poneman@hq.doe.gov'; 'scott.harris@hq.doe.gov'
Cc: Roach, Randy A - L-7
Subject: Re: DSI next step

----- Original Message -----

From: Wright, Stephen J - A-7
To: 'Daniel Poneman (Daniel.Poneman@hq.doe.gov)' <Daniel.Poneman@hq.doe.gov>;
'scott.harris@hq.doe.gov' <scott.harris@hq.doe.gov>
Cc: Roach, Randy A - L-7
Sent: Fri Oct 02 10:24:33 2009
Subject: DSI next step

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Atterbury, Laura M - DK-7

From: Lev, Sean [Sean.Lev@hq.doe.gov]
Sent: Thursday, October 22, 2009 6:44 PM
To: Harris, Scott Blake; Roach, Randy A - L-7
Subject: Re: Alcoa Meeting

Sorry meant to copy Randy below.

From: Lev, Sean
To: Harris, Scott Blake
Sent: Thu Oct 22 21:43:19 2009
Subject: Re: Alcoa Meeting

I think this captures the two key points well.

From: Harris, Scott Blake
To: raroach@bpa.gov <raroach@bpa.gov>
Cc: Lev, Sean
Sent: Thu Oct 22 21:07:04 2009
Subject: Alcoa Meeting

Randy --

Wanted to fill you in on my Alcoa meeting today. Basically [

(b)(5)
AC

I think they may give this approach more serious consideration.]

Sean can add anything he thinks I left out.

Scott

From: Baskerville, Sonya L - DKN-WASH
Sent: Wednesday, October 14, 2009 12:20 PM
To: 'Nolan, Betty'; 'Dickerson, Katharine'
Subject: FW: BPA Briefing Memo for meeting w/Deputy Secretary tomorrow

Importance: High

Attachments: S2 Meeting Memo for 10-15 Pre Meeting.doc

Betty and Kathy, we were thinking that Lily would provide all of the meeting participants with this briefing material. I'm not sure that has happened, so just want to make sure you have it. Thanks.

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

From: Jones, Sheron M - DKN-WASH
Sent: Wednesday, October 14, 2009 12:30 PM
To: Jones, Sheron M - DKN-WASH; 'West, Lily'
Cc: Baskerville, Sonya L - DKN-WASH
Subject: RE: BPA Briefing Memo for meeting w/Deputy Secretary tomorrow

Lily - I made one small change to the cover memo, please replace the first page.



S2 Meeting
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From: Jones, Sheron M - DKN-WASH
Sent: Wednesday, October 14, 2009 10:59 AM
To: 'West, Lily'
Cc: Baskerville, Sonya L - DKN-WASH
Subject: BPA Briefing Memo for meeting w/Deputy Secretary tomorrow

Lily - Attached is the briefing memo for the meeting tomorrow with the Deputy Secretary. There are three documents embedded in the memo that needs to be printed for the meeting. Please let me know if you need any additional information.

<< File: S2 Meeting Memo for 10-15 Pre Meeting.doc >>

Thank you

*Sheron M. Jones
Bonneville Power Administration
Telephone: (202) 586-5640*

MEETING MEMO for the DEPUTY SECRETARY



MEETING WITH STEVE WRIGHT, BPA ADMINISTRATOR

DATE: October 15, 2009
TIME: 11:30 AM
REQUESTED BY: Bonneville Power Administration
FROM: Steve Wright
LOCATION: Deputy Secretary's Office, Administrator on phone
PRESS: closed

I. Purpose/Objective:

The purpose of this meeting is to prepare you for your meeting with the three BPA Direct Service Industries (DSIs) (Alcoa, Columbia Falls Aluminum Company (CFAC), and Port Townsend Paper Company (PTPC). This memo covers material previously provided to you by e-mail. The Ninth Circuit Court of Appeals invalidated BPA's contract with Alcoa and the ruling impacts any power sales BPA may make to all of the DSIs. Various interim solutions have been put in place for the three DSIs that gets them through the month of October. In addition, BPA has released for public comment a draft fourteen-month, IP-rate contract for PTPC that could start on November 1. However, we have committed that we will engage public comment before putting in place any new strategy for all three DSIs. Hence we need to decide what options will be taken out for public comment for CFAC and Alcoa.

The note below describes options and my proposal.


 We will need to start the public
 process as soon as possible if we are to have a reasonable chance to conclude and have a contract
 in place by early to mid- November for Alcoa and CFAC. b-5

II. Participants:

- Steve Wright, BPA Administrator
- Scott Harris, DOE General Counsel
- Sonya Baskerville, BPA National Relations
- Betty Nolan, DOE Congressional Affairs
- Randy Roach, BPA General Counsel
- Allen Burns, BPA Acting Deputy Administrator

III. Talking Points:

N/A

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AP
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VII. Attachments



letter_announcing_ PortTownsend IP
draft_contra... Contract 10_08... BPA analysis
summarizing PT block

VIII. Contacts:

Steve Wright, BPA Administrator, 503-230-5102



Department of Energy

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

POWER SERVICES

October 8, 2009

In reply refer to: PT-5

To regional customers, stakeholders and other interested parties:

The Bonneville Power Administration (BPA) is proposing to offer a Block Power Sales Agreement (Block Contract) to Port Townsend Paper Company at the Industrial Power (IP) rate. Port Townsend currently receives service as a direct-service industry (DSI) through a one month FPS sale from BPA priced at the equivalent of the IP-10 rate for October 2009.

On August 28, 2009, the Ninth Circuit issued its opinion in Pacific Northwest Generating Cooperative v. BPA, Slip Op. 09-70228 (August 28, 2009) ("PNGC II"). BPA believes that with modifications to the draft contract for Port Townsend proposed June 22, 2009, service to Port Townsend is consistent with sound business principles, as described in PNGC II, since the forecasted market value of the energy is below the value of an IP sale. Therefore, the projected revenues BPA recovers from the IP sale Port Townsend exceed the forecasted revenues that BPA would otherwise obtain from the market.

The modifications that BPA and Port Townsend have negotiated reduce the term of the Block Contract from 2-years to 14-months (November 1, 2009 through December 31, 2010). BPA's analysis of the Block Contract, which will be posted by Tuesday October 13th, and this proposed contract will be available for public review and comment until Monday, October 19, 2009, on BPA's Web site at:

www.bpa.gov/power/pl/regionaldialogue/implementation/documents/

We look forward to any comments you may have, which should be provided via BPA's electronic comment system at www.bpa.gov/comment, by 5 p.m. October 19, 2009. If you have additional questions about this issue, please call Mark Miller at (503) 230-4003 or Heidi Helwig of the Public Affairs Office at (503) 230-3458.

Sincerely,

/s/ Mark E. Miller

Mark E. Miller
Trading Floor Manager

1060/1708/09 DRAFT

Contract No. 09PB-~~#####~~12106

BLOCK POWER SALES AGREEMENT
executed by the
BONNEVILLE POWER ADMINISTRATION
and
PORT TOWNSEND PAPER CORPORATION

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This BLOCK POWER SALES AGREEMENT (Agreement) is executed by the UNITED STATES OF AMERICA, Department of Energy, acting by and through the BONNEVILLE POWER ADMINISTRATION (BPA), and PORT TOWNSEND PAPER CORPORATION (Port Townsend), hereinafter individually referred to as "Party" and collectively referred to as the "Parties." Port Townsend is a CORPORATION organized under the laws of the State of Washington.

RECITALS

BPA will sell and Port Townsend will purchase an amount of Industrial Firm Power under this Agreement.

BPA has functionally separated its organization in order to functionally separate the administration and decision-making activities of BPA's power and transmission functions. References in this Agreement to Power Services or Transmission Services are solely for the purpose of clarifying which BPA function is responsible for administrative activities that are jointly performed.

The Parties agree:

1. **TERM**

This Agreement takes effect on the date signed by the Parties (Execution Date) and terminates at 2400, December 31, 2010. ~~Performance by the Parties shall commence on the Execution Date and shall continue through September 30, 2011, except that the delivery of Firm Power made available by PS for delivery to Port Townsend shall commence on November 1, 2009 the first day of the month following the Execution Date, and shall continue through September 30, 2011.~~

2. **DEFINITIONS**

Capitalized terms that are not listed below are either defined within the section in which the term is used or in BPA's applicable Wholesale Power Rate Schedules, including the General Rate Schedule Provisions (GRSPs).

- 2.1 "Amounts Taken" means an amount deemed equal to the amount of power scheduled by Port Townsend under section 7 of this Agreement.
- 2.2 "Fiscal Year" means the period that begins each October 1 and which ends the following September 30. For instance Fiscal Year 2009 begins October 1, 2008, and continues through September 30, 2009.
- 2.3 "Business Day" means every Monday through Friday except for federal holidays.
- 2.4 "Diurnal" means the division of hours within the month between Heavy Load Hours (HLH) and Light Load Hours (LLH).
- 2.5 "Hourly Preschedule of Firm Power" shall have the meaning described in Exhibit F.
- 2.6 "Firm Power" means electric power that PS will make continuously available to Port Townsend under this Agreement.
- 2.7 "Northwest Power Act" means the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839 et seq., Public Law No. 96-501, as amended.

- 2.8 "Planned Maintenance Outage" means a reduction in Total Plant Load due to periodic or routine plant maintenance that is typical for Port Townsend's industry. Planned Maintenance Outages shall not exceed 10 days during a fiscal year, unless otherwise agreed to by BPA.
- 2.9 "Point of Delivery" or "POD" means the point(s) specified in Exhibit E where power is transferred from a transmission provider to Port Townsend.
- 2.10 "Point of Metering" or "POM" means the point at which power is measured as specified in Exhibit E.
- 2.11 "Points of Receipt" means the points in the Pacific Northwest transmission system where Firm Power is to be made available by PS to Port Townsend.
- 2.12 "Power Reserves" shall have the meaning described in Exhibit H.
- 2.13 "Power Services" or "PS" means the organization, or its successor organization, within BPA that is responsible for the management and sale of federal power from the Federal Columbia River Power System.
- 2.14 "Purchase Deficiency" shall have the meaning set out in section 6.1.1.
- 2.15 "Region" means the definition established for "Region" in the Northwest Power Act.
- 2.16 "Term" means the period set out in section 1.
- 2.17 "Total Plant Load" means all electric power consumption including electric system losses, at Port Townsend's production facilities as measured at Points of Metering. No distinction is made between load that is served with power under this Agreement and load that is served with electric power from other sources.
- 2.18 "Transmission Services" or "TS" means that portion of the BPA organization or its successor that is responsible for the management and sale of transmission service on the Federal Columbia River Transmission System (FCRTS).

3. APPLICABLE RATES

- 3.1 Purchases by Port Townsend from PS under this Agreement are subject to the Industrial Firm Power Rate (~~IP-07R~~), or its successor, and are subject to all applicable GRSPs. Purchases are established as follows:

- 3.1.1 ~~IP-107R Rate:~~ Firm Power amount specified in section 4 of the body of this Agreement and Exhibit B (Billing) identifies amounts and billing entitlements subject to the ~~IP-107R Rate~~ schedule, or its successor. ~~Any credit to be allowed Port Townsend for provision of Power Reserves hereunder, in accordance with the Supplemental~~

~~Contingency Reserves Adjustment in Section III, Part 2 of the IP 107R Rate Schedule will be a monthly amount.~~

- 3.1.2 **Additional Adjustments and Charges:** Port Townsend is subject to any applicable additional adjustments or charges, including penalty charges (e.g., the Unauthorized Increase Charge), established in BPA's Wholesale Power Rate Schedules and associated GRSPs.

4. INDUSTRIAL FIRM POWER PRODUCT

BPA shall provide Firm Power up to the amount of the Peak Demand Entitlement specified in Exhibit A rounded up to the next whole megawatt (MW) each hour, to accommodate scheduling requirements, and Port Townsend shall purchase such amount each hour, except as set forth in Section 5.1, and Port Townsend agrees to purchase each month during the Term:

- 4.1 a take-or-pay minimum of the lesser of 13 average megawatts (aMW) or the product of the Peak Demand Entitlement specified in section 1 of Exhibit A and the number of hours in the month;
- 4.2 a maximum of the product of the Peak Demand Entitlement and the number of hours in the month; and,
- 4.3 a maximum in any hour of the Peak Demand Entitlement, rounded up to the next whole MW.

5. CURTAILMENT AND POWER RESERVES

5.1 Curtailment

If Port Townsend curtails Total Plant Load in whole or in part, then Port Townsend may request take-or-pay mitigation for the minimum purchase amount under section 4 pursuant to section 6.1 below. In addition, the take-or-pay obligation for the minimum purchase amount shall not apply to the extent it is the result of Uncontrollable Forces as set forth in section 13.

5.2 Power Reserves

~~The Supplemental Contingency Reserves Adjustment (SCRA) section of the 2007 General Rate Schedule Provisions, issued September 2008, is incorporated as Exhibit H, Power Reserves and shall be effective through the period ending September 30, 2009. Effective October 1, 2009, Port Townsend shall provide Supplemental Contingency Reserves in a manner consistent with the SCRA Minimum DSI Operating Reserve - Supplemental section of the 2010 General Rate Schedule Provisions, and as established in Exhibit H. These provisions will establish the standards and criteria for determining Power Reserves that Port Townsend shall provide.~~

5.3 Additional or Alternative Arrangements for Power Reserves

Nothing in this Agreement shall preclude BPA and Port Townsend from entering into arrangements, either by amendment to this Agreement or through a separate agreement for Port Townsend to provide BPA with

additional reserves or alternative restriction rights for purposes of providing reserves for BPA firm power loads within the region.

6. TAKE-OR-PAY MITIGATION/RELIEF FROM TAKE-OR-PAY

6.1 Take-or-Pay Mitigation for Curtailments

If Port Townsend chooses to curtail its purchase obligation pursuant to section 5.1 above, then the following terms and conditions shall apply:

6.1.1 Notice of Curtailment

Port Townsend shall endeavor to provide notice to PS at least seven (7) Business Days in advance of a curtailment; *provided, however*, that such notice shall in no event be less than three (3) Business Days prior to the beginning of a curtailment. Such notice shall specify the amount of power to be curtailed (Purchase Deficiency) and the duration of the curtailment. The election to curtail such power, and the amount and duration of such curtailment, may not be changed without BPA's consent.

6.1.2 Limitation on Damages

Port Townsend shall pay PS damages for any Purchase Deficiency equal to the amount by which the reasonable market value of such Purchase Deficiency is less than the price of the IP-107 Rate, or its successor. No later than 60 days following the end of each Fiscal Year, PS shall, for each month of the previous Fiscal Year, calculate the reasonable market value for each monthly Purchase Deficiency during the Fiscal Year. Reasonable market value and calculation of damages shall be determined as follows.

6.1.2.1 No later than three (3) Business Days prior to the commencement of a curtailment under this section 6.1, Port Townsend may obtain one or more transactable quotes for all or a portion of such power from a third party. The transactable quote may be for any length of time and curtailment amount. Each quote shall be deemed equal to the reasonable market value of such power to which the quote applies for the purpose of calculating damages under this section 6.1.2. PS may, but shall not be obligated to, resell the curtailed power to the third party, retain the power, or dispose of the power as it chooses. Port Townsend shall allow PS at least four (4) hours during normal business hours to decide whether or not to transact under such quote.

6.1.2.2 PS shall determine, by any reasonable method, the reasonable market value of the portion of each monthly Purchase Deficiency for which Port Townsend has not obtained a transactable quote. The reasonable market value shall be adjusted to reflect volume and BPA transmission costs associated with remarketing each such portion of the

monthly Purchase Deficiency, regardless of whether each such portion is actually remarketed.

- 6.1.2.3 PS shall bill Port Townsend and Port Townsend shall directly pay BPA damages for such Fiscal Year equal to the amount by which the sum of the product of (i) each monthly Purchase Deficiency and (ii) the applicable IP rate that PS would have charged each month if the power had been taken under this Agreement, exceeds the sum of the product of (i) each monthly Purchase Deficiency and (ii) the reasonable market value in each month during the Fiscal Year. PS shall compute as damages the algebraic sum of any positive and negative monthly amounts for monthly Purchase Deficiencies during the Fiscal Year, provided that if the sum of such amounts for the Fiscal Year is a negative number, the damages shall be deemed to be zero and PS shall not be obligated to pay any amounts to Port Townsend with regard to such Purchase Deficiencies.

It is expressly agreed to by the Parties that BPA shall not be obligated to enter into replacement transactions to determine or collect damages under this section 6.1.2.

Notwithstanding anything in this section 6.1.2 to the contrary, BPA may require Port Townsend, consistent with BPA's then-current credit policies, to pay for any damages that occur pursuant to this section 6.1 prior to the end of the Fiscal Year.

6.2 Planned Maintenance Outages

No less than seven days prior to the beginning of a Planned Maintenance Outage Port Townsend shall provide PS with written notice that specifies the duration of the Planned Maintenance Outage and the amount of purchase obligation that is to be reduced. Such notice does not relieve Port Townsend of its obligation to adjust the Hourly Preschedule of Firm Power for the month in accordance with section 7 of this Agreement.

7. SCHEDULING

All power transactions under this Agreement shall be scheduled and implemented consistent with Exhibit F, Scheduling.

8. DELIVERY

8.1 Transmission Service

This Agreement does not provide transmission services for, or include the delivery of, power to Port Townsend. Port Townsend shall be responsible for executing one or more ~~twheeling-ransmission service~~ agreements with TS for the delivery of the power provided by PS (the ~~Wheeling-Transmission Service~~ Agreements). The Parties agree to take such actions as may be necessary to facilitate the delivery of such power to Port Townsend consistent with the

terms, notice, and the time limits contained in the ~~Wheeling Transmission Service~~ Agreements.

8.2 Liability for Delivery

Port Townsend waives any claims against BPA arising under this Agreement for non-delivery of power to any points beyond the applicable Points of Receipt. BPA shall not be liable under this Agreement for any third-party claims related to the delivery of power after it leaves the Points of Receipt. Neither Party shall be liable under this Agreement to the other Party for damage that results from any sudden, unexpected, changed, or abnormal electrical condition occurring in or on any electric system, regardless of ownership.

8.3 Points of Receipt

BPA shall make power available to Port Townsend under this Agreement at firm points of receipt as specified in the ~~Wheeling Transmission Service~~ Agreement (except in the event that all points of receipt on the Federal Columbia River Power System would be considered non-firm) solely for the purpose of scheduling transmission to points of delivery for service to Port Townsend's plant load. Port Townsend shall schedule, if scheduling is necessary, such power solely for use by its plant load.

Points of Receipt and their capacity amounts may only be changed through mutual agreement. However, at any time PS may request the use of a non-firm alternate Point of Receipt to provide power to Port Townsend.

8.4 Real Power Losses

BPA is responsible for the real power losses necessary to deliver Firm Power across the Federal Columbia River Transmission System to Port Townsend's POD(s) listed in Exhibit E.

9. METERING

9.1 Meter Measurements

Port Townsend's purchase obligations in section 4 are dependant on amounts scheduled and do not require load meter measurements for billing and payment. However, PS may require load meter measurements for forecasting, planning and verification purposes.

9.2 Co-generation Measurements

No later than three (3) Business Days following the end of any month that BPA's use of reserves are requested, Port Townsend shall provide to BPA by e-mail an electronic copy of the hourly measurements for the preceding month of the electric energy produced by Port Townsend's onsite co-generation.

10. BILLING AND PAYMENT

All billing and payment under this Agreement shall be implemented consistent with Exhibit C, Billing and Payment.

11. INFORMATION EXCHANGE AND CONFIDENTIALITY

11.1 General Requirements

Upon request, each Party shall provide the other Party with any information that is necessary to administer this Agreement, and to forecast Port Townsend Load, forecast BPA system load, comply with North American Electric Reliability Council (NERC) reliability standards, prepare bills, resolve billing disputes, and otherwise implement this Agreement. For example, this obligation includes transmission and power scheduling information and load and resource metering information (such as one-line diagrams, metering diagrams, loss factors, etc.). Information requested under this section 11.1 shall be provided in a timely manner.

11.2 Reports

If requested by BPA, Port Townsend shall provide annual financial reports and any similar statements made by Port Townsend to BPA either by e-mail at kself@bpa.gov or, at the address specified in section 12, Notices and Contact Information.

11.3 Meter Data

Port Townsend consents to allow PS to receive Port Townsend's meter data from Transmission Services or BPA's metering function required to administer or verify performance under this Agreement.

11.4 Confidentiality

Before Port Townsend provides information to BPA that Port Townsend deems to be confidential, commercial or financial information, Port Townsend shall clearly designate such information as confidential. BPA shall notify Port Townsend as soon as practicable, but in any case as provided by applicable law or regulation, of any request received under the Freedom of Information Act (FOIA) (5 U.S.C. §§ 552 *et seq.*), or under any other federal law or court or administrative order, for any information designated as confidential by Port Townsend. BPA shall only release such confidential information consistent with FOIA, or if required by any other federal law or court or administrative order. BPA shall limit the use and dissemination of such confidential information within BPA to employees who need it for purposes of administering this Agreement.

12. NOTICES AND CONTACT INFORMATION

Any notice required under this Agreement that requires such notice to be provided under the terms of this section shall be provided in writing to the other Party in one of the following ways:

12.1 delivered in person;

12.2 by a nationally recognized delivery service with proof of receipt;

12.3 by United States Certified Mail with return receipt requested;

- 12.4 electronically, if both Parties have means to verify the electronic notice's origin, date, time of transmittal and receipt; or
- 12.5 by another method agreed to by the Parties.

