

19.0 TARGETED ADJUSTMENT CHARGE FOR UNCOMMITTED LOADS (TACUL)

In the initial proposal for the 2002 rate case, BPA proposed to establish an adjustment to the PF-96 and NR-96 rates, which are in effect through September 30, 2001. The TACUL is a charge that would be applied to an individual customer that purchases service for a load that was uncommitted and not included in BPA's 1996 rate case. Kitchen *et al.*, WP-02-E-BPA-36, at 1. The TACUL is an adjustment to the 1996 PF Preference (PF-96) rate for customers who place this uncommitted load on BPA. *Id.* The TACUL also will apply to the NR-96 rate. Kitchen *et al.*, WP-02-E-BPA-36(E), at 1. The purpose of the TACUL is to recover costs BPA may incur to provide firm power requirements service to those customers with loads uncommitted to BPA in the 1996 rate case and whose current power sales contracts expire on or before July 31, 2001. Kitchen *et al.*, WP-02-E-BPA-36, at 2.

To understand BPA's purpose for establishing the TACUL, it is important to understand the competitive pressures and customer access issues associated with the drive by many customers of BPA to diversify their load away from BPA in the mid-1990s. At that time, the market price for wholesale power was at or below BPA's cost of power. Many customers decided that it was in their best economic interest to take their load off BPA. Demands by many customers to reduce their obligations to purchase Federal power under existing BPA contracts led BPA to offer both new contracts and amendatory agreements. These contracts and amendments specifically provide BPA the right to set a rate to cover the cost to serve uncommitted or diversified load that a customer later requests BPA to serve. Therefore, in order to recover the costs to serve the load demands placed on BPA by customers requesting to return uncommitted load to BPA, BPA has, consistent with the terms of the contracts and amendatory agreements, established the TACUL as part of this section 7(i) proceeding.

19.1 BPA's Ratemaking Authority

Issue 1

Whether TACUL violates the fundamental concepts of public preference and FBS cost-based rates.

Parties' Positions

PNGC states that the Administrator must set rates according to specific mandates contained in BPA's organic statutes to recover the cost of producing and transmitting electric energy, and must give preference and priority to public bodies and cooperatives (public preference customers) when selling its power. PNGC Brief, WP-02-B-PN-01, at 2. PNGC concludes the public preference customers were accorded the legal right to buy power from BPA on a first-priority basis, at cost. *Id.* PNGC also summarily describes the 7(b)(2) rate test that BPA is directed to apply in setting the rates charged by BPA to its preference customers. *Id.* PNGC argues that given the background it describes, it is apparent that the TACUL BPA proposed is fatally flawed and violates the mandates of the Northwest Power Act, as well as BPA's other

organic statutes. *Id.* at 3. PNGC takes issue with the Draft ROD’s assertion that the TACUL does not violate the concepts of preference and FBS cost-based rates. PNGC Ex. Brief, WP-02-R-PN-01, at 4.

PPC argues that the TACUL violates the same statutory rights, detailed in the discussion concerning the TAC charge, that protect preference customers from tiered, discriminatory rates. PPC Ex. Brief, WP-02-R-PP-01, at 7. OURCA adopts and joins PPC’s position regarding the TACUL and also claims the Draft ROD “erroneously failed to eliminate the TACUL.” OURCA Ex. Brief, WP-02-B-OU-01, at 6.

BPA’s Position

The TACUL is a charge that would be applied to an individual customer that purchases service for a load that was uncommitted and not included in BPA’s 1996 rate case. Kitchen *et al.*, WP-02-E-BPA-36, at 1. The costs included in TACUL are FBS replacement costs. Kitchen *et al.*, WP-02-E-BPA-50, at 2. The cost of the TACUL will be based on BPA’s costs to replace the FBS to serve the specific uncommitted load the customer wishes to return to PF service. *Id.*

Evaluation of Positions

PNGC cites to the Bonneville Project Act of 1937, 16 U.S.C. §832-832m; the Northwest Power Act, 16 U.S.C. §839-839h; the Transmission System Act, 16 U.S.C. §838-838k; the Regional Preference Act of 1964, 16 U.S.C. §837-837h; and the FPA, 16 U.S.C. §824k(i) (FPA). PNGC quotes language from the Flood Control Act of 1944:

Rate schedules shall be drawn having regard to the recovery . . . of the cost of producing and transmitting such electric energy . . . Preference in the sale of such power and energy shall be given to public bodies and cooperatives.