Notices are effective when received. Either Party may change the name or address for delivery of notice by providing notice of such change or other mutually agreed method. The Parties shall deliver notices to the following person and address;

If to Port Townsend:

Port Townsend Paper Corporation
100 Paper Mill Hill Road
P.O. Box 3170
Port Townsend, WA 98368
Attn: Roger Loney
Sr Vic President, General Mgr
Phone: 360-379-2158
FAX: 360-379-2213
E-Mail: roger12@ptpc.com

If to BPA:

Bonneville Power Administration
905 NE 11th Avenue
P.O. Box 3621
Portland, OR 97208
Attn: Mark E. Miller
Account Executive
Phone: 503-230-4003
FAX: 503-230-3681
E-Mail: memiller@bpa.gov

13. UNCONTROLLABLE FORCES

The Parties shall not be in breach of their respective obligations to the extent the failure to fulfill any obligation is due to an Uncontrollable Force. "Uncontrollable Force" means an event beyond the reasonable control of, and without the fault or negligence of, the Party claiming the Uncontrollable Force, that prevents that Party from performing its contractual obligations under this Agreement and which, by exercise of that Party's reasonable care, diligence and foresight, such Party was unable to avoid. Uncontrollable Forces include, but are not limited to:

- 13.1 any unplanned curtailment or interruption of firm transmission service used to deliver power sold under this Agreement to Port Townsend whether such curtailment or interruption occurs on BPA's or a third party's transmission system;
- 13.2 any failure of Port Townsend's production, distribution or transmission facilities that prevents Port Townsend from taking Firm Power delivered to the Point of Receipt;
- 13.3 strikes or work stoppage; including the threat of imminent strikes or work stoppages; *provided, however*, that nothing contained in this provision shall be construed to require any Party to settle any strike or labor dispute in which it may be involved.
- 13.4 floods, earthquakes, or other natural disasters; terrorist acts; and

- 13.5 final orders or injunctions issued by a court or regulatory body having competent jurisdiction which the Party claiming the Uncontrollable Force, after diligent efforts, was unable to have stayed, suspended, or set aside pending review by a court of competent subject matter jurisdiction.

Neither the unavailability of funds or financing, nor conditions of national or local economies or markets shall be considered an Uncontrollable Force. The economic hardship of either Party shall not constitute an Uncontrollable Force.

If an Uncontrollable Force prevents a Party from performing any of its obligations under this Agreement, such Party shall: (1) immediately notify the other Party of such Uncontrollable Force by any means practicable and confirm such notice in writing as soon as reasonably practicable; (2) use its best efforts to mitigate the effects of such Uncontrollable Force, remedy its inability to perform, and resume full performance of its obligation hereunder as soon as reasonably practicable; (3) keep the other Party apprised of such efforts on an ongoing basis; and (4) provide written notice of the resumption of performance. Written notices sent under this section must comply with section 12, Notices and Contact Information.

14. GOVERNING LAW AND DISPUTE RESOLUTION

This Agreement shall be interpreted consistent with and governed by federal law. Port Townsend and BPA shall identify issue(s) in dispute arising out of this Agreement and make a good faith effort to negotiate a resolution of such disputes before either may initiate litigation or arbitration. Such good faith effort shall include discussions or negotiations between the Parties' executives or managers. Pending resolution of a contract dispute or contract issue between the Parties or through formal dispute resolution of a contract dispute arising out of this Agreement, the Parties shall continue performance under this Agreement unless to do so would be impossible or impracticable. Unless the Parties engage in binding arbitration as provided for in this section 14 the Parties reserve their rights to individually seek judicial resolution of any dispute arising under this Agreement.

14.1 Judicial Resolution

Final actions subject to section 9(e) of the Northwest Power Act are not subject to arbitration under this Agreement and shall remain within the exclusive jurisdiction of the United States Court of Appeals for the Ninth Circuit. Such final actions include, but are not limited to, the establishment and the implementation of rates and rate methodologies. Any dispute regarding any rights or obligations of Port Townsend or BPA under any rate or rate methodology, or BPA policy, including the implementation of such policy, shall not be subject to arbitration under this Agreement. For purposes of this section 14 BPA policy means any written document adopted by BPA as a final action in a decision record or record of decision that establishes a policy of general application or makes a determination under an applicable statute or regulation. If BPA determines that a dispute is excluded from arbitration under this section 14 then Port Townsend may apply to the federal court having jurisdiction for an order determining whether such dispute is subject to nonbinding arbitration under this section 14.

14.2 Arbitration

Any contract dispute or contract issue between the Parties arising out of this Agreement, which is not excluded by section 14.1 above, shall be subject to arbitration, as set forth below.

Port Townsend may request that BPA engage in binding arbitration to resolve any dispute. If Port Townsend requests such binding arbitration and BPA determines in its sole discretion that binding arbitration of the dispute is appropriate under BPA's Binding Arbitration Policy or its successor, then BPA shall engage in such binding arbitration, provided that the remaining requirements of this section 14.2 and sections 14.3 and 14.4 are met. BPA may request that Port Townsend engage in binding arbitration to resolve any dispute. In response to BPA's request, Port Townsend may agree to binding arbitration of such dispute, provided that the remaining requirements of this section 14.2 and sections 14.3 and 14.4 are met. Before initiating binding arbitration, the Parties shall draft and sign an agreement to engage in binding arbitration, which shall set forth the precise issue in dispute, the amount in controversy and the maximum monetary award allowed, pursuant to BPA's Binding Arbitration Policy or its successor.

Nonbinding arbitration shall be used to resolve any dispute arising out of this contract that is not excluded by section 14.1 above and is not resolved via binding arbitration, unless Port Townsend notifies BPA that it does not wish to proceed with nonbinding arbitration.

14.3 Arbitration Procedure

Any arbitration shall take place in Portland, Oregon, unless the Parties agree otherwise. The Parties agree that a fundamental purpose for arbitration is the expedient resolution of disputes; therefore, the Parties shall make best efforts to resolve an arbitrable dispute within one year of initiating arbitration. The rules for arbitration shall be agreed to by the Parties.

14.4 Arbitration Remedies

The payment of monies shall be the exclusive remedy available in any arbitration proceeding pursuant to this section 14. This requirement shall not be interpreted to preclude the Parties from agreeing to limit the object of arbitration to the determination of facts. Under no circumstances shall specific performance be an available remedy against BPA.

14.5 Finality

14.5.1 In binding arbitration, the arbitration award shall be final and binding on the Parties, except that either Party may seek judicial review based upon any of the grounds referred to in the Federal Arbitration Act, 9 U.S.C. §1-16 (1988). Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

14.5.2 In nonbinding arbitration, the arbitration award is not binding on the Parties. Each Party shall notify the other Party within 30 calendar days, or such other time as the Parties otherwise agreed to, whether it accepts or rejects the arbitration award. Subsequent to nonbinding arbitration, if either Party rejects the arbitration award, either Party may seek judicial resolution of the dispute, provided that such suit is brought no later than 395 calendar days after the date the arbitration award was issued.

14.6 **Arbitration Costs**

Each Party shall be responsible for its own costs of arbitration, including legal fees. Unless otherwise agreed to by the Parties, the arbitrator(s) may apportion all other costs of arbitration between the Parties in such manner as the arbitrator(s) deem reasonable taking into account the circumstances of the case, the conduct of the Parties during the proceeding, and the result of the arbitration.

15. **STATUTORY PROVISIONS**

15.1 **Prohibition on Resale**

Port Townsend shall not resell Industrial Firm Power purchased from BPA under this Agreement.

15.2 **BPA Appropriations Refinancing Act**

The text of the BPA Refinancing section of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (BPA Refinancing Act), P.L. 104-134, 110 Stat. 1321, 350, is incorporated as shown in Exhibit D, Special Provisions.

16. **STANDARD PROVISIONS**

16.1 **Amendments**

Except where this Agreement explicitly allows for one Party to unilaterally amend a provision or revise an exhibit, no amendment or exhibit revision to this Agreement shall be of any force or effect unless set forth in a written instrument signed by authorized representatives of each Party.

16.2 **Entire Agreement and Order of Precedence**

This Agreement, including documents expressly incorporated by reference, constitutes the entire agreement between the Parties. It supersedes all previous communications, representations, or contracts, either written or oral, which purport to describe or embody the subject matter of this Agreement. In matters of contact interpretation, The body of this Agreement shall prevail over exhibits to this Agreement in the event of a conflict.

16.3 **Assignment**

Port Townsend may assign this Agreement upon 90 days written notice, but only to a successor-in-interest that has acquired ownership, through purchase

or merger, of Port Townsend's facilities that are served, in whole or in part, with power provided under this Agreement, and then only if such assignee expressly agrees in writing to be bound by the terms of this Agreement. Such assignment will be subject to any reasonable requirement by BPA that the assignee provide credit security, in a form acceptable to BPA, to secure performance of assignee's obligations under this Agreement. It shall not be deemed unreasonable for BPA to require credit security from an assignee with a Moody's credit rating below "A" or the equivalent if rated by another credit rating agency. No other assignment of this Agreement by Port Townsend is permitted.

16.4 No Third-Party Beneficiaries

This Agreement is made and entered into for the sole benefit of the Parties, and the Parties intend that no other person or entity shall be a direct or indirect beneficiary of this Agreement.

16.5 Waivers

No waiver of any provision or breach of this Agreement shall be effective unless such waiver is in writing and signed by the waiving Party, and any such waiver shall not be deemed a waiver of any other provision of this Agreement or any other breach of this Agreement.

16.6 BPA Policies

Any reference in this Agreement to BPA policies, including any revisions, does not constitute agreement of Port Townsend to such policy by execution of this Agreement, nor shall it be construed to be a waiver of the right of Port Townsend to seek judicial review of any such policy.

16.7 Severability

If any term of this Agreement is found to be invalid by a court of competent jurisdiction then such term shall remain in force to the maximum extent permitted by law. All other terms shall remain in force unless that term is determined not to be severable from all other provisions of this Agreement by such court.

16.8 Performance Assurance

When reasonable grounds for insecurity arise with respect to the performance of Port Townsend, BPA may in writing demand adequate assurance of due performance in addition to prepayment and specify the form such assurance shall take. The type of assurance BPA may require includes, but is not limited to, providing a letter of credit, posting a security deposit, as appropriate. Failure of Port Townsend to provide such assurance within the time specified by BPA in its request for adequate assurance shall be considered a material breach and may, in BPA's sole discretion, create reasonable grounds to suspend or terminate this Agreement. If adequate assurance is not provided, or is not provided in the form specified in the request for adequate assurance, BPA shall have five Business Days from the date such assurance was required to be provided to notify Port Townsend in writing of its intentions with respect to termination or suspension of the

contract. Any waiver by BPA of its right to suspend or terminate this Agreement shall not be considered a waiver of said rights with respect to future instances when adequate assurance may be required. Written notices sent under this section must comply with section 12, Notices and Contact Information.

16.9 Prepayment Reevaluation

Port Townsend may request BPA to reevaluate prepayment or performance assurances required pursuant to section 16.8. Upon such request, BPA shall reevaluate Port Townsend's creditworthiness to establish whether the amount of prepayment or the performance assurance required to be posted or maintained by Port Townsend need to be revised.

17. TERMINATION

BPA may terminate this Agreement if:

- 17.1 Port Townsend fails to cure non-payment as required by section 10, or
- 17.2 Port Townsend fails to provide performance assurance satisfactory to BPA as required by section 16.8.

Such termination is without prejudice to any other remedies available to BPA under law.

18. SIGNATURES

The signatories represent that they are authorized to enter into this Agreement on behalf of the Party for which they sign.

PORT TOWNSEND PAPER CORPORATION

UNITED STATES OF AMERICA
Department of Energy
Bonneville Power Administration

By _____

By _____
Account Executive

Name _____
(Print/Type)

Name _____
(Print/Type)

Title _____

Date _____

Date _____

Exhibit A
PEAK DEMAND

1. **PEAK DEMAND ENTITLEMENT**

Port Townsend's Contract Demand equals 20.5 megawatts (MW) and such Contract Demand shall equal Port Townsend's hourly Peak Demand Entitlement.

2. **REVISIONS TO CONTRACT DEMAND**

Port Townsend's Contract Demand specified in section 1 of this Exhibit A was established at 2400 hours on September 30, 1997 under Revision No. 1, Exhibit C of Contract No. DE-MS79-81BP-90347. The Parties recognize that Public Utility District No. 1 of Clallam County, Washington (Clallam) has requested that it be permitted to serve Port Townsend's OCC plant load, consistent with BPA's determination in 2005 that service to the OCC plant could be served by Clallam at the PF rate pursuant to Bonneville's Atochem policy. See, BPA's Policy for Power Supply Role for Fiscal Years 2007-2008 (February 2005) at page 56. ~~As a consequence the Contract Demand stated above is contingent on the outcome of BPA's final determination regarding the status of the OCC load. To the extent Clallam is permitted complies with the procedures outlined in BPA's June 16th letter approving Clallam's request and Clallam commences to serve OCC load, Port Townsend's Contract Demand will be adjusted downward accordingly to reflect the change in status of that portion of the Port Townsend load and the OCC plant load shall not be included in Port Townsend's Total Plant Load.~~

**Exhibit B
BILLING PARAMETERS**

1. INDUSTRIAL FIRM POWER ENTITLEMENTS

1.1 Port Townsend's HLH and LLH Energy Entitlements shall be the greater of: (i) the product of the applicable take-or-pay minimum specified in section 4.1 of the body of the Agreement and the number of hours in the respective diurnal periods for the billing month; or, (ii) the sum of the megawatt amounts in the Hourly Preschedule of Firm Power for hours in the respective diurnal periods in the billing month.

1.2 Port Townsend's Demand Entitlement shall be the lesser of: (i) Peak Demand Entitlement as specified in Exhibit A of this Agreement; or, (ii) the maximum megawatt amount in the Hourly Preschedule of Firm Power for the billing month.

2. UNAUTHORIZED INCREASE CHARGE

Consistent with the applicable BPA Wholesale Power Rate Schedules and GRSPs, power scheduled pursuant to section 7 of the body of this Agreement is subject to unauthorized increase charges specified in section 2.1 and 2.2 of this Exhibit, unless such power is provided under another contract with PS.

2.1 Hourly Preschedule of Firm Power amounts in any hour that exceed the MW amount specified in section 4.3 of the body of the Agreement shall be subject to the Charge for Unauthorized Increase in Demand.

2.2 The total of Hourly Preschedule for Firm Power amount, submitted and updated by Port Townsend pursuant to Exhibit F, for the month that exceeds the product of Peak Demand Entitlement and the number of hours in the month shall be subject to the Charge for Unauthorized Increase in Energy.

3. REVISIONS

If this exhibit is inconsistent with BPA's IP-~~107R~~ Rate schedule, or its successor, as finally approved by FERC, the Parties shall make a good faith effort to amend this exhibit so that it is consistent.

Exhibit C
BILLING AND PAYMENT

1. BILLING

1.1 Take or Pay Minimum Firm Power

~~BPA shall bill Port Townsend monthly for electric power and related services to be provided to Port Townsend under section 4.1 of the body of this Agreement.~~ BPA shall bill Port Townsend for prepayment of monthly electric power and related services to be provided to Port Townsend under section 4.1 of the body of the Agreement ("Take or Pay Minimum Firm Power") in the succeeding calendar month (the "Delivery Month"). The Issue Date is the earlier of the date BPA provides a bill for Take or Pay Products and Services by electronic transmission to Port Townsend and, in the case of physical delivery (whether by hand delivery, U.S. Mail, other reasonable means), the date the bill for Take or Pay Products and Services is received by Port Townsend.

1.2 Final Bill

BPA shall bill Port Townsend monthly for electric power and related services to be provided to Port Townsend under section 4 of the body of this Agreement and section 1 of Exhibit F to this Agreement.

2. PAYMENT

Port Townsend shall pay all bills electronically in accordance with instructions on the bill.

2.1 Prepayment

For each prepayment bill for Take or Pay Minimum Firm Power provided by BPA under section 1.1 of this Exhibit, Port Townsend shall pay such bill not later than the later to occur of (a) 15th calendar day of the month preceding the Delivery Month, and (b) five Business Days following the Issue Date.

2.1.2.1 Prepayment to be Billed

The amount to be included in a bill by BPA under section 1.1 of this Exhibit and to be paid by Port Townsend for Take or Pay Minimum Firm Power is the take-or-pay minimum Firm Power amount for the related Delivery Month established pursuant to section 4.1 of the body of this Agreement.

2.1.2.2 Prepayment Essential

Prepayment by Port Townsend of Take or Pay Minimum Firm Power is an essential term of this Agreement.

2.1.2.3 Non-Payment by Port Townsend of Take or Pay Minimum Firm Power

In the event of non-payment by Port Townsend of amounts billed for Take or Pay Minimum Firm Power, even if BPA by written agreement waives breach and default for late payment thereof, Port Townsend

shall be liable for unpaid amounts until the payment is satisfied or the obligations hereunder are discharged. Until such time as amounts in arrears are paid in full or are discharged, the unpaid balance shall accrue interest daily at the Default Rate and such accrued interest shall be included in the determination of the amount of the unpaid balance.

2.21.4 Effect of Partial Payments of Prepayment Essential

In the event that Port Townsend makes a payment that is insufficient to cover amounts then due and payable for either Take or Pay Minimum Firm Power or for a final monthly bill under this Agreement, the insufficiency shall be deemed to be a nonpayment under section 5 of this Exhibit.

2.23 Final Payment

If payment is due, Port Townsend shall make payment of the final bill provided by BPA under section 1.2 of this Exhibit by the 20th day after the Issue Date of the final bill. If the 20th day is a Saturday, Sunday, or federal holiday, then the due date is the next Business Day. Failure to make payment by the due date shall be deemed to be a nonpayment of Firm Power.

2.23.1 If the amount of the final bill exceeds the amount of the bill for Take or Pay Minimum Firm Power for the Delivery Month, Port Townsend shall pay BPA the difference between the bill for Take or Pay Minimum Firm Power and final bill by the final bill's due date; or

2.23.2 ~~if~~ If the amount of the final bill for the Delivery Month is less than the amount of the bill for Take or Pay Minimum Firm Power, then BPA shall pay Port Townsend the difference between the bill for Take or Pay Minimum Firm Power and final bill by the 20th day after the final bill's Issue Date. If the 20th day is a Saturday, Sunday, or federal holiday, BPA shall pay the difference by the next Business Day.

3. DEFAULT RATE

The Default Rate shall be equal to the higher of:

3.1 the Prime Rate (as reported in the Wall Street Journal or successor publication, in the first issue published during the month in which payment was due), plus four percent, divided by 365; or

3.2 the Prime Rate times 1.5, divided by 365;

and shall be applied each day after the due date to any unpaid balance.

4. DISPUTED BILLS

4.1 If Port Townsend disputes any portion of a charge or credit on Port Townsend's bill, Port Townsend shall provide written notice to BPA with a copy of the bill noting the disputed amounts. Notwithstanding whether any portion of the bill is in dispute, Port Townsend shall pay the entire bill by the due date. This section 4.1 does not allow Port Townsend to challenge the validity of any BPA rate. Notice of a disputed charge on a bill does not constitute BPA's agreement that a valid claim under contract law has been stated.

4.2 If the Parties agree, or if after dispute resolution, Port Townsend is entitled to a refund of any portion of the disputed amount, then BPA shall make such refund with simple interest computed from the date of receipt of the disputed payment to the date the refund is made. The daily interest rate shall equal the Prime Rate (as reported in the Wall Street Journal or successor publication in the first issue published during the month in which payment was due) divided by 365.

5. NON PAYMENT BY PORT TOWNSEND

If Port Townsend fails to pay in full any bill for Take or Pay Minimum Firm Power or final bill by the applicable due date it shall be considered in default and such unpaid amount shall be charged the default rate charge provided above in section 3. The unpaid amount and the default rate charge shall be considered overdue and Bonneville shall have the right, at its sole option and without notice to suspend delivery under this Agreement to Port Townsend on or after the third (3) calendar day of the applicable due date. If Port Townsend has not paid in full any unpaid amount including the applicable default rate charge on or before the Seventh (7) calendar day after the applicable due date, Bonneville shall have the sole option to terminate this Agreement pursuant to Section 17.1 of the body of the Agreement.

6. Deposit

Not later than the seventh Business Day prior to the scheduled commencement of deliveries of ~~Take or Pay Minimum Firm Power~~ under this Agreement, Port Townsend shall irrevocably pay to BPA as security for a possible default by Port Townsend in its payment obligation to BPA for ~~Take or Pay Minimum Firm Power~~ under this Agreement an amount in dollars equal to the amount of the highest monthly bill less the prepayment amount for that month, which will be established by the product of the: i) subtraction of the take-or-pay minimum established in section 4.1 of the body of the Agreement from the Peak Demand Entitlement; ii) highest monthly average IP-107R rate, or its successor (\$/MWh); and iii) number of hours in such month (the "Security Amount"). The Security Amount is \$213,267.60 and is the result of 20.5 MW minus 13 MW then multiplied by the \$38.22 per MWh average IP rate for January 2010 then multiplied by 744 hours in January 2010. In the event that Port Townsend does not default in its payment obligations to BPA for Take or Pay Minimum Firm Power under this Agreement, BPA shall provide in aggregate, payment credits in an amount equal to the Security Amount toward payments otherwise due by Port Townsend to BPA for the final month of service, as agreed to herein, for Take or Pay Minimum Firm Power under this Agreement,

provided, that, in the event that the final month's bill for Take or Pay Minimum Firm Power under this Agreement is less than the Security Amount, BPA shall, not later than the sixtieth calendar day after the final bill is provided to Port Townsend, refund in cash to Port ~~Townshend~~Townsend the positive difference between the Security Amount less the final month's bill for Take or Pay Minimum Firm Power under this Agreement.

7. REVISIONS

BPA may unilaterally revise this Exhibit C to implement requirements resulting from updates to Port Townsend's creditworthiness determination as a result of BPA's determination pursuant to section 16.9 of the body of the Agreement.

Exhibit D
ADDITIONAL PRODUCTS, SERVICES, AND SPECIAL PROVISIONS

1. BPA APPROPRIATIONS REFINANCING

In accordance with section 15.2 of the body of this Agreement, section (i) of the BPA Refinancing Section of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (BPA Refinancing Act), P.L. No. 104-134, 110 Stat. 1321, 350, is included in this Agreement--

1.1 Contract Provisions

In each contract of the Administrator that provides for the Administrator to sell electric power, transmission, or related services, and that is in effect after September 30, 1996, the Administrator shall offer to include, or as the case may be, shall offer to amend to include, provisions specifying that after September 30, 1996--

1.1.1 the Administrator shall establish rates and charges on the basis that

1.1.1.1 the principal amount of an old capital investment shall be no greater than the new principal amount established under subsection (b) of the BPA Refinancing Act;

1.1.1.2 the interest rate applicable to the unpaid balance of the new principal amount of an old capital investment shall be no greater than the interest rate established under subsection (c) of the BPA Refinancing Act;

1.1.1.3 any payment of principal of an old capital investment shall reduce the outstanding principal balance of the old capital investment in the amount of the payment at the time the payment is tendered; and

1.1.1.4 any payment of interest on the unpaid balance of the new principal amount of an old capital investment shall be a credit against the appropriate interest account in the amount of the payment at the time the payment is tendered;

1.1.2 apart from charges necessary to repay the new principal amount of an old capital investment as established under subsection (b) of the BPA Refinancing Act and to pay the interest on the principal amount under subsection (c) of the BPA Refinancing Act, no amount may be charged for return to the United States Treasury as repayment for or return on an old capital investment, whether by way of rate, rent, lease payment, assessment, user charge, or any other fee;

1.1.3 amounts provided under section 1304 of title 31, United States Code, shall be available to pay, and shall be the sole source for payment of, a judgment against or settlement by the Administrator or the United

States on a claim for a breach of the contract provisions required by this Part; and

1.1.4 the contract provisions specified in this Part do not--

1.1.4.1 preclude the Administrator from recovering, through rates or other means, any tax that is generally imposed on electric utilities in the United States, or

1.1.4.2 affect the Administrator's authority under applicable law, including section 7(g) of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839e(g)), to--

1.1.4.2.1 allocate costs and benefits, including but not limited to fish and wildlife costs, to rates or resources, or

1.1.4.2.2 design rates.

2. REVISIONS

This exhibit shall be revised by mutual agreement of the Parties to reflect additional special provisions during the Term.

Exhibit E
METERING (07/09/08 Version)

1. METERING

1.1 Directly Connected Points of Delivery and Load Metering

BPA POD Name: Fairmount Substation 115 kV;
BPA POD Number: TBD*
WECC Balancing Authority: BPAT;

Location: the point in BPA's Fairmount Substation where the 115 kV facilities of BPA and Clallam are connected;

Voltage: 115 kV;

Metering: in BPA's Fairmount Substation 115 kV in the 115 kV circuit over which such electric power flows;

- (1) **BPA Meter Point Name:** New Mill In;
BPA Meter Point Number: 2872;
Direction for PF Billing Purposes: Negative;
Manner of Service: Direct, BPA to Port Townsend;
- (2) **BPA Meter Point Name:** New Mill Out;
BPA Meter Point Number: 2871;
Direction for PF Billing Purposes: Positive;
Manner of Service: Direct, Port Townsend to BPA
- (3) **BPA Meter Point Name:** Port Townsend Generation;
BPA Meter Point Number: 2863;
Direction for PF Billing Purposes: «Positive/Negative/Not used»; TBD*
Manner of Service: «Direct, BPA to «Customer Name» or «Customer Name» to BPA»; TBD*

Metering Loss Adjustment: BPA shall adjust for losses between the POD, New Mill In, and the New Mill Out. Such adjustments shall be specified in writing between BPA and Port Townsend;

Exception: None.

2. REVISIONS

Each Party shall notify the other in writing if updates to this exhibit are necessary to accurately reflect the actual characteristics of POD and meter information described in this exhibit. The Parties shall revise this exhibit to reflect such changes. The Parties shall mutually agree on any such exhibit revisions and agreement shall not be unreasonably withheld or delayed. The effective date of any exhibit revision shall be the date the actual circumstances described by the revision occur.

Exhibit F
SCHEDULING

1. SCHEDULING FEDERAL RESOURCES

Hourly preschedules of Firm Power for the month must be submitted by Port Townsend to PS in whole megawatts (MW) for each hour in the month in the format presented in Exhibit G of the Agreement, no later than 11 a.m. (1100) PPT three Business Days prior to the beginning of each month. Such submission shall constitute Port Townsend's Hourly Preschedule of Firm Power for the month and shall be communicated by Port Townsend to BPA Preschedule by e-mail at:

E-mail: presched@bpa.gov

Additional BPA Preschedule Contact Information

Preschedule Desk Phone: (503) 230-3813

Preschedule Facsimile: (503) 230-3039

Port Townsend shall provide PS a contact person available at the plant to contact 24 hours, 7 days a week at the following phone number.

Port Townsend

Phone: 0 -

PS agrees to provide Port Townsend e-Tagging services for the purposes of scheduling power and for e-Tagging scheduled deliveries to Port Townsend under this Agreement. Port Townsend agrees to pay PS \$300 each month for such service. Port Townsend shall be responsible for any charges or penalties assessed schedules submitted by Port Townsend and scheduled by PS.

Changes during the month to the Hourly Preschedule of Firm Power for the month shall be submitted by Port Townsend to PS, in the format presented in Exhibit G of the Agreement, no later than 11 a.m. (1100) PPT in accordance with the WECC Preschedule Calendar for the Preschedule Day hourly schedules to be changed. Such changes shall be communicated by Port Townsend to BPA Preschedule by e-mail at:

E-mail: presched@bpa.gov

In the event of an emergency or unplanned outage or reduction that requires a real-time change to the Hourly Preschedule of Firm Power, Port Townsend shall call the BPA Real-Time Load Desk at the following number to update its hourly schedules as soon as Port Townsend identifies the event.

BPA Real-Time Loads Desk

Phone: (503) 230-3341

Both Parties shall notify each other of changes to telephone or fax numbers of key personnel (for Prescheduling, Real-Time Scheduling, or After the Fact, etc.)

BPA After the Fact Desk
Phone: (503) 230-3949

If BPA, in its sole discretion, determines that Port Townsend has intentionally submitted schedules that deviate, in magnitude and/or duration, from its actual metered load, in order to realize a significant financial benefit beyond what would normally be realized when managing its monthly energy imbalance, as determined by BPA, BPA may take action to mitigate further deviations. If BPA determines that there have been intentional deviations, it will provide written notice to Port Townsend giving Port Townsend 90 days from the date the date of such notice to alter its scheduling practices in a manner that avoids further intentional deviations. At the end of this 90 day cure period, if Port Townsend has altered its scheduling practices in a manner that will avoid future intentional deviations, no further action will be taken. If Port Townsend has not altered its scheduling practices to BPA's satisfaction, BPA shall have the right to unilaterally revise the Agreement to convert power deliveries from scheduled service to load following service and all charges and other requirements specified in BPA rate schedules and General Rate Schedule Provisions for that type of service will be applied.

In the event that Port Townsend moves its load to a different Balancing Authority Area, Scheduling will require 60-day notification and additional scheduling services may be required.

2. AFTER THE FACT

BPA and Port Townsend agree to reconcile all transactions, schedules and accounts at the end of each month (as early as possible within the first 10 calendar days of the next month). BPA and Port Townsend shall verify all transactions per this Agreement, as to product or type of service, hourly amounts, daily and monthly totals, and related charges.

3. REVISIONS

BPA may unilaterally revise this Exhibit F to implement changes that are applicable to Port Townsend and that BPA determines are reasonably necessary to: (i) update contact information; (ii) meet its power and scheduling obligations under this Agreement; or, (iii) comply with requirements of the Western Energy Coordinating Council (WECC), North American Energy Standards Board (NAESB), or NERC, or their successors or assigns.

Revisions are effective 45 days after BPA provides written notice of the revisions to Port Townsend unless, in BPA's sole judgment, less notice is necessary to comply with an emergency change to the requirements of the WECC, NAESB, NERC, or their successors or assigns. In this case, BPA shall specify the effective date of such revisions.

**Exhibit G
PRESCHEDULE EXAMPLES**

**Monthly Preschedule of Firm Power
Port Townsend Pre-Schedule**

To: presched@bpa.gov

Contract # 09PB-

Date	HE1	HE2	HE3	HE4	HE5	HE6	HE7	HE8	HE9	HE10	HE11	HE12	HE13	HE14	HE15	HE16	HE17	HE18	HE19	HE20	HE21	HE22	HE23	HE24	HE25	TOTAL	
4/1/09																										0	
4/2/09																											0
4/3/09																											0
4/4/09																											0
4/5/09																											0
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4/30/09																											0

Mid-Month Change to Monthly Preschedule of Firm Power

Port Townsend Pre-Schedule

To: presched@bpa.gov

Contract # 09PB-

Date	HE1	HE2	HE3	HE4	HE5	HE6	HE7	HE8	HE9	HE10	HE11	HE12	HE13	HE14	HE15	HE16	HE17	HE18	HE19	HE20	HE21	HE22	HE23	HE24	HE25	TOTAL	
4/17/09																										0	
4/18/09																											0
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Exhibit H
POWER RESERVES

1. DEFINITIONS

- 1.1 "Event" is a system condition under which PS needs additional power to meet its obligations during a system disturbance. The beginning of an Event shall be identified by alarm notice to the PS Loads Scheduler/Hydro Duty Scheduler of a system disturbance, and the Loads Scheduler will notify Port Townsend that Restricted Energy is required. The end of the Event shall occur the earlier of when: a) initially established; b) Port Townsend's scheduling agent has notified Port Townsend that full service has been restored; or c) 105 minutes from the beginning of the Event. An Event shall not include BPA electing not to purchase power for economic reasons, nor shall an Event include circumstances in which BPA elects not to purchase available transmission capacity to avoid the need to impose a restriction.
- 1.2 "Event Duration" shall be the total cumulative Event Minutes of the Event.
- 1.3 "Event Minute" shall be the minutes of restriction (or any portion thereof) during an Event.
- 1.4 "Contingency Reserves" are those reserves provided by Port Townsend under this Agreement for purposes of providing reserves for BPA's firm power loads within the region, as provided for in the Northwest Power Act.
- 1.5 "Reserve Amount" shall be the kilowatt (kW) amount of Contingency Reserves available to BPA by Port Townsend specified in section 2 of this Exhibit.
- 1.6 "Restricted Energy" means the requested megawatt-hour (MWh) amount of energy not made available to Port Townsend hereunder because of an Event pursuant to section 2 of this Exhibit.

2. AMOUNT AND TYPES RESERVES

When necessary to provide Contingency Reserves, BPA may restrict the Reserve Amount, or the requested portion thereof, for a period of time (Restricted Energy). The Reserve Amount shall equal 2,000 kilowatts, or 10% of the Amount, consistent with the amount of Minimum DSI Operating Reserve – Supplemental specified in the 2010 GRSP, or its successor.

Port Townsend will provide the Restricted Energy to BPA by an interruption of its loads or increased generation in an amount equal to or greater than the amount of such specified Restricted Energy, and in each case shall continue such load interruption for the duration of the Event.

3. QUALITY AND CHARACTER OF RESERVES

Contingency Reserves provided by Port Townsend shall be consistent with North American Electric Reliability Council (NERC), Western Electricity Coordinating Council (WECC), and Northwest Power Pool (NWPP) standards and criteria:

3.1 the Reserve Amount, or the requested portion thereof, must be offline within ten (10) minutes of the Event and pursuant to section 4 of this Exhibit:

3.2 the Reserve Amount, or the requested portion thereof, must be available to be offline for up to one-hundred five (105) minutes.

4. NOTIFICATION

Port Townsend shall provide a contact at the Facility at the following phone number:

Port Townsend
Phone: TBD

Port Townsend shall maintain such contact for every hour in the Term of the Agreement in which the Minimum DSI Operating Reserve – Supplemental amount is greater than zero megawatts.

The Loads Scheduler will notify Port Townsend of each contingency event by means of a pre-programmed phone call or other electronic means. Within eight (8) minutes following such notice by the Loads Scheduler of an Event, Port Townsend shall commence providing the Restricted Energy to BPA. Port Townsend shall not restore its use of the Restricted Energy until the lesser of: (a) one-hundred five (105) minutes; or (b) immediately following notice from the Loads Scheduler terminating an Event.

5. VERIFICATION

PS retains the right to verify Port Townsend's provision of Restricted Energy by comparing the metered amounts before an Event, during an Event, and after an Event is terminated. If such verification fails to demonstrate that the Restricted Energy was made available to BPA by Port Townsend for the Event Duration, then PS, in its sole discretion, may: (a) terminate the compensation specified in Section 6 of this Exhibit for the undemonstrated portion of the Reserve Amount for the remaining Term of the Agreement; and, (b) notify TS of the undemonstrated portion of the Reserve Amount. Port Townsend acknowledges that any undemonstrated portion of the Reserve Amount may cause its transmission supplier to take additional actions subject to the provisions of transmission service agreements Port Townsend maintains with its transmission supplier, that may include an assessment of the monetary penalty described in the Failure to Comply provision of the prevailing TS tariff for transmission service.

6. COMPENSATION FOR CONTINGENCY RESERVES

Port Townsend will be compensated by PS for Minimum DSI Operating Reserve - Supplemental provided in this Agreement through an adjustment to the IP rate determinants, as provided for in the Northwest Power Act.

7. RETURNED ENERGY

BPA must make any Restricted Energy during an Event available to Port Townsend within 24 hours ("Returned Energy") in mutually agreed flat hourly amounts and hours. Parties agree Returned Energy does not need to be scheduled during hours immediately following an Event and that the Returned Energy will likely be made available during Light Load Hours.

BPA will not bill Port Townsend for Returned Energy

Scheduling of Returned Energy amounts scheduled will be in addition to federal power purchased pursuant to section 4 of the body of the Agreement.

8. TESTING OF RESERVES

BPA shall have the right to conduct tests of the procedure specified in this Exhibit.

9. REVISIONS

BPA may unilaterally revise this Exhibit F to implement changes that are applicable to Port Townsend and that BPA determines are reasonably necessary for reserves provided under this Agreement to: (a) reflect changes in the value of the DSI Reserves Adjustment; and (b) comply with requirements of the WECC, NAESB, or NERC, or their successors or assigns.

Revisions are effective 45 days after BPA provides written notice of the revisions to Port Townsend unless, in BPA's sole judgment, less notice is necessary to comply with an emergency change to the requirements of the WECC, NAESB, NERC, or their

~~successors or assigns. In this case, BPA shall specify the effective date of such revisions.~~ **1. GENERAL RATE SCHEDULE PROVISION**

~~In accordance with section 5.2 of the body of this Agreement, section C, Supplemental Contingency Reserve Adjustment (SCRA) of the 2007 General Rate Schedule Provisions, issued September 2008, is included in section 2 of this Exhibit H.~~

~~2. SUPPLEMENTAL CONTINGENCY RESERVES ADJUSTMENT~~

~~The energy charges stated in the IP-07R rate schedule may be adjusted to reflect the negotiated Supplemental Contingency Reserves Adjustment (SCRA) adjustment. Power Services will negotiate with any direct service industries (DSI) interested in providing Supplemental Contingency Reserves (Supplemental Reserves). Supplemental Reserves refers to generating capacity, and associated energy, fully available within 10 minutes' notice of a system disturbance. This is a flexible rate that will allow BPA to negotiate company-specific interruption rights and will establish a value tied to the company-specific arrangement based on the amount and quality of reserves provided. The maximum amount Power Services may pay for Supplemental Reserves from a DSI is capped at the rate published in BPA's Final Supplemental WP-07 Rate Proposal for operating reserve capacity that is provided as a generation input to Transmission Services. This maximum value is based on the Federal Energy Regulatory Commission (FERC) approved embedded cost methodology.~~

~~The suitability and quality of the Supplemental Reserves will be measured by whether they have certain characteristics, some of which are required and others optional. Any Supplemental Reserves purchased by Power Services must be consistent with North American Electric Reliability Council (NERC), Western Electricity Coordinating Council (WECC), and Northwest Power Pool (NWPP) standards or criteria as stated:~~

~~2.1 The interruptible load must be offline within five minutes after a call by BPA;~~

~~2.2 In the event of a system disturbance, the interruptible load must be accessible prior to a request for reserves from other NWPP parties; and~~

~~2.3 The interruptible load must be available to be offline for up to 60 minutes.~~

~~In addition to these required characteristics, the issues identified below will help define when Power Services may pay the maximum value for Supplemental Reserves:~~

~~2.4 The extent to which Power Services has the discretion when and how to use all operating reserves and to determine what resources to call on in the event of a system disturbance; and~~

~~2.5 Whether there are limitations on the number of times or total minutes the reserves may be utilized.~~

~~Pursuant to established criteria met and performance demonstrated, BPA will satisfy its obligation to provide a reserves credit or payment to the DSI through Transmission Services, Transmission Contracts, and the Stability Reserves Credit, or through other contracts as negotiated.~~

2. **REVISIONS**

~~BPA will revise this Exhibit H such that the 2010 Wholesale Power Rate Schedules and General Rate Schedule Provisions will establish the standards and criteria for Port Townsend to provide Power Reserves effective October 1, 2000.~~

213

Summary of BPA's Analysis of the Block Contract for Port Townsend

DP
b-5

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b-5

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b-5

7P
b-5

Atterbury, Laura M - DK-7

F46 (6)(A)
Whed in pt

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Monday, October 26, 2009 8:59 AM
To: Roach, Randy A - L-7
Subject: FW: quick question

FYI. From the new Alcoa govt. affairs person.

Scott Blake Harris
General Counsel
United States Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
(202) 586-5281

-----Original Message-----
From: Harris, Scott Blake
Sent: Monday, October 26, 2009 11:58 AM
To: Cruise, Daniel
Cc: Lev, Sean
Subject: RE: quick question

Dan --

Your folks seem to believe

(b)(4)?
~~SP~~

I've copied my colleague Sean Lev who participated in the meeting with me and can add anything I've missed.

Scott

withhold in pt

(b)(4)

Blake Harris
General Counsel
United States Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
(202) 586-5281

-----Original Message-----

From: Scott Harris [mailto:sbharris@rcn.com]
Sent: Monday, October 26, 2009 10:52 AM
To: Cruise, Daniel
Cc: Harris, Scott Blake
Subject: Re: quick question

Will respond from my official email when I can.

Sent from my iPhone

On Oct 26, 2009, at 10:31 AM, "Cruise, Daniel"
<Daniel.Cruise@alcoa.com> wrote:

> Scott,
> Per our internal conversations and Alcoa's last meeting with you it
> sounds like!

(b)(4)

> Is this in line with your thinking at this point? Or should I move my
> guys in a different direction?
> We're sending you a paper later today.
> Hope all is well.
> Daniel
>
> Tel. 212 836 2733
>
>
>
>

Atterbury, Laura M - DK-7

From: Wright, Stephen J - A-7
Sent: Monday, October 26, 2009 1:45 PM
To: Roach, Randy A - L-7; 'Harris, Scott Blake'
Cc: Poneman, Daniel; Burns, Allen L - D-7
Subject: RE: DSIs

DP
b-5

From: Roach, Randy A - L-7
Sent: Monday, October 26, 2009 9:49 AM
To: 'Harris, Scott Blake'; Wright, Stephen J - A-7
Cc: Poneman, Daniel; Burns, Allen L - D-7
Subject: RE: DSIs

I talked with Steve Wright about this and he wants to respond to the questions.

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Monday, October 26, 2009 7:16 AM
To: Roach, Randy A - L-7
Cc: Poneman, Daniel
Subject: DSIs

Randy -

12/9/2009

I have to get on a plane in a bit and wondered if you could help with something.

DP AC
6-5

Thanks.

Scott

Stauffer, Nicki - A-7

#97

4 hold in pt (S)(S) DP+AC

From: Wright, Stephen J - A-7
Sent: Monday, October 26, 2009 6:58 PM
To: 'Harris, Scott Blake'; 'Poneman, Daniel'
Subject: RE: Alcoa Meeting

DP
B5

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Monday, October 26, 2009 6:24 PM
To: Wright, Stephen J - A-7; Roach, Randy A - L-7; Poneman, Daniel
Subject: Re: Alcoa Meeting

DP
B5

----- Original Message -----

From: Wright, Stephen J - A-7 <sjwright@bpa.gov>
To: Harris, Scott Blake; Roach, Randy A - L-7 <raroach@bpa.gov>; Poneman, Daniel
Sent: Mon Oct 26 17:02:11 2009
Subject: RE: Alcoa Meeting

DP
B5

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Monday, October 26, 2009 11:09 AM
To: Wright, Stephen J - A-7; Roach, Randy A - L-7; Poneman, Daniel
Subject: Re: Alcoa Meeting

DP
B5

11/19/2009

----- Original Message -----

From: Wright, Stephen J - A-7 <sjwright@bpa.gov>
To: Harris, Scott Blake; Roach, Randy A - L-7 <raroach@bpa.gov>
Sent: Mon Oct 26 13:00:24 2009
Subject: Alcoa Meeting

DP
BS

DP
BS

From: Roach, Randy A - L-7
Sent: Sunday, October 25, 2009 9:53 AM
To: Harris, Scott Blake
Cc: Lev, Sean; Wright, Stephen J - A-7
Subject: RE: Alcoa Meeting

DP
BS

DP
BS

Randy

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Thursday, October 22, 2009 6:07 PM
To: Roach,Randy A - L-7
Cc: Lev, Sean
Subject: Alcoa Meeting

Randy --

Wanted to fill you in on my Alcoa meeting today. Basically

(b)(5)
AK
DP

Sean can add anything ne thinks I left out.

Scott

Atterbury, Laura M - DK-7

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Thursday, October 22, 2009 12:02 PM
To: Roach, Randy A - L-7
Cc: Lev, Sean
Subject: RE: CFAC -- PRIVILEGED LEGAL COMMUNICATION

Very helpful

DP/AC
B5

Scott Blake Harris
General Counsel
United States Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
(202) 586-5281

-----Original Message-----

From: Roach, Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Wednesday, October 21, 2009 8:30 PM
To: Harris, Scott Blake
Cc: Lev, Sean
Subject: RE: CFAC -- PRIVILEGED LEGAL COMMUNICATION

Scott--

DP/AC
B5

DP/AL
B5

Randy

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Wednesday, October 21, 2009 2:17 PM
To: Roach,Randy A - L-7
Cc: Lev, Sean
Subject: RE: CFAC -- PRIVILEGED LEGAL COMMUNIC ATION

Randy --

DP
AL
BS

Scott

-----Original Message-----

From: Roach, Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Wednesday, October 21, 2009 4:45 PM
To: Harris, Scott Blake
Subject: CFAC

Confidential

Scott--The comment period closed Monday on the 15-month short-term deal we drafted for Pt. Townsend Paper Co. The comments will take some time to analyze,

Signature: [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

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Note

also the attached news article:

http://www.flatheadbeacon.com/articles/article/cfac_to_shut_down_by_end_of_the_month/13705/

Randy

#47

Atterbury, Laura M - DK-7

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Thursday, October 22, 2009 6:47 PM
To: Roach, Randy A - L-7
Subject: FW: DRAFT PROPOSAL
Importance: High
Attachments: CFAC Draft Proposal to BPA 10-22-09.doc

FYI

From: CFAC [mailto:hbeaudry@cfaluminum.com]
Sent: Thu 10/22/2009 3:58 PM
To: Allen Burns
Cc: Harris, Scott Blake; Max BAUCUS; Denny REHBERG; Jon TESTER; Chuck REALI; Matthew Lucke
Subject: DRAFT PROPOSAL

Mr. Allen Burns:

I have attached a draft of proposal language that we believe is both creative and in concurrence with the recent Ninth Circuit Court decisions. We are ready and eager to negotiate definitive contractual term around the precepts of this proposal.

Please, review this and get back to me as quickly as possible. Thank you in advance for your speedy attention.

Haley Beaudry, PE
Manager, External Affairs
Columbia Falls Aluminum Company
hbeaudry@cfaluminum.com
406-560-5404 (Cell)

12/10/2009

#479
w/hold in pt (s)(4)

CFAC Draft Proposal for Power Service from BPA

October 22, 2009

The terms and concepts below are pre-decisional, non-binding, and for discussion purposes only.

Basic Terms (subject to the conditions below):

Ex 4
Entire
Attachment
(b)(4)

(b)(4)



Production will be stopped on Oct. 31: Columbia Falls Aluminum to Shut Down by End of the Month

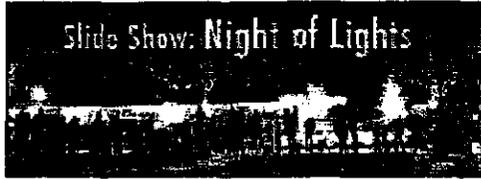


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Sarah Nargi MD
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Production will be stopped on Oct. 31

Columbia Falls Aluminum to Shut Down by End of the Month



Columbia Falls Aluminum Plant

By Molly Priddy, 10-21-09

Columbia Falls Aluminum Co. announced Wednesday that the company will curtail all production at the end of October.

CFAC spokesman Haley Beaudry said it is not a "going-out-of-business notice," but the plant must shut down all processes since they are still without a long-term power contract.

The company had previous contracts with the Bonneville Power Administration, but the agreements ran out on Sept. 30. CFAC went on the open market for power without jeopardizing its position as a Bonneville customer earlier this month.

Beaudry said CFAC is still in the open market for a power contract, and they are still considering a contract with Bonneville.

But even if CFAC finds a good, long-term power contract before Oct. 31, Beaudry said the plant does not have enough raw materials to keep working. Those must be ordered on a long-term basis as well, he said.

The company had been able to buy discount electricity from the Bonneville, a quasi-governmental outfit that for decades sold at-cost electricity to big industrial customers. But with an increase in population came an increase in demand for cheap hydropower, pitting industry against other users.

The amount of at-cost power available to industry was diminished and eventually was replaced entirely by a subsidy that helped the aluminum company and others buy down the cost of electricity.

Critics successfully argued that the subsidy was too large and came at the expense of other rate payers, and in December a court ordered the Bonneville Power Administration to end its subsidy to Columbia Falls Aluminum.

Bonneville and the aluminum producer put together a "bridge agreement" that carried the company through Sept. 30, but that deal also was successfully challenged.

The power administration cut the company loose, and the plant has struggled since the beginning of October to buy electricity from private producers.

There have been shutdown announcements at CFAC since last December, when the company gave 200 workers 60-days notice of closure because of increased costs for raw products and decreased costs for aluminum. The plant remained open through July, however, running on decreased capacity.

Workers were given another 60-day notice of closure in July, but production was extended again through August and once more for September.

The Associated Press contributed to this report.

title

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“

On 10-22-09, senator blutarski commented....

Everyone involved in the Touch America scam should be sitting in prison. Instead our politicians have allowed the same people to fleece the American taxpayer again in the form of bailouts. Sometimes I wonder why I bother to vote! As one comedian put it years ago 'one party is for...

[View all comments \(7 total\)](#) or [Add your own](#)

”



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[A Hundred Jobs in a Time of Need](#)



[HIGHS & LOWS](#)

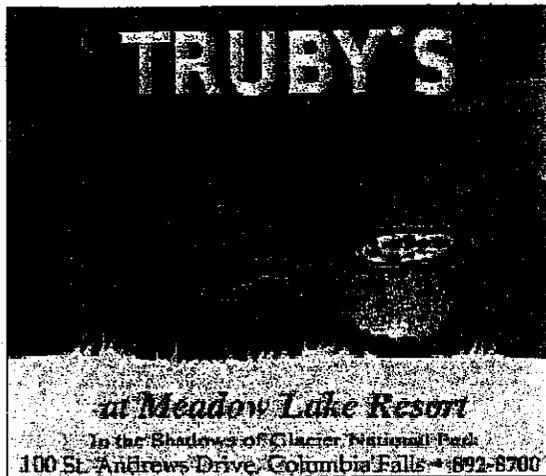


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[Feds Could Rule on Lawmakers Taking State Jobs](#)

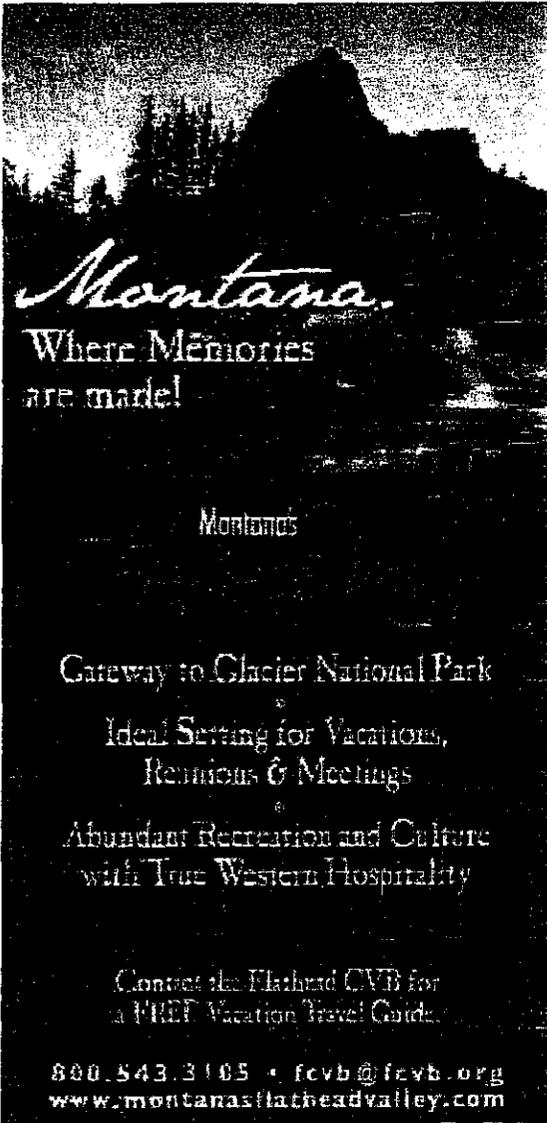
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 Billy said: "So those that non-violently disregard the drug law ? code? whatever it is. is a form of disobedience. And even if no one is harmed...."
- [Baucus Says Girlfriend Merited U.S. Attorney Nomination \(24 Comments\)](#)
 littlehawk123 said: "Dont work on a boat no more. Got work in the gold mine. Recession proof. Gotta pay for that 2nd residence down Montany way. You should try workin' sometime...."
- [AARP Backs Democrats in Senate Health Care Fight \(18 Comments\)](#)
 mooseberryinn said: "Woody must be listening to Hugo Chavez?""
- [State Authorizes Elimination of Montana Wolf Pack \(13 Comments\)](#)
 montananan said: "Could not agree more !!!! Lets send them some of their own wolves. then it would be easier to see the truth in order to..."



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Atterbury, Laura M - DK-7

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Wednesday, October 21, 2009 2:22 PM
To: Baskerville, Sonya L - DKN-WASH; Roach, Randy A - L-7
Subject: FW: BPA Letter on DSI contracts

Sonya/Randy --

I should have sent this along last week. I'd think you guys would want to respond in some way to the Wyden et. al. letter.

Scott

Ps. And Sonya, thanks for the invitation to the lunch meeting today. I very much enjoyed myself.

Scott Blake Harris
General Counsel
United States Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
(202) 586-5281

-----Original Message-----

From: Berick, Dave (Wyden) [mailto:Dave_Berick@wyden.senate.gov]
Sent: Monday, October 19, 2009 4:53 PM
To: Harris, Scott Blake
Subject: RE: BPA Letter on DSI contracts

We have not heard anything from Bonneville in response to our letter on the Alcoa/DSI contracts. Do you have any idea what is going on with this?

From: Harris, Scott Blake <Scott.Harris@hq.doe.gov>
To: Berick, Dave (Wyden)
Sent: Tue Sep 29 20:19:04 2009
Subject: BPA Letter

Just wanted you to know that I'd received and reviewed the letter. Thanks for sending it along.

Scott

Scott Blake Harris
General Counsel
United States Department of Energy

Child - pt (S)(5) AC + DP

Atterbury, Laura M - DK-7

From: Roach, Randy A - L-7
Sent: Tuesday, October 27, 2009 10:37 PM
To: Harris, Scott Blake; Lev, Sean
Subject: FW: Protected Attorney Client communication--note

fyi below; Steve sent in response to a request from the Dep. Sec.

From: Wright, Stephen J - A-7
Sent: Tuesday, October 27, 2009 8:27 PM
To: Poneman, Daniel
Cc: Roach, Randy A - L-7
Subject: FW: Protected Attorney Client communication--note

I
Protected Attorney Client communication

I was just sitting here finishing it up. There are a lot of variables here and I was trying to say it as simply as possible. If I've fallen short please let me know.

Senators Murray and Cantwell as well as Congressman Dicks have separately asked to talk to me tomorrow

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Atterbury, Laura M - DK-7

From: Fygi, Eric [Eric.Fygi@hq.doe.gov]
Sent: Wednesday, October 07, 2009 4:03 PM
To: Roach, Randy A - L-7
Cc: Fygi, Eric
Subject: FW: BPA DSI Sales

Randy -- sorry I forgot to put you on the addressee list as Mr. Fygi instructed.

From: Fygi, Eric
Sent: Wednesday, October 07, 2009 6:33 PM
To: Harris, Scott Blake; Lev, Sean; Edwards, Jr. Robert H
Cc: Fygi, Eric
Subject: BPA DSI Sales

Last night Harvey Spigal, former General Counsel of Bonneville who is now representing Alcoa, called me. His basic point was a little different from those we have recently considered.

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Eric

Atterbury, Laura M - DK-7

#49

From: Fygi, Eric [Eric.Fygi@hq.doe.gov]
Sent: Wednesday, October 14, 2009 9:16 AM
To: Harris, Scott Blake; Lev, Sean; Edwards, Jr. Robert H; Roach, Randy A - L-7
Subject: FW: BPA DSI Sales
Attachments: Fax from Harvard Spigal_PBGC II_101209.PDF

Attached please find the Harvey Spigal analysis on behalf of Alcoa that I mentioned below.

Eric

<<Fax from Harvard Spigal_PBGC II_101209.PDF>> *attachment sent for b-4 review*

-----Original Message-----

From: Fygi, Eric
Sent: Wednesday, October 07, 2009 6:33 PM
To: Harris, Scott Blake; Lev, Sean; Edwards, Jr. Robert H
Cc: Fygi, Eric
Subject: BPA DSI Sales

Last night Harvey Spigal, former General Counsel of Bonneville who is now representing Alcoa, called me. His basic point was a little different from those we have recently considered;

6-5

Eric

Atterbury, Laura M - DK-7

(R)

From: Roach, Randy A - L-7
Sent: Tuesday, October 13, 2009 2:30 PM
To: Harris, Scott Blake
Subject: DSI meeting

Scott, Late Friday, Steve encouraged me to attend this Thursday's meetings back there re DSI service. My secretary was able to make reservations this morning to fly out tomorrow, so I will be there for the meetings, along with Steve and Allen Burns. I will be there to answer questions if that would be helpful, but intend to take my signals from you. Mike Dotter, counsel for Alcoa, left me a voice mail this morning indicating that their purpose is not to challenge BPA's position that an equivalent benefits test (benefits equal or exceed costs) should apply, but to convince the Department to allow BPA to move forward with the contingent long-term approach

~~DR~~

Although it is short notice, I've not yet met Robert Edwards or Sean Lev, so will contact them to see if they have any time Friday morning/early afternoon for me to introduce myself. Obviously, if you have any spare time, I'd like to meet you apart from the meetings, but understand that your schedule is probably tight. Randy

Atterbury, Laura M - DK-7

From: Wright, Stephen J - A-7
Sent: Tuesday, October 13, 2009 5:39 PM
To: Roach, Randy A - L-7; Burns, Allen L - D-7
Subject: FW: DSI Update -- PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE

fyi

-----Original Message-----

From: Wright, Stephen J - A-7
Sent: Tuesday, October 13, 2009 8:23 AM
To: 'Scott.Harris@hq.doe.gov'; 'Daniel.Poneman@hq.doe.gov'
Subject: Re: DSI Update -- PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE

DP
BS

----- Original Message -----

From: Harris, Scott Blake <Scott.Harris@hq.doe.gov>
To: Poneman, Daniel <Daniel.Poneman@hq.doe.gov>; Wright, Stephen J - A-7
Sent: Tue Oct 13 05:41:34 2009
Subject: RE: DSI Update -- PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE

DP BS
AC BS

DP BS
AC BS

Scott

Scott Blake Harris
General Counsel
United States Department of Energy

100 Independence Avenue, SW
Washington, DC 20585
(202) 586-5281

-----Original Message-----

From: Poneman, Daniel
Sent: Monday, October 12, 2009 6:23 PM
To: sjwright@bpa.gov; Harris, Scott Blake
Subject: RE: DSI Update

Steve:

e
1

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DP

-----Original Message-----

From: Wright, Stephen J - A-7 [mailto:sjwright@bpa.gov]
Sent: Monday, October 12, 2009 5:44 PM
To: Poneman, Daniel; Harris, Scott Blake
Subject: DSI Update

A quick update on status. More to come in a briefing paper being prepared for the Thursday meeting with DSIs.

..., last week we released for public comment a proposed short term (14 month) agreement with Pt. Townsend (pulp and paper mill in Washington). We did not proceed with the short term combined with a longer term arrangement that Alcoa (Washington aluminum mill) wants

DP B5

Alcoa says they need hope for the longer term to stay open now. CFAC (Montana aluminum company) is vague about what they want, but we believe they are not interested in the 14 month option. Pt. Townsend needs the short term to stay open, but is very concerned about the longer term. We spent the week actively exploring a variety of options that may work long term for Pt. Townsend only and which the public power community may be more amenable to.

Atterbury, Laura M - DK-7

+6

From: Baskerville, Sonya L - DKN-WASH
Sent: Thursday, October 08, 2009 1:36 PM
To: 'Nolan, Betty'; 'West, Lily'
Cc: 'Utech, Dan'
Subject: RE: BPA meeting w/WA companies/unions

Hi, Betty. I talked with Joel yesterday and he didn't seem to have an issue with Steve being at the meeting - he expected that Steve would participate. That said, Steve and Allen Burns, BPA's Acting Deputy Administration and the lead negotiator on these contracts, are determining which one of them would actually participate and possibly come back in person for the meeting. I should have more information tomorrow if not later today. Thanks.

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

-----Original Message-----

From: Nolan, Betty [mailto:Betty.Nolan@hq.doe.gov]
Sent: Tuesday, October 06, 2009 5:05 PM
To: West, Lily
Cc: Utech, Dan; Baskerville, Sonya L - DKN-WASH
Subject: BPA meeting w/WA companies/unions

Lily -- talked w/Joel Merkel of Sen. Cantwell's staff -- he is the contact for arranging the requested meeting, per his earlier note to you. Cell is 202-870-9856. He agrees that the meeting needs to happen next week. Utility contracts actually expired Sept. 30, and companies are operating on various 30 day-extension arrangements, so they need resolution soon.

Purpose: To allow company officials to speak directly to Dep.Sec., to explain how they believe BPA can write new (beneficial) utility contracts w/the Northwest Direct Service Industries (DSIs) within the parameters of the recent Ninth Circuit Court ruling -- and, at a *minimum*, tee up the entire issue for a rehearing/clarification by the Court.

Participants: Three companies -- Alcoa, Port Townsend Paper, and Glencore/Columbia Falls Aluminum -- and two unions -- Machinists (Alcoa) and US Steelworkers (other two companies) -- would participate, each sending 2 officials. In addition, one staffer each would come from Sen. Murray, Rep. Rick Larson, and Rep. Dicks. (Joel Merkel will be in WA state that week, so only the Murray Senate staffer.) Glencore is in

Montana; the other two in Washington State.

DOE participants will be Dep. Sec. Poneman, GC Harris, Sonya Baskerville, BPA, and me. I told Joel there may be 1-2 others.

Joel seemed sensitive to Steve Wright's joining the meeting. (He was fine w/Sonya.) Don't think Steve is necessary, but if so, he should come in person. As we agreed, phone hook-ups don't work well with this type of meeting, and especially not w/so many participants.

Joel understands that this meeting is the DSIs' chance to talk directly w/the Dep. Sec., and that DOE will be in a listening mode. But, probably won't hurt if you reinforce that. Also, given all the participants, think meeting probably needs to be scheduled for 60 minutes.

Let me know what I've missed, how else I can help . . . thanks . . .

Atterbury, Laura M - DK-7

T + D

From: Baskerville, Sonya L - DKN-WASH
Sent: Wednesday, October 07, 2009 9:11 AM
To: Burns, Allen L - D-7; Wright, Stephen J - A-7; Symonds, Mark C - PTL-5; Clark, Harry W - PTL-5
Subject: FW: DOE meeting with DSIs

The meeting has been scheduled for next Thursday at 2:00p eastern/11:00a pacific. There is a pre-meeting on the same at 11:30a eastern/8:30a pacific. We will need to provide briefing material to the Deputy Secretary early next week. Allen, can you work with your team to put together a one or two pager that summarizes the issues, what they should expect to hear from the companies and unions, and what BPA would propose as next steps? Thanks!

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

-----Original Message-----

From: West, Lily [mailto:Lily.West@hq.doe.gov]
Sent: Wednesday, October 07, 2009 9:50 AM
To: Nolan, Betty; Baskerville, Sonya L - DKN-WASH
Subject: FW: Meeting on BPA issues -- updated participants

Betty and Sonya,

Although I sent this via Outlook, I wanted to also send you the latest names from Sen. Cantwell's office.

I'll let you know if I hear anything else!

Lily West
Special Assistant to the Deputy Secretary
U.S. Department of Energy
o: (202) 586-7045 | c: (202) 253-5381

-----Original Message-----

From: Merkel, Joel (Cantwell) [mailto:Joel_Merkel@cantwell.senate.gov]
Sent: Wednesday, October 07, 2009 9:42 AM
To: West, Lily
Subject: RE: Meeting on BPA issues

Ms. West,

Thank you for your help scheduling this. Thursday, October 15 at 2:00pm will work well.

Here is a list of attendees:

10 total representatives from the following 5 entities (I will work to get you the 10 names ASAP):

- Alcoa
- Port Townsend Paper
- Columbia Falls Aluminum Company
- Steelworkers (representing workers from Port Townsend Paper and Columbia Falls Aluminum Company)
- Machinists (representing workers from Alcoa's Intalco plant in Ferndale, Washington)

Up to 5 congressional staff members from the following offices (I will be out of town, so staff from Senator Murray's office will represent Senator Cantwell's office):

- Senator Murray (Jaime Shimek)
- Senator Tester (Stephene Harding)
- Senator Baucus (Paul Wilkins)
- Congressman Larsen (Mark Middaugh)
- Congressman Dicks (Pete Modaff)

Thank you again for helping with this request. Senator Cantwell and the entire delegation is very appreciative. Please let me know if you have any questions.

Joel

Atterbury, Laura M - DK-7

4

From: Baskerville, Sonya L - DKN-WASH
Sent: Monday, October 05, 2009 1:53 PM
To: 'Nolan, Betty'
Subject: FW: Meeting on BPA issues
Importance: High

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

-----Original Message-----

From: Baskerville, Sonya L - DKN-WASH
Sent: Monday, October 05, 2009 11:41 AM
To: 'West, Lily'
Subject: RE: Meeting on BPA issues

Lily, nothing has changed since last week - we would prefer to wait until the Deputy Secretary is back the following week. Thanks!

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

-----Original Message-----

From: West, Lily [mailto:Lily.West@hq.doe.gov]
Sent: Friday, October 02, 2009 10:08 AM
To: Baskerville, Sonya L - DKN-WASH
Subject: RE: Meeting on BPA issues

Got it!

Lily West
Special Assistant to the Deputy Secretary
U.S. Department of Energy
o: (202) 586-7045 | c: (202) 253-5381

Original Message-----

From: Baskerville, Sonya L - DKN-WASH [mailto:slbaskerville@BPA.GOV]
Sent: Friday, October 02, 2009 10:02 AM
To: West, Lily
Subject: Re: Meeting on BPA issues

I heard back from Steve and he definitely would prefer to wait until the Deputy Secretary is back the following week. Thanks!

Sonya Baskerville
202.253.7352

----- Original Message -----

From: West, Lily <Lily.West@hq.doe.gov>
To: Baskerville, Sonya L - DKN-WASH
Sent: Thu Oct 01 16:20:57 2009
Subject: RE: Meeting on BPA issues

Sonya,

No worries - I will stand by!

Lily West
Special Assistant to the Deputy Secretary
U.S. Department of Energy
o: (202) 586-7045 | c: (202) 253-5381

-----Original Message-----

From: Baskerville, Sonya L - DKN-WASH [mailto:slbaskerville@BPA.GOV]
Sent: Thursday, October 01, 2009 7:20 PM
To: West, Lily
Subject: RE: Meeting on BPA issues

I think the preference from BPA's side is that the Deputy is in the meeting, so the following week would be better. However, I need to confirm that with my boss! I'll let you know what I hear from Steve. He's tied up in meetings until 9:00p our time, so I may not get back to you until late or tomorrow. Thanks!

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

-----Original Message-----

From: West, Lily [mailto:Lily.West@hq.doe.gov]
Sent: Thursday, October 01, 2009 7:10 PM
To: Baskerville, Sonya L - DKN-WASH
Subject: RE: Meeting on BPA issues

nya,

Thank you so much for the quick response. The Deputy is out of the country next week - is this something that can wait until the following week?

Lily West
Special Assistant to the Deputy Secretary
U.S. Department of Energy
o: (202) 586-7045 | c: (202) 253-5381

-----Original Message-----

From: Baskerville, Sonya L - DKN-WASH [mailto:slbaskerville@BPA.GOV]
Sent: Thursday, October 01, 2009 7:05 PM
To: Nolan, Betty
Cc: West, Lily; Tuttle, Robert; Levy, Jonathan
Subject: RE: Meeting on BPA issues
Importance: High

Thanks for informing me of this. The Deputy Secretary and General Counsel have been very engaged in this issue. The issue has advanced to such a sensitive level that I believe this meeting would have to be at their level.

I believe that the Deputy Secretary and General Counsel also would want Steve Wright and Randy Roach to participate (presumably by phone given the short notice). I would be available to attend in person. Thanks.

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

-----Original Message-----

From: Nolan, Betty [mailto:Betty.Nolan@hq.doe.gov]
Sent: Thursday, October 01, 2009 6:47 PM
To: Baskerville, Sonya L - DKN-WASH
Cc: West, Lily; Tuttle, Robert
Subject: FW: Meeting on BPA issues

Sonya -- just realized that tomorrow is Robert's AWS day . . . so you may want to follow up w/Lily and Scott. My "two cents worth" is below. . . .am sure you know more about this than any of us . . . thanks . . .

-----Original Message-----

From: Nolan, Betty
Sent: Thursday, October 01, 2009 6:40 PM
To: Tuttle, Robert
Cc: Utech, Dan

Subject: RE: Meeting on BPA issues

Agree, Robert, that this looks like an appropriate meeting for Scott Harris, Sonya, and whomever else they want from their respective staffs. As I read Joel Merkel's email, the problem is a recent court ruling, which I infer BPA interprets as restricting its ability to write (I'm guessing -- preferential treatment) contracts with DSIs. But, the DSI lawyers think they have a way for such contracts to be written . . . if that's the gist of the issue, it would seem definitely to be a GC/BPA matter.

My advice would be to schedule the meeting next week w/Scott and Sonya -- since it's time sensitive, seems they should meet as soon as possible, so DOE/BPA can determine whether they agree/disagree with the DSI lawyers' arguments. Then, if necessary and desired, it can be elevated to Dan the following week. But, at that point, Scott and Sonya will have had time to understand the issue and agree on a unified position to recommend to Dan.

-----Original Message-----

From: Tuttle, Robert
Sent: Thursday, October 01, 2009 5:39 PM
To: Nolan, Betty
Subject: FW: Meeting on BPA issues

Betty,

Seems the BPA liaison folks (Sonya Baskerville) should be looped into this and they and GC, determine how they want to approach such a meeting.

Thoughts?

r.

Robert Tuttle
CI-20 Rm. 7B-170
202-586-4298 Phone
202-586-4891 Fax

-----Original Message-----

From: West, Lily
Sent: Thursday, October 01, 2009 5:34 PM
To: Tuttle, Robert
Cc: Levy, Jonathan
Subject: FW: Meeting on BPA issues

Robert,

Jonathan Levy said that you might be the best person to help me with the email below. I just received it from Joel Merkel and am not sure how to proceed...

Also, as a matter of logistics, the Deputy is out of the country next week, so if this meeting

es happen, it will have to happen the week after next...

Advice on how to respond/move forward?

Many thanks!

Lily West

Special Assistant to the Deputy Secretary U.S. Department of Energy

o: (202) 586-7045 | c: (202) 253-5381

-----Original Message-----

From: Merkel, Joel (Cantwell) [mailto:Joel_Merkel@cantwell.senate.gov]

Sent: Thursday, October 01, 2009 5:20 PM

To: West, Lily

Subject: Meeting on BPA issues

Ms. West,

I am writing on behalf of Senator Maria Cantwell and Senator Patty Murray to request a meeting next week with Deputy Secretary Poneman and General Counsel Harris for some constituents from Washington state, and others, to discuss Bonneville Power Administration power contracts with the Northwest Direct Service Industries (DSIs). The DSIs are a statutorily designated group of industrial companies that BPA is authorized to sell power to.

I have spoken about this with General Counsel Harris and he recommended I contact you to help set this up.

I know scheduling a meeting for next week is very short notice, but as I've discussed with General Counsel Harris, time is of the essence.

Recently, BPA has been discussing power sales contracts with the following companies: Alcoa for its Intalco Works aluminum smelter in Ferndale, Washington, Port Townsend Paper for its facility in Port Townsend, Washington, and Glencore for its Columbia Falls Aluminum Company (CFAC) facility in Columbia Falls, Montana

Contract discussions have been complicated by a recent court decision out of the Ninth Circuit (what is being called "PNGC II") regarding BPA power sales to the DSIs. The DSI companies would like to explain to Secretary Poneman and General Counsel Harris their understanding of the Ninth Circuit decision, how DSI contracts can be drafted going forward that will keep these important plants open, and how that contract, if offered by BPA, will tee up the contract issue for consideration, again, and clarification by the Ninth Circuit.

This matter is quite time sensitive because without a BPA power contract, the two aluminum smelters and one pulp and paper plant may close their doors, resulting in the loss of almost one thousand direct jobs and 2-3 times that amount in indirect jobs.

Therefore, we would appreciate a meeting for our constituents with Mssrs. Poneman and Harris as soon as their schedules permit. Because the date scheduled will control who is able to attend the meeting for the DSIs, I can only identify the following meeting participants: an executive and attorney from Alcoa, an executive from Port Townsend Paper, an Executive from Glencore, and representatives from the two unions involved -- the International Association of Machinists (IAM) and the United Steelworkers (USW). Once you identify a specific date, I or a representative of the DSIs will supply the precise names and

...es of those planning to attend.

I apologize for the last minute nature of this request, but events have pushed this matter forward. I will be your contact in the Senate. Irene Ringwood (at Ball Janik LLP, 202-638-3307) will be your contact with the companies and unions. Should you need further information, please do not hesitate to contact me.

Thanks,
Joel Merkel
Legislative Counsel
Senator Maria Cantwell
Cell: 202-870-9853

#72

Atterbury, Laura M - DK-7

From: West, Lily [Lily.West@hq.doe.gov]
Sent: Monday, October 05, 2009 8:10 AM
To: Baskerville, Sonya L - DKN-WASH
Subject: any thoughts on this?

Sonya,

Any resolution on this? I'm not sure what to do, as the Deputy is out of the country all this week...so any guidance would be tremendously helpful!

Thank you!

Lily West
Special Assistant to the Deputy Secretary
U.S. Department of Energy
o: (202) 586-7045 | c: (202) 253-5381

12/11/2009

#109

Stauffer, Nicki - A-7

From: Wright, Stephen J - A-7
Sent: Friday, October 02, 2009 10:14 AM
To: 'scott.harris@hq.doe.gov'
Subject: Next step

I really appreciated our conversation yesterday and it gave me a different perspective on your views. In fact, I decided I needed to sleep on the issue before making a recommendation on how to proceed.

Thanks for your thoughtful consideration.

DP
AC
BS

71
Atterbury,Laura M - DK-7

From: Wright,Stephen J - A-7
Sent: Thursday, October 01, 2009 5:56 PM
To: Baskerville,Sonya L - DKN-WASH; Burns,Allen L - D-7; Roach,Randy A - L-7
Subject: RE: PLEASE READ: Meeting on BPA issues

Constitutents and Senators offices won't think it's a successful meeting without Deputy participation. It should be scheduled based on his availability recognizing that final decisions will most likely be made by the end of October.

-----Original Message-----

From: Baskerville,Sonya L - DKN-WASH
Sent: Thursday, October 01, 2009 4:22 PM
To: Wright,Stephen J - A-7; Burns,Allen L - D-7; Roach,Randy A - L-7
Subject: FW: PLEASE READ: Meeting on BPA issues
Importance: High

See Lily's question below. That leaves only two weeks to the end of October (and that Monday is a holiday), but it's probably better that the Deputy is in the meeting. Let me know. Thanks!

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

-----Original Message-----

From: West, Lily [mailto:Lily.West@hq.doe.gov]
Sent: Thursday, October 01, 2009 7:10 PM
To: Baskerville,Sonya L - DKN-WASH
Subject: RE: Meeting on BPA issues

Sonya,

Thank you so much for the quick response. The Deputy is out of the country next week - is this something that can wait until the following week?

Lily West
Special Assistant to the Deputy Secretary
U.S. Department of Energy
o: (202) 586-7045 | c: (202) 253-5381

-----Original Message-----

From: Baskerville,Sonya L - DKN-WASH [mailto:slbaskerville@BPA.GOV]
Sent: Thursday, October 01, 2009 7:05 PM
To: Nolan, Betty

cc: West, Lily; Tuttle, Robert; Levy, Jonathan
Subject: RE: Meeting on BPA issues
Importance: High

Thanks for informing me of this. The Deputy Secretary and General Counsel have been very engaged in this issue. The issue has advanced to such a sensitive level that I believe this meeting would have to be at their level.

I believe that the Deputy Secretary and General Counsel also would want Steve Wright and Randy Roach to participate (presumably by phone given the short notice). I would be available to attend in person. Thanks.

Sonya Baskerville
Manager, National Relations Office
Bonneville Power Administration
1000 Independence Ave., SW, 8G-061
Washington, DC 20585
202-586-5640 (o)
202-253-7352 (c)

-----Original Message-----

From: Nolan, Betty [mailto:Betty.Nolan@hq.doe.gov]
Sent: Thursday, October 01, 2009 6:47 PM
To: Baskerville, Sonya L - DKN-WASH
Cc: West, Lily; Tuttle, Robert
Subject: FW: Meeting on BPA issues

Sonya -- just realized that tomorrow is Robert's AWS day . . . so you may want to follow up w/Lily and Scott. My "two cents worth" is below. . . am sure you know more about this than any of us . . . thanks . . .

-----Original Message-----

From: Nolan, Betty
Sent: Thursday, October 01, 2009 6:40 PM
To: Tuttle, Robert
Cc: Utech, Dan
Subject: RE: Meeting on BPA issues

Agree, Robert, that this looks like an appropriate meeting for Scott Harris, Sonya, and whomever else they want from their respective staffs. As I read Joel Merkel's email, the problem is a recent court ruling, which I infer BPA interprets as restricting its ability to write (I'm guessing -- preferential treatment) contracts with DSIs. But, the DSI lawyers think they have a way for such contracts to be written . . . if that's the gist of the issue, it would seem definitely to be a GC/BPA matter.

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-----Original Message-----

From: Tuttle, Robert
Sent: Thursday, October 01, 2009 5:39 PM
To: Nolan, Betty
Subject: FW: Meeting on BPA issues

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Thoughts?

r.

Robert Tuttle
CI-20 Rm. 7B-170
202-586-4298 Phone
202-586-4891 Fax

-----Original Message-----

From: West, Lily
Sent: Thursday, October 01, 2009 5:34 PM
To: Tuttle, Robert
Cc: Levy, Jonathan
Subject: FW: Meeting on BPA issues

Robert,

Jonathan Levy said that you might be the best person to help me with the email below. I just received it from Joel Merkel and am not sure how to proceed...

Also, as a matter of logistics, the Deputy is out of the country next week, so if this meeting does happen, it will have to happen the week after next...

Advice on how to respond/move forward?

Many thanks!

Lily West
Special Assistant to the Deputy Secretary U.S. Department of Energy
o: (202) 586-7045 | c: (202) 253-5381

-----Original Message-----

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Sent: Thursday, October 01, 2009 5:20 PM
To: West, Lily

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Contract discussions have been complicated by a recent court decision out of the Ninth Circuit (what is being called "PNGC II") regarding BPA power sales to the DSIs. The DSI companies would like to explain to Secretary Poneman and General Counsel Harris their understanding of the Ninth Circuit decision, how DSI contracts can be drafted going forward that will keep these important plants open, and how that contract, if offered by BPA, will tee up the contract issue for consideration, again, and clarification by the Ninth Circuit.

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Therefore, we would appreciate a meeting for our constituents with Messrs. Poneman and Harris as soon as their schedules permit. Because the date scheduled will control who is able to attend the meeting for the DSIs, I can only identify the following meeting participants: an executive and attorney from Alcoa, an executive from Port Townsend Paper, an Executive from Glencore, and representatives from the two unions involved -- the International Association of Machinists (IAM) and the United Steelworkers (USW). Once you identify a specific date, I or a representative of the DSIs will supply the precise names and titles of those planning to attend.

I apologize for the last minute nature of this request, but events have pushed this matter forward. I will be your contact in the Senate. Irene Ringwood (at Ball Janik LLP, 202-638-3307) will be your contact with the companies and unions. Should you need further information, please do not hesitate to contact me.

Thanks,
Joel Merkel
Legislative Counsel
Senator Maria Cantwell
Cell: 202-870-9853

Stauffer, Nicki - A-7

#104

From: Wright, Stephen J - A-7
Sent: Friday, September 11, 2009 8:19 AM
To: 'Daniel.Poneman@hq.doe.gov'; 'Scott.Harris@hq.doe.gov'
Cc: 'rod.oconnor@hq.doe.gov'
Subject: Re: Aluminum issues - Guidance requested

withhold info (b)(5)

Just spent the last couple of hours with Alcoa

BS

----- Original Message -----

From: Wright, Stephen J - A-7
To: 'Daniel.Poneman@hq.doe.gov' <Daniel.Poneman@hq.doe.gov>; 'Scott.Harris@hq.doe.gov' <Scott.Harris@hq.doe.gov>
Cc: 'rod.oconnor@hq.doe.gov' <rod.oconnor@hq.doe.gov>
Sent: Fri Sep 11 03:35:05 2009
Subject: Re: Aluminum issues - Guidance requested

Ok - here is how I am planning to proceed.

----- Original Message -----

From: Poneman, Daniel <Daniel.Poneman@hq.doe.gov>
To: Harris, Scott Blake <Scott.Harris@hq.doe.gov>; Wright, Stephen J - A-7
Cc: OConnor, Rod <Rod.OConnor@hq.doe.gov>
Sent: Thu Sep 10 23:01:44 2009
Subject: RE: Aluminum issues - Guidance requested

DP
BS

DP
BS

Regards,

-----Original Message-----

From: Harris, Scott Blake
Sent: Tuesday, September 08, 2009 9:16 PM
To: sjwright@bpa.gov; Poneman, Daniel
Cc: OConnor, Rod
Subject: Re: Aluminum issues - Guidance requested

BS
DK
BS

----- Original Message -----

From: Wright, Stephen J - A-7 <sjwright@bpa.gov>
To: Poneman, Daniel
Cc: Harris, Scott Blake; OConnor, Rod
Sent: Tue Sep 08 20:56:16 2009
Subject: Aluminum issues - Guidance requested

5

#105

Stauffer, Nicki - A-7

From: Wright, Stephen J - A-7
Sent: Friday, September 11, 2009 4:44 AM
To: 'Daniel.Poneman@hq.doe.gov'; 'Scott.Harris@hq.doe.gov'
Cc: 'rod.oconnor@hq.doe.gov'
Subject: Re: Aluminum issues - Guidance requested

One more thing

BS

----- Original Message -----

From: Wright, Stephen J - A-7
To: 'Daniel.Poneman@hq.doe.gov' <Daniel.Poneman@hq.doe.gov>; 'Scott.Harris@hq.doe.gov' <Scott.Harris@hq.doe.gov>
Cc: 'rod.oconnor@hq.doe.gov' <rod.oconnor@hq.doe.gov>
Sent: Fri Sep 11 03:35:05 2009
Subject: Re: Aluminum issues - Guidance requested

Ok - here is how I am planning to proceed.

DP
BS

----- Original Message -----

From: Poneman, Daniel <Daniel.Poneman@hq.doe.gov>
To: Harris, Scott Blake <Scott.Harris@hq.doe.gov>; Wright, Stephen J - A-7
Cc: OConnor, Rod <Rod.OConnor@hq.doe.gov>
Sent: Thu Sep 10 23:01:44 2009
Subject: RE: Aluminum issues - Guidance requested

Steve:

DP
BS

-----Original Message-----
From: Harris, Scott Blake
Sent: Tuesday, September 08, 2009 9:16 PM
To: sjwright@bpa.gov; Poneman, Daniel
Cc: OConnor, Rod
Subject: Re: Aluminum issues - Guidance requested

R
~~DP~~

----- Original Message -----
From: Wright, Stephen J - A-7 <sjwright@bpa.gov>
To: Poneman, Daniel
Cc: Harris, Scott Blake; OConnor, Rod
Sent: Tue Sep 08 20:56:16 2009
Subject: Aluminum issues - Guidance requested

I have mentioned before that aluminum issues tend to generate a lot of controversy for us. We are in one of those moments now.

Quick background: Aluminum production uses huge amounts of electricity. Substantial aluminum production was located in the Northwest primarily because of the low-cost federal hydrosystem. Even in the late 1990's nine plants purchased power from BPA. That number is now down to 2, an Alcoa plant in northwest Washington (Ferndale) and a plant owned by Glencore in northwest Montana (Columbia Falls Aluminum Company or CFAC).

DP
BS

Our original contracts for the 2007-2011 period were struck down by the Ninth Circuit last December. The primary concern of the court was that when BPA monetized the sales (i.e., provided the DSI's monetary payments instead of power, based on the difference between market and the PF rate) it used the PF rate rather than the specifically designated IP rate for sales to aluminum companies under the Northwest Power Act. The court decision effectively invalidated the contracts we were operating under. We responded by very quickly putting in place a replacement contract that is based on the correct rate according to the court. We moved quickly because of concern about near-term job losses. The replacement contract expires at the end of FY 09. Late last month, the court concluded the new contracts are invalid as well.

The logic the court used is based on a provision in law that requires that BPA operate "consistent with sound business principles." The court concluded that if BPA purchases power at above the rate that it will sell at, creating a cost for the remaining BPA customers, then it is not consistent with sound business principles. The court was dismissive of concerns about job impacts, going so far as to suggest legislative changes would be necessary to use this reasoning as a foundation for making power sales to the companies.

DP
85

#101

Stauffer, Nicki - A-7

From: Wright, Stephen J - A-7
Sent: Thursday, October 01, 2009 2:30 PM
To: 'Daniel Poneman (Daniel.Poneman@hq.doe.gov)'
Cc: 'scott.harris@hq.doe.gov'
Subject: DSI issue

If at all possible, I would like to meet with you and Scott tomorrow for a half hour to bring closure to our next steps on the DSI/aluminum issue. I will send you a paper that lays out the remaining issue later this evening.

#23

Atterbury, Laura M - DK-7

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Wednesday, September 30, 2009 2:44 PM
To: Roach, Randy A - L-7
Cc: Fygi, Eric; Lev, Sean; Edwards, Jr. Robert H
Subject: RE: PDF of BPA letter on DSI contracts

Randy --

DP
AWP
BS

Scott

-----Original Message-----

From: Roach, Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Wednesday, September 30, 2009 1:49 PM
To: Harris, Scott Blake
Subject: RE: PDF of BPA letter on DSI contracts

DD

BS
DP
AC BS
AWP

-----Original Message-----

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Tuesday, September 29, 2009 5:15 PM

12/10/2009

To: Roach, Randy A - L-7
Subject: FW: PDF of BPA letter on DSI contracts

FYI

-----Original Message-----

From: Berick, Dave (Wyden) [mailto:Dave_Berick@wyden.senate.gov]
Sent: Tuesday, September 29, 2009 3:04 PM
To: Levy, Jonathan
Subject: FW: PDF of BPA letter on DSI contracts

Jonathan, please note the CC's at the bottom of the letter to the Deputy Secretary and to the General Counsel. (Sparing you a separate cover letter this time, but pls make sure they both get this.)

Thanks.

12/10/2009

----- Original Message -----

From: Roach,Randy A - L-7

To: Wright,Stephen J - A-7; Burns,Allen L - D-7; Baskerville,Sonya L - DKN-WASH

Sent: Tue Sep 29 17:19:37 2009

Subject: Congressional letter against DSI contracts FW: PDF of BPA letter on DSI contracts

-----Original Message-----

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]

Sent: Tuesday, September 29, 2009 5:15 PM

To: Roach,Randy A - L-7

Subject: FW: PDF of BPA letter on DSI contracts

FYI

-----Original Message-----

From: Berick, Dave (Wyden) [mailto:Dave_Berick@wyden.senate.gov]

Sent: Tuesday, September 29, 2009 3:04 PM

To: Levy, Jonathan

Subject: FW: PDF of BPA letter on DSI contracts

Jonathan, please note the CC's at the bottom of the letter to the Deputy Secretary and to the General Counsel. (Sparing you a separate cover letter this time, but pls make sure they both get this.)

Thanks.

Congress of the United States

Washington, DC 20510

September 29, 2009

Mr. Steve Wright
Administrator
Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

Dear Mr. Wright,

We urge the Bonneville Power Administration (BPA) not to proceed with its proposed seven year power sales contracts with two aluminum companies in the Northwest known as Direct Service Industry (DSI) contracts. Although BPA has historically provided service to these plants, there are now significant legal and physical limits on future service which the pending proposals do not resolve.

First, BPA has not met the test required by recent U.S. Ninth Circuit Court of Appeals decisions that the contracts represent sound business practices and benefit BPA and its preference customers. For the second time in eight months, the Court again concluded that BPA must have a business justification for these contracts and it invalidated the latest contract (*Pac. Northwest Generating Coop. v. Bonneville Power Admin.*, Case Nos. 09-70228, 09-70236, 09-70988 (9th Cir. Aug. 28, 2009)), finding that "BPA has once again failed to advance a reasonable interpretation of its governing statutes that supports its actions" with regard to existing contracts with these companies. The Court's finding is not surprising since BPA loses money in these arrangements, receives no discernible benefit from them, and must raise rates to its preference utility customers in order to purchase power for an individual company. BPA's analysis of its current proposal is no different and shows that over time they cause job loss to consumers of BPA preference customers. Even under BPA's most recent optimistic assessment, the net expected gain in regional jobs comes at a staggering cost of nearly \$180,000 per job per year – a cost borne by BPA and its customers.

Second, while service to DSI's historically provided benefits to Bonneville and its customers from the sale of surplus power, BPA no longer has excess power to sell to the DSIs. The Regional Dialogue process leading to the renegotiation of long-term contracts to preference customers indicated that federal power will essentially be fully allocated. Ongoing proceedings concerning the Biological Opinion for the Federal Power System and recent BPA economic and budget forecasts suggest that power reserves will likely to continue to be constrained. Implementation of the proposed DSI contracts will therefore require BPA to enter into power purchase agreements with outside suppliers placing BPA and its customers at risk for changes in market conditions and/or for termination by the DSI's. Rather than providing system benefits, the proposed contracts will result in increased system costs and financial risks.

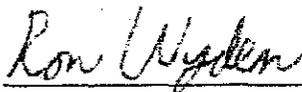
In light of the Ninth Circuit's invalidation of BPA's current arrangements for the aluminum companies, and the lack of a reasoned analysis regarding the impacts of BPA intentionally

incurring up to \$600 million in additional costs to support these two companies over the next seven years. We question the agency's intent to move forward with new contracts. It would seem necessary at a minimum that BPA conduct added review of the risks, costs, and benefits of the proposed new seven-year deals.

We question whether the agency can justify new contracts with the aluminum companies under the requirements laid out by the Court. Pushing forward with the existing proposal and its analysis, which shows a loss to the agency and marginal trade-off of jobs across the region does not seem responsible.

On the heels of the Court's decision, and out of concern of the broader economic impacts to the region, we urge that you withhold further action on the proposed contracts.

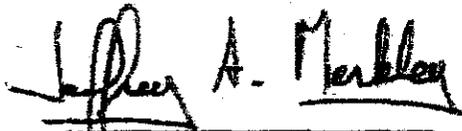
Sincerely,



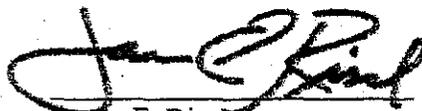
Ron Wyden
U.S. Senator



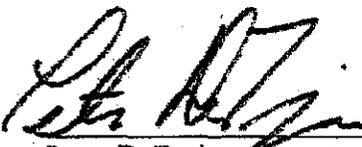
Mike Crapo
U.S. Senator



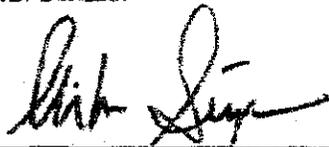
Jeff Merkley
U.S. Senator



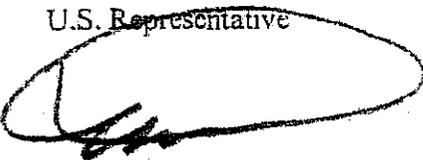
James E. Risch
U.S. Senator



Peter DeFazio
U.S. Representative



Michael K. Simpson
U.S. Representative



David Wu
U.S. Representative

Cc: Daniel Poneman, Deputy Secretary of Energy
Scott Blake Harris, General Counsel

Atterbury, Laura M - DK-7

27
4 hold in A (b)(5)

From: Roach, Randy A - L-7
Sent: Saturday, September 26, 2009 11:20 AM
To: Harris, Scott Blake
Subject: RE: Alcoa Development -- PRIVILEGED LEGAL COMMUNICATION

Importance: High

(S)(S)

DP
BS

Randy

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Friday, September 25, 2009 2:54 PM
To: Roach, Randy A - L-7
Subject: Re: Alcoa Development -- PRIVILEGED LEGAL COMMUNICATION

Randy I do appreciate receiving the paper and will review it this weekend.

----- Original Message -----

From: Roach, Randy A - L-7 <raroach@bpa.gov>
To: Harris, Scott Blake
Sent: Fri Sep 25 17:41:58 2009
Subject: RE: Alcoa Development -- PRIVILEGED LEGAL COMMUNICATION

DP
AWP
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From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Thursday, September 24, 2009 12:04 PM
To: Roach,Randy A - L-7
Cc: Lev, Sean; Fygi, Eric; Edwards, Jr. Robert H; Johnston, Marc; Poneman, Daniel
Subject: RE: Alcoa Development -- PRIVILEGED LEGAL COMMUNICATION

Randy --

I appreciate your thoughtful e-mail on this. As you will guess from the "cc" line above, we have spent some time discussing this issue in the office. What follows is our collective judgment.

BS
DP
AC

in pl be y e
will e
time i

DP
AC

B5

Scott

-----Original Message-----

From: Roach,Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Wednesday, September 23, 2009 6:46 PM
To: Harris, Scott Blake
Subject: Alcoa Development

Scott, Thank you for your message earlier re rehearing en banc. That was most considerate, and I really appreciate that.

(b)(5)

B5
DP
AC

DP
AWP
BS

I wasn't sure who there, if anyone, to cc on this. Thanks. Randy

Randy Roach - L-7

Executive Vice-President and General Counsel

Bonneville Power Administration

PO Box 3621

Portland, OR 97208-3621

503-230-5178

withheld in full

Entire
Document
DP
AC
BS

4/hold in pt (S)(S)

#608

Atterbury, Laura M - DK-7

From: Baskerville, Sonya L - DKN-WASH
Sent: Tuesday, September 29, 2009 10:01 AM
To: Roach, Randy A - L-7
Subject: Re: Request for rehearing en banc in PNGC II
Follow Up Flag: Follow up
Flag Status: Red

Thanks! Sorry - it was a crazy week with the ABA function. [when Steve and I met with them and Scott told Joel Merkel the same thing. Sonya Baskerville 202.253.7352

] They were very clear

R
EP

From: Roach, Randy A - L-7
To: Baskerville, Sonya L - DKN-WASH
Sent: Tue Sep 29 09:55:06 2009
Subject: FW: Request for rehearing en banc in PNGC II

Protected Attorney Client Communication
This is the note I referenced in the last message.

From: Harris, Scott Blake [mailto:Scott.Harris@hq.doe.gov]
Sent: Wednesday, September 23, 2009 8:45 AM
To: Roach, Randy A - L-7
Cc: Johnston, Marc; Lev, Sean
Subject: RE: Request for rehearing en banc in PNGC II

Randy --

BS
AC
DP
(S)(S)

Scott

Scott Blake Harris
General Counsel
United States Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
(202) 586-5281

-----Original Message-----

From: Roach, Randy A - L-7 [mailto:raroach@bpa.gov]
Sent: Tuesday, September 22, 2009 10:23 PM
To: Harris, Scott Blake
Cc: Johnston, Marc
Subject: FW: Request for rehearing en banc in PNGC II

8
C

UP

DP

(B)

Thanks. Randy

Randy Roach - L-7
Executive Vice-President and General Counsel
Bonneville Power Administration
PO Box 3621
Portland, OR 97208-3621

#67

Atterbury, Laura M - DK-7

From: Baskerville, Sonya L - DKN-WASH
Sent: Tuesday, September 22, 2009 7:37 PM
To: Roach, Randy A - L-7
Subject: Re: Request for rehearing en banc in PNGC II

Did you get my voicemail?
Sonya Baskerville
202.253.7352

From: Roach, Randy A - L-7
To: Wright, Stephen J - A-7; Burns, Allen L - D-7
Cc: Baskerville, Sonya L - DKN-WASH; Johnson, Tim A - LP-7; Adler, David J - LP-7; Olive, J Courtney - LP-7; Wright, Jon D - LP-7; Decker, Anita J - K-7
Sent: Tue Sep 22 19:25:46 2009
Subject: FW: Request for rehearing en banc in PNGC II

This was fun.

From: Roach, Randy A - L-7
Sent: Tuesday, September 22, 2009 7:23 PM
To: 'Scott.Harris@hq.doe.gov'
Cc: 'marc.johnston@hq.doe.gov'
Subject: FW: Request for rehearing en banc in PNGC II

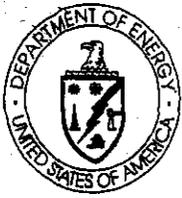
Scott, A

DP
AC
(b)(5)

Thanks. Randy

Randy Roach - L-7

#33a
w/hold in pt (s)(s)



Department of Energy

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

GENERAL COUNSEL

September 22, 2009

In reply refer to: L-7

Entire document
Exempt (Except to/from)

DP
AC

Mr. Robert E. Kopp, Director
Appellate Staff, Civil Division
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 7519
Washington, D.C. 20530

RE: Request for Rehearing *En Banc* in Pacific Northwest Generating v. BPA, No. 09-70228
(9th Cir.)

Dear Mr. Kopp:

I am writing to request that you seek rehearing *en banc* of the United States Court of Appeals for the Ninth Circuit's opinion in *Pacific Northwest Generating Cooperative v. Bonneville Power Administration*, Case No. 09-70228, issued August 28, 2009 (PNGC II).

(b)(5)
→
end

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For the reasons stated above, BPA respectfully requests that the Solicitor General authorize the government to seek rehearing *en banc* of *PNGC II*.

Respectfully,

/s/ Randy Roach

Randy Roach
General Counsel

cc:

Scott Blake Harris, General Counsel, DOE

Marc Johnston, Deputy General Counsel, DOE

Steve Odell, US Attorney's Office, Portland, Oregon

Steve Wright, Administrator and Chief Executive Officer, BPA

Allen Burns, Acting Deputy Administrator, BPA

#45

Atterbury, Laura M - DK-7

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Monday, October 26, 2009 6:00 PM
To: Poneman, Daniel; Wright, Stephen J - A-7
Cc: Lev, Sean; Roach, Randy A - L-7
Subject: Fw: Paper on contract offer to Alcoa and "sound business principles"
Attachments: Marten Law Group.bmp; 10-24-09 DOE memo [2].doc

----- Original Message -----

From: Michael C. Dotten <mdotten@martenlaw.com>
To: Harris, Scott Blake; Lev, Sean
Cc: marc.pereira@alcoa.com <marc.pereira@alcoa.com>; max.laun@alcoa.com <max.laun@alcoa.com>;
mike.rousseau@alcoa.com <mike.rousseau@alcoa.com>
Sent: Mon Oct 26 16:21:13 2009
Subject: Paper on contract offer to Alcoa and "sound business principles"

Gentlemen:

(S)(19)
Ex. 4?
including
attachment

Please don't hesitate to call if you would like to discuss our analysis.

Best regards,

Mike Dotten

Michael C. Dotten | Marten Law Group
1001 SW Fifth Ave. | Suite 1500 | Portland, OR 97204
503.241.2640 (Direct) | 503-243-2200 (Main) | 503-243-2202 (Fax)
mdotten@martenlaw.com | www.martenlaw.com

12/10/2009

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Atterbury, Laura M - DK-7

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Monday, October 26, 2009 6:59 PM
To: Roach, Randy A - L-7
Subject: Fw: Paper on contract offer to Alcoa and "sound business principles"

----- Original Message -----

From: Harris, Scott Blake
To: sjwright@bpa.gov; Poneman, Daniel
Cc: Lev, Sean; 'raroach@bpa.com' <raroach@bpa.com>
Sent: Mon Oct 26 21:50:56 2009
Subject: Fw: Paper on contract offer to Alcoa and "sound business principles"

----- Original Message -----

From: Harris, Scott Blake
To: 'mdotten@martenlaw.com' <mdotten@martenlaw.com>; Lev, Sean
Cc: 'marc.pereira@alcoa.com' <marc.pereira@alcoa.com>; 'max.laun@alcoa.com' <max.laun@alcoa.com>; 'mike.rousseau@alcoa.com' <mike.rousseau@alcoa.com>
Sent: Mon Oct 26 21:49:20 2009
Subject: Re: Paper on contract offer to Alcoa and "sound business principles"

Gentlemen -

Thank you for the document. We have reviewed it and forwarded as promised to BPA. To avoid any confusion given the limited time you seem to have available to resolve this issue, you should deal only with BPA going forward.

If we have any input whatsoever, it will be in the form of advice to our clients.

All the best.

Scott

----- Original Message -----

From: Michael C. Dotten <mdotten@martenlaw.com>
To: Harris, Scott Blake; Lev, Sean
Cc: marc.pereira@alcoa.com <marc.pereira@alcoa.com>; max.laun@alcoa.com <max.laun@alcoa.com>; mike.rousseau@alcoa.com <mike.rousseau@alcoa.com>
Sent: Mon Oct 26 16:21:13 2009
Subject: Paper on contract offer to Alcoa and "sound business principles"

Gentlemen:

(b)(5)

(b)(4)
Ex. 4?
including
attachment



Department of Energy

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

PUBLIC AFFAIRS

June 17, 2010

In reply refer to: DK-7

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

RE: FOIA #BPA-2010-00335-F

Dear Mr. Seligman:

This is a final response to your Freedom of Information Act (FOIA) request that you made to the Bonneville Power Administration (BPA).

You requested the following:

A copy of all communications since August 27, 2009 between BPA and the U.S. Department of Energy regarding BPA's existing or proposed contracts with Alcoa and Columbia Falls Aluminum Co. ("CFAC").

Response:

BPA has provided the final documents in their entirety. There is no charge for your request.

I appreciate the opportunity to assist you with this matter. If you have any questions regarding this letter, please contact Laura M. Atterbury, Freedom of Information Act/Privacy Act Specialist (503) 230-7305.

Sincerely,

Christina J. Munro
Christina J. Munro

Freedom of Information Act/Privacy Act Officer

Enclosure(s): Responsive Documents

#47

Atterbury, Laura M - DK-7

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Thursday, October 22, 2009 6:47 PM
To: Roach, Randy A - L-7
Subject: FW: DRAFT PROPOSAL
Importance: High
Attachments: CFAC Draft Proposal to BPA 10-22-09.doc

FYI

From: CFAC [mailto:hbeaudry@cfaluminum.com]
Sent: Thu 10/22/2009 3:58 PM
To: Allen Burns
Cc: Harris, Scott Blake; Max BAUCUS; Denny REHBERG; Jon TESTER; Chuck REALI; Matthew Lucke
Subject: DRAFT PROPOSAL

Mr. Allen Burns:

I have attached a draft of proposal language that we believe is both creative and in concurrence with the recent Ninth Circuit Court decisions. We are ready and eager to negotiate definitive contractual term around the precepts of this proposal.

Please, review this and get back to me as quickly as possible. Thank you in advance for your speedy attention.

Haley Beaudry, PE
Manager, External Affairs
Columbia Falls Aluminum Company
hbeaudry@cfaluminum.com
406-560-5404 (Cell)

12/10/2009

CFAC Draft Proposal for Power Service from BPA

October 22, 2009

The terms and concepts below are pre-decisional, non-binding, and for discussion purposes only.

Basic Terms (subject to the conditions below):

Product Block, firm power, delivered on all hours.

Rate Industrial Firm Power (IP) rate. Reserves provided consistent with law.

Amount Up to 140 aMW from November 1, 2009 – September 30, 2013

Term November 1, 2009 – September 30, 2013

Ex 14

Basic Conditions

Beginning immediately, BPA will make available to CFAC the full Amount at the IP Rate, and it will be in CFAC's option to take the quantity of power it requires, up to the full Amount and including its wheel-turning load when curtailed.

CFAC must give a minimum of 60 days' notice to BPA when adjusting its total plant load by more than 5 MW in any direction.

BPA shall not be obligated to serve CFAC, and shall have the option to curtail deliveries to the smelter, if the spread between the Mid-C power market price and the IP Rate exceeds \$40/MWh. BPA must give CFAC at least 90 days' notice prior to curtailing power deliveries pursuant to this clause.

It will be in BPA's option to either participate in future CFAC profits OR take an equity share in CFAC as further described below.

BPA Profit Participation Program

For any period during which the spread between the Mid-C power price and the IP Rate exceeds \$15/MWh, BPA may participate in CFAC profits during periods of LME prices greater than \$2,750 per Metric Ton as follows:

- for every \$/mt aluminum price above \$2,750/mt but below \$3,500/mt on the LME, CFAC is to pay BPA the IP Rate PLUS the LME Premium, a \$/MWh amount as calculated below
- for every \$/mt aluminum price above \$3,500/mt on the LME, CFAC is to pay BPA the IP Rate PLUS the High LME Premium, a \$/MWh amount as calculated below

LME Premium

(Average LME price for the measurement period - \$2,750)*0.02

High LME Premium

LME Premium

PLUS

(Average LME price for the measurement period - \$3.500)*0.04

Equity Sharing Program

Should BPA choose not to take part in the BPA Profit Participation Program as outlined above, BPA will have the option to take up to a 25% equity share in CFAC at any point during the Term, in BPA's sole option, such stake to be sellable by BPA at any time in BPA's sole discretion.

Q2 Ramp-Up Request

Each year during the Term on October 1, as long as CFAC is operating at a minimum of 35 aMW, BPA shall have the option to request the CFAC ramp up its production to as much as 35 aMW more than its then-current operating level from April 1 through July 31 of the following calendar year. CFAC may reject such a request no more than once during the Term.

Atterbury, Laura M - DK-7

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Monday, October 26, 2009 6:00 PM
To: Poneman, Daniel; Wright, Stephen J - A-7
Cc: Lev, Sean; Roach, Randy A - L-7
Subject: Fw: Paper on contract offer to Alcoa and "sound business principles"
Attachments: Marten Law Group.bmp; 10-24-09 DOE memo [2].doc

----- Original Message -----

From: Michael C. Dotten <mdotten@martenlaw.com>
To: Harris, Scott Blake; Lev, Sean
Cc: marc.pereira@alcoa.com <marc.pereira@alcoa.com>; max.laun@alcoa.com <max.laun@alcoa.com>;
mike.rousseau@alcoa.com <mike.rousseau@alcoa.com>
Sent: Mon Oct 26 16:21:13 2009
Subject: Paper on contract offer to Alcoa and "sound business principles"

Gentlemen:

As you requested, we have prepared the attached analysis concerning why the offer of either the 15-month, plus five-year or the seven-year contract offer to Alcoa would be consistent with sound business principles, as defined by the Court in PNGC II. I want to reiterate that time is of the essence. As indicated, Alcoa is prepared to promptly execute either of the two contracts that have been drafted by BPA and which were acceptable to BPA, in form and substance, at least prior to the PNGC II opinion. We believe that either contract would exceed the standards established by the Court in PNGC II. There simply isn't any more time left to negotiate any alternative arrangement.

As you probably know, Columbia Falls Aluminum Company has announced that its smelter in Montana is closing down in light of its power contract situation. Alcoa could be close behind if we cannot resolve which contract will be offered to Alcoa by the end of this week.

We appreciate the time you have taken to understand this issue and we look for your assistance in maintaining the 2000 plus jobs in Whatcom County, Washington that are dependent upon the successful completion of a contract.

Please don't hesitate to call if you would like to discuss our analysis.

Best regards,

Mike Dotten

Michael C. Dotten | Marten Law Group
1001 SW Fifth Ave. | Suite 1500 | Portland, OR 97204
503.241.2640 (Direct) | 503-243-2200 (Main) | 503-243-2202 (Fax)
mdotten@martenlaw.com | www.martenlaw.com

12/10/2009

We have been asked to describe why contracts under consideration by US DOE/BPA are “consistent with sound business principles”¹ and the Ninth Circuit’s August 2009 opinion in *Pacific NW Generating Coop v. BPA* (9th Cir. Aug. 28, 2009) (“*PNGC I*”). Time is of the essence as Alcoa and BPA have reached agreement on 2 separate contracts during the Summer and Fall, but BPA has not yet offered a contract to Alcoa for power service. Alcoa’s Intalco facility is operating without a contract and has been paying market-based rates for power since August and is incurring substantial operating losses that are unsustainable. A decision on continued operation of the Intalco smelter is imminent.

¹ In *PNGC II*, the Ninth Circuit referred at various points in its opinion to “business-oriented philosophy” (Slip Op. at 11965, 11972), “business interests consistent with its public mission” (Slip Op. at 11966), “a transaction a rational business would enter” (Slip Op. at 11970), “business interests” (Slip Op. at 11976), “business judgment rule” (Slip Op. at 11979), and “sound business sense” (Slip Op. at 11986). But the statutory genesis for each of these standards is the same: the ratemaking standard contained in the Flood Control Act of 1944:

[T]he Secretary of Energy who shall transmit and dispose of such power and energy *in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles*, the rate schedules to become effective upon confirmation and approval by the Secretary of Energy. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years.

16 U.S.C. § 825s (emphasis supplied). The same standard is repeated essentially verbatim in Section 9 of the Federal Columbia River Transmission System Act, 16 U.S.C. § 838(g) and Section 7(a)(1) of the Northwest Power Act, 16 U.S.C. § 839e(a)(1).

In the past, the Department of Interior (as predecessor of the Department of Energy), Bonneville Power Administration, and the Federal Energy Regulatory Commission all treated the “sound business principles” standard as part of the three-part standard: “1) to encourage the most widespread use (of power); 2) at the lowest possible rates to consumers; 3) consistent with sound business principles.” The standard has consistently been treated in the past as setting a general revenue requirement standard for BPA. That is, overall, to encourage the most widespread use of power, BPA’s total rates should be lowest possible consistent with the obligation to repay the Federal Treasury for funds borrowed. *PNGC II* is the first time a Court has suggested that the standard applies to: a) decisions to enter into contracts; or b) to define the rate at which power must be sold to a particular customer.

There are three alternative contracts under consideration. Time is of the essence because power prices have started to go up and the "window of opportunity" to meet the pricing caps that BPA has placed in its contracts may well close if BPA does not get into the markets quickly to secure sufficient power to serve all of its customers (including Alcoa). In addition, the mounting losses at Alcoa's Intalco smelter may force a closure of the smelter unless a longer contract path is identified that would allow Alcoa to offset its virtually certain losses over the next two years by expected profitable periods over the ensuing five years.

The first contract option is a 15-month contract for the physical sale of power to Alcoa. To the best of our knowledge, this contract has not yet been drafted and was presented in a meeting on October 15 as a theoretical alternative to the other two contracts described below. As Mr. Wilt, the President of Alcoa's U.S. smelter operations explained, the 15-month alternative is not acceptable to Alcoa because the duration of this alternative would assure continuing, sizeable operating losses for Alcoa's Intalco smelter, with an insufficient term to permit Intalco to have any chance of having a period of profitability to offset the losses when aluminum prices rebound. For that reason, we cannot envision any contract offered by BPA with a 15-month duration that will avoid the immediate closure of the Intalco smelter with the ensuing loss of approximately 2000 jobs in the community.

The second contract option is the 15-month plus five-year contract for the physical sale of power to Alcoa. That proposal is premised on BPA's initial (and we believe incorrect) reading of the *PNGC II* opinion in which BPA concluded that it would have to meet an "Equivalent Benefits" standard. Under that standard BPA concluded that it would have to receive from Alcoa, in a calculated economic value, at least as much as the incremental cost of providing service to Intalco. We believe this erroneously and unnecessarily reads the *PNGC II* opinion in a way that conflicts with BPA's statutory melded-rate obligation, an obligation that also applies to BPA's Industrial Power rate.² Furthermore, it ignores that the Court took pains expressly to explain "we can envision several [non-exclusive] situations in which BPA might reasonably conclude that a below-market rate sale to the DSIs is a sound business decision." *PNGC II*, slip op. at 11973. For an initial term that BPA would define (for this discussion, assumed to be 15 months), BPA would offer to make a physical sale of power to Alcoa at the Industrial Power rate. The term of the contract could be extended on a rolling basis so long as BPA could make a finding that during the term of the contract, it would realize "Equivalent Benefits" (at least matching the costs) under the contract. The contract would convert to an additional five-year term if a Court holds that a physical sale of such duration may be offered to

² As with all customers, BPA's rates to the industrial customers are dictated by Section 7 of the Northwest Power Act and are based on "rolled-in" or "melded" costs rather than marginal or incremental costs. Because of limits built into the preference customer rate provisions, Alcoa will pay approximately \$35 per MWH for power while the preference customers will pay \$27 per MWH under current rates. The Tiered Rate Methodology adopted by BPA does not change the fact that its customers' rates are based on rolled-in pricing.

Alcoa and meet the standards of the Northwest Power Act. Although this contract applies a standard that Alcoa believes exceeds the requirements of *PNGC II* and the Northwest Power Act, it offers the opportunity for an extension of definite duration that Alcoa believes could permit the recovery of operating losses associated with the initial term of the agreement. We understand that the Department of Energy believes that the “Equivalent Benefits” standard is an incorrect reading of the *PNGC II* opinion and that the Department agrees that the extended term of the contract should depend upon a successful challenge to the “Equivalent Benefits” standard.

The third contract option is the seven-year agreement that BPA posted on its website for comment. This contract has been the object of the comments of the various interest groups that have been following the proposal. This agreement calls for standard physical delivery of power at the Industrial Power rate. The initial two-year term would be extended if BPA were able to make a purchase of power below a dollar limit (cap) set by BPA. The dollar cap is designed to serve as a limitation of the impact to other customers of purchasing power during the contract term to meet all of BPA’s loads (including Alcoa’s load).

The latter two options would not only satisfy, but exceed the “sound business principles standard” for a variety of reasons:

1. Either contract contemplates a traditional physical sale of power rather than a “contract for differences” or “Monetary Benefit.” In other words, Alcoa will be sending payments to BPA for power it is purchasing from BPA rather than BPA sending a check to Alcoa to reimburse Alcoa for a portion of the power cost it incurs from third parties. Both in *PNGC I* and *PNGC II*, the Court invalidated BPA’s payments under the “Monetary Benefit” contracts in part because “BPA’s authority to *sell* power to the DSIs does not mean that BPA may simply *give* money to the DSIs by calling the agreement a ‘power sale’ with ‘monetized service benefits.’ ” *PNGC II* at 11965 citing *PNGC*, 550 F.3d at 878 (emphasis in original).
2. Although the Court was incorrect in its assumption that the Monetary Benefit contract yielded a rate to Alcoa *lower* than the statutorily specified Industrial Power Rate—that was the basis for the Court’s finding that the contract was invalid. “Nor has the agency shown how offering the DSIs rates below the market rate and below what it is statutorily authorized to offer “further[s] BPA’s business interests consistent with its public mission.” *Ass’n of Pub. Agency Customers*, 126 F.3d at 1171. We conclude that BPA’s decision to offer the subsidized rates to the DSIs and then monetize those rates is inconsistent with BPA’s statutory authority under the NWPA, and therefore hold that the monetization provisions of the aluminum contracts are invalid.” *PNGC II* at 11966. The Court’s suspicion that the payment by BPA to Alcoa would not “further BPA’s business interests” would not apply to either contract under consideration. Both the second and third contract options would have BPA make physical power sales to Alcoa and Alcoa at all times during the contract would pay the Industrial Power Rate (the rate that is “statutorily authorized” for sales to direct service industries like Alcoa).

3. The Court held that a decision to enter into the Monetary Benefit contract (the form of contract at issue in *PNGC I* and *PNGC II*) “like its authority to enter into contracts generally, is cabined by its obligation to “operate with a business-oriented philosophy.” *PNGC II* at 11972-73. At oral argument, Columbia Falls Aluminum Company’s counsel protested that if that was the standard, BPA would be unable to enter into any contracts with the DSIs if the cost of purchasing power to serve the DSIs was higher than the IP rate. The Court rejected that argument:

“We disagree.

We can envision several situations in which BPA might reasonably conclude that a below-market rate sale to the DSIs is a sound business decision.”

PNGC II at 11973.

4. In *PNGC II*, the Court cited three examples under which BPA could enter into physical power sales contracts with Alcoa and other DSI customer stating, “as these examples illustrate — and they are only examples, not meant to be exhaustive — a decision by BPA to enter into a power sale contract with the DSIs at the IP rate, even if the IP rate is below market rates, could under various circumstances be consistent with sound business principles.” Slip Op. at 11974. Two of the three examples cited by the Court are directly reflected in the contracts:

A. Waiver of rights to surplus power.

The Court first held that:

... BPA’s governing statutes likely require it to offer power within the Pacific Northwest at established rates before the agency may sell power outside the region. See PNGC, 550 F.3d at 876 n.35. If so, BPA might reasonably enter into a contract with the DSIs at the IP rate so as to “free up power to sell outside the Pacific Northwest.” Id.

PNGC II at 11973.

The second contract option contains, and Alcoa has agreed that the third contract option could include the following waiver:

- 24.2 **Alcoa Covenant Not to Request Surplus Firm Power from BPA or Challenge BPA Sales of Surplus Firm Power to Other Customers**
Other than as set forth in sections 4, 5, 6, and 23 of this Agreement, during the Initial Period, any Extended Initial Period, and Transition Period, or any Second Period, Alcoa will make no additional request for power from BPA, whether Surplus Firm Power or otherwise; provided, further, that during such period Alcoa agrees not to file a petition for review in the Ninth Circuit challenging (a) any proposed or actual sale of Surplus Firm Power by BPA to any other BPA customer, whether

inside or outside the Region, or (b) any rate adopted by BPA, and approved on a final basis by the Federal Energy Regulatory Commission, for the sale of Surplus Firm Power; *provided, however,* that the foregoing commitment by Alcoa will be of no force or effect in the event the Ninth Circuit issues its mandate in a case in which it has granted a petition for review challenging this Agreement and has issued an order or opinion that declares or renders this Agreement void and provided further that in the event that BPA terminates this Agreement pursuant to section ___ the covenant and waivers, above, shall not apply to the period following such termination. (emphasis supplied).

The Court has articulated BPA's obligation to make sales of power to the direct service industries at the Industrial Power Rate before BPA may make sales outside the Pacific Northwest region. *PNGC I*, 550 F.3d at 873 ("We therefore hold that BPA improperly refused to offer the aluminum DSIs energy at a rate set under §839e(c) [the Industrial Power rate] before selling them power at an FPS rate."). BPA sought panel rehearing on this point and the Court denied rehearing. Any of the power contacts offered to Alcoa would have BPA serve the Intalco smelter with only 2/3 of the power that BPA has historically supplied the smelter and that is required to operate the smelter at full capacity. Thus, Alcoa's waiver of its right to have its entire needs served by BPA at the Industrial Power rate before BPA makes sales outside the region: "(a) frees up power for lucrative market-rate sales to customers outside the Northwest region, and (b) removes a potential challenge to such sales. As the Court put it, the entry by BPA "*into a contract with the DSIs at the IP rate so as to "free up power to sell outside the Pacific Northwest"* is achieved by the waiver and is one specific basis that the Court expressly found could be used by BPA to justify a power sale to the DSIs "consistent with sound business principles."

B. Indirect Benefits of DSI Sales.

The second basis for offering a contract at less than market price for power to Alcoa was identified by the Court as meeting the "sound business principles standard." The Court concluded that a number of indirect benefits could accrue from a physical sale of power:

Second, BPA has asserted that the physical sale of power to the DSIs has indirect benefits that might offset a below market rate sale. For example, BPA noted in its letter explaining its justifications for the amended contract with CFAC that "DSI loads have historically benefited BPA by taking power in relatively flat blocks that require little or no shaping; they have taken power from BPA at light load hours, when power has historically been difficult to market; and they have provided the Administrator with additional power reserves." These and other non-financial benefits to BPA could very well justify a less-than-market rate sale, but they have no direct application when, as here, BPA is not in fact physically selling power to the DSIs.

PNGC II at 11973 (emphasis supplied).

Both contract options 2 and 3 require Alcoa to take delivery of power in flat blocks—meaning that BPA will deliver the same amount of power to Alcoa in every month rather than “shaping” its power resources to meet varying electrical loads as it does for most of its other customers. The definition of “Firm Power” that BPA will deliver under the contract provides: “Firm Power” means the amount(s) of electric power that PS will make available at the IP rate to Alcoa under this Agreement in equal hourly amounts for every hour of the Fiscal Year.”(emphasis supplied).

Both contract options 2 and 3 also require that Alcoa provide BPA with power system reserves defined in Exhibit F of the Agreement and require the parties to negotiate an additional and new form of power reserves designed to help BPA incorporate wind power into BPA’s system:

9.6 Power Reserves

Alcoa shall provide Supplemental Contingency Reserves in a manner consistent with the Minimum DSI Operating Reserve - Supplemental section of the 2010 General Rate Schedule Provisions and as established in Exhibit F.

9.7 Additional or Alternative Arrangements for Power Reserves

Nothing in this Agreement shall preclude BPA and Alcoa from entering into arrangements, either by amendment to this Agreement or through a separate agreement for Alcoa to provide BPA with additional reserves or restriction rights for purposes of providing reserves for BPA firm power loads within the region.

In other words, as written, both contract options 2 or 3 would satisfy the Court’s standard for sound business principles based on indirect benefits that the Court has already recognized.

C. Short-term discount to obtain future business.

The third identified potential basis that the Court identified that would constitute a “sound business principle” justification for sales of power at less than market prices is to retain load (even at a discounted rate not applicable here) in order to get higher future prices:

Third, a soundly run business might reasonably offer a large customer a short-term discount with the expectation that the customer’s future business at higher prices will more than make up for the short-term loss of revenue. Similarly, a reasonable business might offer a short-term discount to a customer in order to diversify its customer base or to offload unused capacity.

Slip Op. at 11974.

Under current rates, BPA has not proposed discounting the Industrial Power rate, so the rationale for providing a "discount" does not apply. But the principle of retaining a large customer does apply, and it leaves open the option for BPA offering variable rates to aluminum customers in future rate periods. In the past, BPA has offered, and the Ninth Circuit has sanctioned, a "DSI variable rate." The rate to aluminum DSIs was, for a 10-year period, based on the price of aluminum. As aluminum prices rose, so too did the price for power, and as aluminum prices declined, power prices were discounted.

As the Court has said, this list of situations under which the "sound business principles" standard would be satisfied is non-exclusive. So other components of the Alcoa/BPA proposed contract could be said to be "consistent with sound business principles" and justify a physical power sale by BPA to Alcoa. The principle basis for making such finding (as opposed to the two instances in which the Court determined that BPA had not demonstrated that the contracts met this standard) is that BPA now proposes not a dollar payment to Alcoa to offset the difference between market costs and BPA's industrial power rate, but instead, BPA proposes the type of physical power sale in which Alcoa will make payments to BPA at the statutorily mandated Industrial Power rate.

Based on the foregoing, Alcoa urges the Department of Energy and BPA to offer, by the end of this week, a contract to Alcoa based on either option 2 or 3. Anything short of that will likely result in the closure of the Intalco smelter and the loss of 2000 jobs in the Whatcom County, Washington community.

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Ex. 4
Entire
ATTACHMENT

FAX

Date • October 12, 2009
Pages • 12
Time • 2 PM
Transmit To • Eric Fygi, Deputy General Counsel
Company/Firm • Department of Energy
Telephone No. • 202-586-5284
Fax No. • 202-586-7583
From • Harvard P. Spigal
Phone • 503-226-5788
Secretary • Linda Ramey
Phone • 503-226-5735

COMMENTS:

Eric,

Alcoa asked that I send you a copy of the memorandum that I prepared regarding PNGC II. The memorandum addresses the issue we discussed last week: whether BPA must prepare an analysis showing the dollar value of indirect benefits arising from a sale of power to Alcoa.

If you have any questions, please call me.

Harv

When you are sending to us, please be sure to include a cover sheet with your transmittal and a telephone number where you can be contacted in case of equipment malfunction.

Transmitted by:

Time:

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October 12, 2009

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Mr. Max Laun
Senior Counsel
Alcoa Inc.
201 Isabella Street
Pittsburgh, PA 15212

Re: Bonneville Power Administration's Sale of Power to Alcoa, Inc.

Dear Mr. Laun:

You have asked whether the Bonneville Power Administration's ("BPA") administrative record justifying a sale of power to Alcoa Inc. ("Alcoa") must forecast the value¹ of each indirect benefit in order to demonstrate "a rational business justification" for the sale.³ If it is not necessary to estimate the financial value of such indirect benefits, you have asked what type of information regarding indirect benefits is sufficient to show that a proposed sale has a "rational business justification."⁴ Last, you have asked what standard the court will apply in reviewing BPA's estimate of the financial value of indirect benefits if, nevertheless, BPA must assign a dollar value to indirect benefits.

¹ The term "financial value" means the value in dollars and cents. "Financial" means "relating to finance or financiers." Merriam-Webster Online at: <http://www.meriam-webster.com/dictionary/financial>. "Finance" means "money or other liquid resources of a government, business, group, or individual." Merriam-Webster Online at: <http://www.meriam-webster.com/dictionary/finance>. Therefore, financial value means money value. In estimating the financial value of an indirect benefit, BPA will estimate the effect of the indirect benefit in terms of the dollar value of the indirect benefit. For example, if a physical sale of power to Alcoa results in Alcoa purchasing light load hour energy that would otherwise be lost to spill at federal hydroelectric projects, the financial value to BPA of light load hour sales to Alcoa would be the megawatt hours of light load hour energy sold to Alcoa multiplied by BPA's Industrial Power ("IP") rate.

² BPA sales of physical power to Alcoa will provide BPA with direct benefits (revenues received from Alcoa) and indirect benefits such as reserves, light load hour load, and a flat load that does not require shaping resources. *Pacific Northwest Generating v. BPA*, --- F.3d ---, 11973-74, No. 09-70228, WL 2386294 (9th Cir August 28, 2009).

³ *Id.* at 11992.

⁴ *Id.*

For the reasons set forth in more detail below, *Pacific Northwest Generating v. BPA* ("PNGC I"), --- F.3d ---, No. 09-70228, WL 2386294 (9th Cir. August 28, 2009) ("PNGC I") does not require that BPA determine the financial value of the indirect benefits associated with a physical power sale to Alcoa. BPA may identify other business analyses or evidence regarding indirect benefits to support a rational business justification for a physical sale. *PNGC II* provides examples for a non-financial justification. It is flatly incorrect to read *PNGC II* to require a financial valuation of indirect benefits that is determined by one of BPA's sophisticated programs.

If BPA does forecast the financial value of indirect benefits associated with a physical power sale to Alcoa, BPA must provide forecasts of indirect benefits and the financial value of the indirect benefits. The forecasts will not be arbitrary and capricious if the forecasts are consistent with the information available to BPA and are plausible because of BPA's expertise in such matters or because alternative forecasts or criticism of BPA's forecast can be ascribed to a difference in view.

I. PNGC II Holding

In *Pacific PNGC II*, the Ninth Circuit held:

BPA has failed to demonstrate that it reasonably believed its decision to execute the Alcoa contract amendment consistent with 'sound business principles.' If the agency provides a rational business justification for a sale (monetized or otherwise) that is supported by the record before the agency, we would be obliged to defer to the agency's expertise."

PNGC II, Slip Op. at 11992. The court noted that the rate at which BPA would sell power to Alcoa was less than the market price of power. The court acknowledged that the sale of power to Alcoa can produce indirect, non-financial benefits.⁵ Among such benefits, the court identified reserves available to BPA from the right to interrupt deliveries to Alcoa, avoidance of lost revenues from light load hour spill, and the possibility of future sales to Alcoa at rates that equal or exceed BPA's cost of service to Alcoa.^{6,7}

The court rejected BPA's justifications because BPA did not *describe* credible indirect benefits, not because BPA *failed to estimate* the financial value of such benefits. It criticized the business rationales BPA offered in *PNGC I* and *PNGC II* because the indirect benefits on which BPA relied were irrelevant to a monetized sale of power. BPA discussed the shape of

⁵ *Id.* at 11974. The term "non-financial benefits" means non-money or non-liquid benefits. It refers to benefits that cannot be measured, need not be measured, or for which measurement would be speculative.

⁶ *Id.*

⁷ The court did not take into account that BPA may be able to sell Alcoa power having a cost less than the market price of power. Apparently, this matter was not part of the administrative record on which BPA relied to justify its decision.

the power being sold (relatively flat blocks that require little generation shaping), light load hour purchases and reserves that DSIs can supply. However, these benefits do not exist for a monetized sale. BPA also argued that if it did not make the \$32 million payment to Alcoa, Alcoa would shut down. The court found that the administrative record did not show that the payment would keep Alcoa in operation. The court rejected BPA's justification based on past, indirect benefits of physical power sales to DSI because BPA did not explain why it reasonably believed those indirect benefits will occur in the future as a result of the \$32 million payment to Alcoa.

II. Background

In *Pacific Northwest Generating Coop. v. Dep't of Energy* ("PNGC I"), 550 F.3d 846 (9th Cir. 2008), amended on denial of reh'g, No. 05-75638, 2009 WL 2386294 (9th Cir. Aug. 5, 2009), the court held that Northwest Power Act ("NWPA") Section 5(d) authorized, but did not require, BPA to enter into a contract to sell power to Alcoa.⁸ In *PNGC II*, the court held that BPA's decision to enter into a contract amendment to pay Alcoa the monetary benefits Alcoa would receive from a physical sale of power at BPA's IP rate, had BPA made a physical sale, must be consistent with sound business principles.⁹ The court implied,¹⁰ but did not expressly state, that the amount by which the \$32 million monetized payment to Alcoa exceeded BPA's monetized benefits would be a gift.¹¹ Regardless of whether BPA should have estimated the financial value of indirect benefits associated with the contract amendment, the administrative record BPA filed did not assign a dollar value to BPA's indirect benefits, and the court found that BPA's other rationales were not adequate to justify the payment to Alcoa.¹²

The court, nevertheless, noted that non-financial indirect benefits could provide a sufficient business rationale for a physical sale of power at the IP rate even when the IP rate is less than the market price of power. BPA had argued that its sales of power to its direct service industrial customers ("DSI") historically benefitted BPA by taking relatively flat blocks that require little or no shaping, by taking power during light load hours when demand for energy was low, and by providing power reserves. In response, the court stated, "These and other *non-financial* benefits to BPA could very well justify a less-than-market rate [physical] sale, but they have no direct application when, as here, BPA is not in fact physically selling power to the DSIs." *PNGC II*, *Slip. Op.* at 11974. (emphasis added).

⁸ *PNGC I*, 550 F.3d. at 866.

⁹ *PNGC II*, *Slip Op.* at 11972.

¹⁰ "For example, BPA has not quantified the monetary value of the past benefits that the DSIs provided." *Id.* at 11989.

¹¹ "[M]onetizing a contract only makes sound business sense if the underlying contract is a sound one. For the reasons we discuss above, BPA could not reasonably have concluded that its decision to sell power to Alcoa, and thereby incur a \$32 million loss, was 'consistent with sound business principles.' If anything, the agency's decision to monetize highlights the fact that the contract amendment amounts to no more than a \$32 million gift to Alcoa." *Id.* at 11988.

¹² *Id.* at 11992.

III. Judicial Review and Standard of Review

A. Standard of Review for BPA Final Actions

BPA's power sales contracts are subject to judicial review by the Ninth Circuit. NWPA Sections 9(e)(1)(B) and 9(e)(5). The record on review "shall be limited to the administrative record compiled by the administrator," and the scope of review shall be governed by 5 U.S.C. § 706, which provides that a reviewing court shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1)(a).

In deciding whether a BPA action is arbitrary and capricious, the Ninth Circuit "may not substitute our own judgment for that of BPA; we must simply assess whether BPA relied on improper factors, failed to consider an important aspect of the question, 'offered an explanation for its decision that runs counter to the evidence before [it], or [rendered a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' . . . This highly deferential standard presumes BPA's actions to be valid."¹³ *Public Power Council v. BPA* ("Public Power Council"), 442 F.3d 1204, 1209 (9th Cir. 2006), quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). See also, *California Energy Commission v. BPA* ("CEC"), 909 F.2d 1298, 1313 (9th Cir. 1990). The Ninth Circuit will give great weight to BPA's interpretation of its organic statutes.^{13, 14}

A "more desirable" alternative proposed by a party challenging BPA's ratemaking decisions will be insufficient for the court to set aside BPA's final action unless the applicable law requires otherwise or "BPA's decisions were either unreasonable or unsupported by evidence in the record." *Central Lincoln People's Utility District v. Johnson*, 735 F.2d 1101, 1120 (9th Cir. 1984).¹⁵ The Ninth Circuit affords BPA substantial discretion in making business decisions.¹⁶

¹³ *Aluminum Company of America v. Central Lincoln People's Utility District, et al.*, 467 U.S. 380, 388-391 (1984) (discussing BPA administrative actions). The courts give great deference to BPA's interpretations because, among other reasons, "the enabling legislation is highly technical and complex." BPA "was intimately involved in the drafting and consideration of the legislation at the time of its passage," and Congress monitors "BPA performance in electricity regulation and allocation." *Department of Water and Power of Los Angeles v. BPA*, 759 F.2d 684, 690-91 (9th Cir. 1985) (citations omitted).

¹⁴ Unlike its review of other BPA final actions, including decisions to sell power, BPA's final actions setting rates must be supported by a higher standard: substantial evidence in the rulemaking record. NWPA Section 9(e)(2). BPA's decision to sell power to Alcoa is not required to be supported by substantial evidence in the administrative record because a sale of power is not a rate.

¹⁵ If parties challenging a BPA rate decision propose a reasonable alternative to BPA's decision, "their interpretation does not prevent BPA's position from also being deemed reasonable." *Kaiser Aluminum & Chemical Corporation v. BPA*, 261 F.3d 850 (9th Cir. 2001).

¹⁶ "We are not to debate the wisdom of any BPA business decision unless that decision is so manifestly unreasonable as to rise to the level of being arbitrary and capricious." *Association of Public Agency Customers, Inc. v. BPA* ("APAC"), 126 F.3d 1158, 1175 (9th Cir. 1997). The test of whether BPA has made a decision

B. BPA's Administrative Record Must Be Complete, But Need Not Be Free from Doubt

BPA can assure that its decisions are not arbitrary or capricious by creating a sufficiently complete administrative record demonstrating that BPA decisions are based on sound business principles and that BPA considered alternatives to its actions. It is not necessary to present the court with an administrative record showing that a business decision is free from doubt, or that the analytical basis for a decision cannot be reasonably disputed, or even that a decision be supported by a financial analysis of the impact of indirect benefits on the demand for energy and BPA power rates. BPA's decision to sell power to Alcoa is entitled to great deference, and BPA is required only to have some support in the administrative record for its business decision. If BPA's administrative record provides a reasonable explanation for BPA's decision, then the decision will not be arbitrary and capricious. A reasonable explanation is one for which there is evidence in the administrative record. The evidence that is necessary will depend on the purpose or intent of the proposed action.

C. Private Sector Application of Sound Business Principles

In *PNGC II*, the court looked to the private sector for guidance. "[C]ourts routinely review the rationality of business decisions in other contexts. For example, under the common law 'business judgment rule,' courts are required to defer to business decisions made by a corporation's board of directors, unless 'the directors [, among other reasons,] act in a manner that cannot be attributed to a rational business purpose.'" *PNGC II, Slip Op.* at 11979, quoting from *Brehm v. Eisner* ("*Brehm*"), 746 A.2d 244, 264 n.66 (Del. 2000).¹⁷

The court in *PNGC II* also relied on *Navellier v. Sletten* ("*Navellier*"), 262 F.3d 923, 946 (9th Cir. 2001), "(affirming district court's formulation of the business judgment rule as requiring a director to "[r]ationally believe that the [director's] business judgment is in the best interest of the corporation)." *PNGC II* at 11979. In looking to *Brehm* and *Navellier* for authority for judicial "review [of] the rationality of business decisions" (*PNGC II* at 1179), the court took deliberate pains to establish that the administrative record for decisions can be limited, *i.e.*,

based on sound business principles in not whether the court reasonably believes that BPA has made the correct decisions, but whether "the administrative record shows that, after considering alternatives to its action, BPA "adopted what it reasonably believed would be a predictable, fair, and nondiscriminatory basis for [its decision] while insuring adequate BPA revenues." *CEC*, 831 F.2d at 1476-77. "Few contracts entail no business risk. BPA's decision to amend its contract obligations was eminently businesslike, given the probably devastating result of performing the original contract, the significant risk that the DSIs would not independently curtail their power purchases, and the program's smashing success. We will not second-guess the wisdom of BPA's winning business decisions, especially when it was responding to unprecedented market changes." *Bell v. BPA* ("*Bell*"), 340 F.3d 945, 949 (9th Cir. 2003).

¹⁷ "Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context. Due care in the decision-making context is *process* due care only. Irrationality is the outer limit of the business judgment rule. Irrationality may be the functional equivalent of the waste test or it may tend to show that the decision is not made in good faith, which is a key ingredient of the business judgment rule." *Brehm*, 746 A.2d at 264. (citation and footnotes omitted).

more than a mere scintilla. A scintilla is less than speculative assumptions, based largely on past experience, that are run through a complex computer model.

The third business decision case cited by the court in *PNGC II* is *McCarthy v. Middle Tenn. Elec. Membership Corp.* ("*McCarthy*"), 466 F.3d 399 (6th Cir. 2006). The court asserts that *McCarthy* is "[e]ven more relevant[] than *Brehm* and *Navellier*. *PNGC II*, *Slip Op.* at 11980.¹⁸ *McCarthy* only stands for the obvious (an unnecessary expenditure is unlawful because it conflicts with the requirement to have the lowest cost possible consistent with sound business principles). *McCarthy* does not reach the question of what information in the record is necessary to demonstrate that a particular expenditure is necessary, and therefore be consistent with sound business principles. Neither *McCarthy*, *Brehm* or *Navellier* suggest that a financial analysis of costs and benefits associated with a decision is necessary to establish a business rationale for the decisions. In fact, *Brehm* stands for the opposite principle.¹⁹

IV. *PNGC II* Rejected BPA's Justification Because BPA Did Not Describe Credible Indirect Benefits, Not Because BPA Failed to Estimate the Financial Value of Indirect Benefits

The court criticized the business rationales BPA offered in *PNGC I* and *PNGC II* because the indirect benefits on which BPA relied were irrelevant to transaction. Relatively flat blocks that require little generation shaping, light load hour purchases and reserves that DSIs can supply do not exist for a monetized sale. *PNGC II*, *Slip Op.* at 11968-69 and 11974, fn 5.²⁰ BPA also argued that if it did not make the \$32 million payment to Alcoa, Alcoa would shut down. The court found that the administrative record did not show that the payment would

¹⁸ In *McCarthy*, the Sixth Circuit held that an electric cooperative's decision to incur "'non-necessary expenses,' if proven true, would 'clear[ly]' violate the cooperative's statutory duty under Tennessee law to provide its 'members with electricity 'at the lowest cost consistent with sound business principles.'"
McCarthy, 466 F.3d at 410. The alleged non-necessary expenses included "beauty pageants, all expense trips for board members around the country, and unnecessary capital improvements." *Id.* at 209. According to the court in *PNGC II*, *McCarthy* stands for the proposition that non-necessary expenses violate a statutory requirement to provide electricity at the lowest cost consistent with sound business principles. Because *McCarthy* did not reach the issue of whether expenditures for beauty pageants or particular capital improvements, *inter alia*, were unnecessary, *McCarthy* sheds no light on how BPA is to establish that a particular decision would be consistent with sound business principles, or how the Ninth Circuit is to apply the sound business principles statutory standard. Nothing in *McCarthy* suggests that the indirect benefits, if there were any, associated with the challenged expenditures must be assigned financial value.

¹⁹ In *Brehm*, the issue was whether the lavish compensation paid the Walt Disney Company exceeded Michael Ovitz's value to the company. The expert hired by the board did not quantify the cost of Ovitz's severance package. Nevertheless, the court held that the board's action was lawful because the board in good faith relied on its expert.

²⁰ BPA also claimed that its payment to Alcoa was justified because changing technologies in aluminum smelting would "'provide value to BPA in way not yet imagined'" *Id.* at 11969. This business rationale was hypothetical and, perhaps, illusory. Another rationale offered by BPA was that its payment to Alcoa would save jobs. The court stated that this was a "humanitarian" reason, which the court had previously rejected in *PNGC I*. *Id.* at 11987.

keep Alcoa in operation. *Id.* at 11989. The court rejected BPA's justification based on past, indirect benefits of physical power sales to DSI because BPA did explain why it reasonably believed those indirect benefits will occur in the future as a result of the \$32 million payment to Alcoa.²¹

However, *PNGC II* does not require that BPA find that revenues from a physical sale plus indirect benefits must meet or exceed the cost to BPA of selling power to Alcoa. The court specifically stated that non-financial business analyses or evidence could be an acceptable justification for a power sale. "In short, neither the record in this case nor the record in *PNGC* contains any financial or other business analysis or evidence to support the agency's assertion that future benefits to the agency are (a) likely or (b) sufficiently large to make the decision to give \$32 million away a sound business decision." *Id.* at 11989-90 (emphasis added).

BPA should have "quantified the value of the past benefits that the DSIs provided" precisely because past benefits were capable of being quantified and, therefore, capable of being assigned a financial value. *Id.* (emphasis added). On the other hand, for future benefits, BPA only needs to demonstrate "financial or other business analysis or evidence." *Id.* (emphasis added). The court offers BPA three ways to justify a power sale to Alcoa: (i) a financial analysis that computes dollar value of BPA's costs, direct benefits and indirect benefits; (ii) a business analysis that considers cost, direct benefits and indirect benefits without assigning a financial value to each component of its decision; or (iii) other evidence.²²

The court is leaving the door open for BPA to decide what type of business rationale to present, and telling BPA that it will accept one or a combination of the methods. BPA need show only that "benefits to the agency are (a) likely or (b) sufficiently large to make the decision to give \$32 million away a sound business decision." *Id.* If the court is presumed to know the meaning of "or", the court intended that benefits to the agency do not have to be both likely and sufficiently large to justify the payment.²³ BPA can elect to present only the financial value of direct and indirect benefits, but that is not required by the plain reading of *PNGC II*.

²¹ "The agency does not explain why, given that the risks of selling power to Alcoa are currently so significant that the agency would rather give the company money to purchase power from a competitor than deliver power to the aluminum company itself, it reasonably believes that the risks will be less significant in the future or that Alcoa's financial situation will improve." *Id.* at 11989 (emphasis added).

²² The court should be presumed to know the meaning of "or" and to have intended "or" to have its commonly understood meaning. Or: "used as a function word to indicate an alternative ('coffee or tea') ('sink or swim')." Merriam-Webster Online at <http://www.merriam-webster.com/dictionary/or>.

²³ Perhaps the court is considering the fact that BPA can take a business risk. *Bell*, 340 F.3d at 949. A business decision having a low probability, but sufficiently large benefits, may be acceptable, as well as the inverse.

PNGC II only required that BPA "demonstrate that [BPA] *reasonably believed* its decision to execute the Alcoa contract amendment" would be consistent with "sound business principles," and that if BPA would provide "*a rational business justification for a sale . . . that is supported by the record before the agency, we would be obliged to defer to the agency's expertise.*" *Id.* at 11992 (emphasis added). The court is pleading with BPA to provide something based on its acknowledged expertise, anything better than it provided in the administrative records for *PNGC I* and *PNGC II*, so the court can find that BPA's decision was not arbitrary and capricious.

Had the court really meant that BPA must compute the dollar value of a future power sales transaction to BPA, whether by pulling numbers out of the air or by running a sophisticated economic model, the court would have been far more specific. For example, the court could have stated that BPA must determine to profitability of power sales transactions. That would have required a dollars and cents analysis of future indirect benefits. Instead, consistent with the well established standard of review of BPA's final actions and the deference given BPA's decisions, the court asked only for a rational business justification based on "*financial or other business analysis or evidence.*" *Id.* at 11989. (emphasis added).

V. ***PNGC II* Offers Examples of Below Market-price Power Sales Justified by Non-monetized, Indirect Benefits**

PNGC II provides specific examples of how BPA might reasonably conclude that even a below-market price sale of power to Alcoa can be a sound business decision. None require that indirect benefits plus direct benefits meet or exceed costs. *Id.* at 11973. Those examples are (1) entering into the contract to "free up power to sell outside the Pacific Northwest"; (2) "assert[ing] that the physical sale of power has indirect benefits that might offset a below-market rate sale; or (3) offer[ing] a large customer a short-term discount with the expectation that the customer's future business at higher prices will more than make up for the short-term loss of revenue." *Id.* at 11973-74. The third example, a short-term discount with the expectation that the customer's future business at higher prices will more than make up for the short-term loss of revenue, relies more on an explanation of how the customer will provide additional future business and the likelihood of that happening. The court postulated that there may be evidence that Alcoa's current situation is not unique in history and that recovery should be anticipated in the future.

It also may be difficult to estimate the dollar value of reserves, light load hour purchases, delivery of relatively flat blocks of power and other, indirect benefits. BPA must, however, provide a "business analysis or evidence" (*Id.*) demonstrating existence of these benefits. BPA's business analysis or evidence can demonstrate that a physical sale will produce "benefits to the agency [that] are (a) likely or (b) sufficiently large" to justify a physical sale to Alcoa.

VI. If BPA Is Required to Estimate the Financial Value of Indirect Benefits, A Detailed Financial Analysis Is Not Required

The standard of review to determine whether BPA's estimate of the financial value of indirect benefits is arbitrary and capricious will be the same as the standard of review applied to BPA decisions: is the decision, or the analysis that supports the decision, arbitrary and capricious or otherwise unlawful? Holding financial forecasts to a higher standard would have the effect of resetting the standard for review of BPA decisions. In reviewing BPA's assessments of the financial value of indirect benefits, the court must simply assess whether BPA relied on improper factors, failed to consider an important aspect of the question, offered an explanation for its decision that runs counter to the evidence before, or rendered a decision that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. "This highly deferential standard presumes BPA's actions to be valid." *Public Power Council*, 442 F.3d at 1209.

In *APAC*, the court relied on the administrative record filed by BPA. *APAC*, 126 F.3d at 1175. The administrative record included BPA's Business Plan EIS, which was prepared to evaluate strategic business alternatives, including unbundled transmission service. In the chapter devoted to alternative DSI strategies, BPA considered the financial impact of reduced sales to DSIs and offsetting increased sales at a then higher rate to preference customers. The evaluation was based on sweeping generalizations. The Business Plan EIS estimated that BPA's preferred DSI strategy would provide BPA with benefits "that would be about \$50 million annually" based entirely on selling some of power that had been sold to DSI to other customers.²⁴ This figure appears to be a rough, back of the envelope estimate. Business Plan EIS at 4-151.

If BPA attempts to assign a financial value to indirect benefits, BPA may base its estimate on its own forecasts and estimates. For example, if indirect benefits of a physical power sale include a market for light load hour energy, BPA may estimate the amount of light load hour energy that Alcoa will purchase and the difference between the rate Alcoa will pay and (i) the amount of light load hour energy that, but for Alcoa's purchases, would be spilled and (ii) the price for the amount of energy that would be sold to other power customers. BPA's estimate of the value of this indirect benefit need not be the only analysis of this indirect benefit, and BPA's financial valuation need not be the best analysis. If other parties submit critiques of BPA's financial valuation, or submit their studies showing a different financial valuation, BPA must explain in its administrative record why it does not accept an alternative valuation

²⁴ Some of the assumptions used to reach this conclusion were wildly incorrect. For example, in 1995, when the Business Plan EIS was prepared, BPA assumed that it would take power that it had been selling to DSIs and replace in-lieu sales under the residential exchange program with actual, physical sales. "With the price of alternative power sources dropping, DSIs would find it easier to contract with other sources than to be subject to the uncertainties of BPA's interruptible top quartile service." Business Plan EIS at 4-151. Six years later, the west coast energy crisis forced market prices to record levels, causing many industries to close forever, including some DSIs. The Business Plan EIS is a caution that quantitative financial analysis of future events can be profoundly incorrect and is not a superior basis for decision making.

or agree with a critique of BPA's valuation.²⁵ BPA can, of course, modify its own, initial forecast of financial value based on the information it receives from others, and in some cases BPA must do so.²⁶

VII. Conclusion

PNGC II does not require that BPA determine the financial value of the indirect benefits associated with a physical power sale to Alcoa. BPA may identify other business analyses or evidence regarding indirect benefits to support a rational business justification for a physical sale. *PNGC II* provides examples for a non-financial justification. It is flatly incorrect to read *PNGC II* to require a financial valuation of indirect benefits that is determined by one of BPA's sophisticated programs

The court referred thirty-one times to the monetary or monetized benefits of the \$32 million payment to Alcoa. The court clearly understood the concept of monetary or monetized. The court twice referred to financial or monetary indirect benefits to BPA, once in the context of one of the ways BPA could provide a rational business justification for a sale to Alcoa (*Id.* at 11989) and once in noting that BPA did not quantify the past value of indirect DSI benefits (*Id.*).

On the other hand, *PNGC II* states that BPA can provide a rational business justification using non-financial analysis²⁷ and that that a rational business justification can be based on a business analysis or other evidence (in contrast to a financial analysis).²⁸ The court explicitly

²⁵ In *M-S-R Public Power Agency v. Bonneville Power Admin.*, 297 F.3d 833 (9th Cir. 2002), Petitioners argued that BPA's long-term forecasts of the amount of power it would sell Pacific Northwest customers was arbitrary and capricious. BPA forecasted the amount of power that would be available in excess of its Pacific Northwest customers' requirements based on power contracts it expected to offer Pacific Northwest customers, whereas M-S-R argued that BPA was "obligated to base its ten-year forecasts . . . solely on its then-current contracts" *Id.* at 842. The court found nothing arbitrary or capricious in the way BPA estimated the amount of power available for sale to M-S-R. *Id.* at 843.

²⁶ In *Golden Northwest Aluminum v. BPA* ("*Golden Northwest*"), 501 F.3d 1037, 1053 (9th Cir. 2007), the Ninth Circuit remanded to BPA rates adopted based, in part, on BPA estimates of the cost of BPA's fish and wildlife program because BPA's estimate of its fish and wildlife program costs were arbitrary and capricious. BPA underestimated its likely costs because it ignored new information in a study prepared by fish and wildlife agencies that have the statutory duty of protecting endangered species. *Id.* at 1052. Although the court did not fault the quality of BPA's initial cost estimates, the court found that, based on the information presented during BPA's rate proceeding, BPA should have known that its earlier estimate of costs was too low. *Id.* If BPA estimates the dollar value of indirect benefits associated with a sale of power to Alcoa, BPA must take into account information provided by others regarding BPA's estimates in the administrative record supporting its decision. Of course, the standard of review for BPA's decision to sell power to Alcoa is not the same as the standard of review in *Golden Northwest*. In *Golden Northwest*, BPA's rate decision was required to be based on the substantial evidence.

²⁷ In referring to BPA's explanation that DSIs take power during light load hours, in relatively flat blocks and provide power system reserves, the court stated, "These and other non-financial benefits to BPA could very well justify a less-than-market rate sale . . ." *PNGC II, Slip. Op.* at 11974

²⁸ After summarizing BPA's justifications for the monetized sale to Alcoa, the court summarized, "In short,

Mr. Max Laun
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rejected the argument that a power sale to Alcoa could not be consistent with sound business principles only if the IP rate is less than the market price for power,²⁹ finding that "non-financial benefits to BPA could very well justify a less-than-market rate sale."³⁰ To assert that *PNGC II* absolutely requires that a physical sale of power to Alcoa be justified by a forecast of the financial value of indirect benefits to BPA is to read out of the opinion the specific direction that a non-financial analysis or business analysis is sufficient, and to further assume that the court was incapable of speaking clearly.

If BPA does forecast the financial value of indirect benefits associated with a physical power sale to Alcoa, BPA must provide forecasts of the extent of indirect benefits and the financial value of the indirect benefits. The forecasts will not be arbitrary and capricious if the forecasts are consistent with the information available to BPA and are plausible because of BPA's expertise in such matters or because alternative forecasts or criticism of BPA's forecast can be ascribed to a difference in view.

If you have any questions, please feel free to contact me.

Very truly yours,

K&L GATES LLP



By
Harvard P. Spigal
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neither the record in this case nor the record in *PNGC* contains any financial or other business analysis or evidence to support the agency's assertion that future benefits to the agency are (a) likely or (b) sufficiently large to make the decision to give \$32 million away a sound business decision." *Id.* at 11989: (emphasis added).

²⁹ "Intervenor CFAC, another aluminum DSI, argues that this interpretation of BPA's governing statutes would render the IP rate a nullity, because it would never make business sense for BPA to sell to the DSIs at the IP rate when market rates exceed the IP rate, and DSIs would never accept the IP rate when market rates fall below the IP rate. We disagree." *Id.* at 11973.

³⁰ *Id.* at 11974

From: Harris, Scott Blake [Scott.Harris@hq.doe.gov]
Sent: Monday, October 26, 2009 8:59 AM
To: Roach,Randy A - L-7
Subject: FW: quick question

FYI. From the new Alcoa govt. affairs person.

Scott Blake Harris
General Counsel
United States Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
(202) 586-5281

-----Original Message-----

From: Harris, Scott Blake
Sent: Monday, October 26, 2009 11:58 AM
To: Cruise, Daniel
Cc: Lev, Sean
Subject: RE: quick question

Dan --

Your folks seem to believe they can fashion a firm seven year contract that would meet the reasonable business judgment test. As far as I can tell, BPA strongly disagrees. I've told your guys if they send me their argument as to why they are correct, I would be happy to share it with BPA for their response. But I also told them it was most unlikely HQ would overrule BPA and insist it sign a contract it did not believe met that test.

BPA, as you know, has been talking about a contingent contract -- 15 months or so a real contract, and the next five plus years essentially a BPA option. Your guys did not seem very excited about that; and I am skeptical.

Finally, I suggested again a strategy that would include signing a short-term contract, seeking expedited consideration from the 9th circuit of the inevitable challenge to that contract, and using the case as a mechanism to flesh out and expand the concept of reasonable business judgment so that it would not be overly restrictive. I had the impression your guys would at least consider that option -- which, at the moment, I believe is the best option available.

I've copied my colleague Sean Lev who participated in the meeting with me and can add anything I've missed.

Scott

Scott Blake Harris
General Counsel
United States Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
(202) 586-5281

-----Original Message-----

From: Scott Harris [mailto:sbharris@rcn.com]
Sent: Monday, October 26, 2009 10:52 AM
To: Cruise, Daniel
Cc: Harris, Scott Blake
Subject: Re: quick question

Will respond from my official email when I can.

Sent from my iPhone

On Oct 26, 2009, at 10:31 AM, "Cruise, Daniel"
<Daniel.Cruise@alcoa.com> wrote:

> Scott,
> Per our internal conversations and Alcoa's last meeting with you it
> sounds like the cleanest option is a 7 year contract based on a 'sound
> business principals' standard. It also sounds like the only way we
> can
> keep our business running. We think BPA and the courts would go for
> it.
>
> Is this in line with your thinking at this point? Or should I move my
> guys in a different direction?
> We're sending you a paper later today.
> Hope all is well.
> Daniel
>
> Tel. 212 836 2733
>
>
>
>