16 U.S.C. §825s. PNGC also quotes the following language from section 4(a) of the Bonneville Project Act:

In order to insure that the facilities for the generation of electric energy at the BPA project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at such project, give preference and priority to public bodies and cooperatives.

16 U.S.C. §832c(a). PNGC also quotes section 7 of the Bonneville Project Act:

Rate schedules shall be drawn having regard to the recovery . . . of the cost of producing and transmitting such electric energy, including the amortization of the capital investment over a reasonable period of years.

16 U.S.C. §832f. By reference to the TAC, PPC also quotes section 4(a) of the Bonneville Project Act, as well as section 7(b)(1) of the Northwest Power Act that provides that “the Administrator shall establish . . . rates . . . for electric power sold to meet the general requirements of public body, cooperative, and Federal agency customers within the Pacific Northwest . . . Such . . . rates shall recover the costs of that portion of the FBS resources needed to supply such loads . . .” 16 U.S.C. §839e(b)(1). PPC Ex. Brief, WP-02-R-PP-01, at 5. PPC then argues that these statutes, taken together with the protections afforded preference customers in section 7(b)(2) of the Northwest Power Act, provide those customers the right to purchase Federal power at BPA’s lowest cost-based rate. *Id.*

PNGC identifies some but not all the statutory rate directives BPA is required to follow in establishing rates. PNGC, relying only on the two rate directives quoted and a passing reference to section 7(b)(2), wrongly concludes that it is “apparent” that BPA’s TACUL is fatally flawed and violates BPA statutes.

The TACUL is an adjustment to the PF-96 rate for those customers who place their uncommitted load on BPA. Kitchen *et al.*, WP-02-E-BPA-36, at 1. BPA’s basis for identifying uncommitted loads is the actual load the customers elected to serve with non-Federal power during the FY 1996-2001 rate period. Kitchen *et al.*, WP-02-E-BPA-50, at 3. The TACUL will provide BPA revenue protection against the costs of additional power that will be required to serve such load. Kitchen *et al.*, WP-02-E-BPA-36, at 2.

Because PNGC fails to recognize the full spectrum of BPA’s rate directives, PNGC is incorrect in its belief that BPA is somehow limited by statute from recovering the costs BPA incurs to serve uncommitted load.

BPA’s TACUL is grounded on multiple BPA rate directives. The primary rate directives are set forth in section 7 of the Northwest Power Act which, among other things, provides that BPA establish rates in accordance with sections 9 and 10 of the Transmission System Act, section 5 of the Flood Control Act of 1944, and the provisions of the Northwest Power Act. Section 7(a) of the Northwest Power Act authorizes BPA to set rates within a wide discretionary range. Under section 7(b)(1) BPA is directed to “establish a rate or rates . . .” applicable to public body, cooperative, and Federal agency customers. Not only must such rates “have regard to” the recovery of the costs of the Bonneville Project, they must also recover the costs of all the resources in the FBS used to serve public body, cooperative, and Federal agency customers. Under section 7(e) BPA has broad authority to design rates to recover its total costs to meet its revenue requirement.

PPC quotes section 4(a) of the Bonneville Project Act. This provision of the Northwest Power Act directs the Administrator to give preference and priority to public bodies and cooperatives when disposing of electric energy. 16 U.S.C. §832c(a). No conflict exists, nor does the PPC identify one, between the Administrator’s authority to establish the TACUL under BPA’s rate directives and the Administrator’s obligation to give preference and priority to public bodies and cooperatives. PPC also quotes language from section 7(b)(1) of the Northwest Power Act. PPC Ex. Brief, WP-02-R-PP-01, at 6. As noted above, section 7(b)(1) directs BPA to establish a rate or rates applicable to public body, cooperative, and Federal agency customers

that “have regard to” the recovery of the costs of all the resources in the FBS needed to supply such load. PPC also claims that TACUL cannot be reconciled with the preference provisions in BPA’s statutes, and cites to section 7(b)(2) of the Northwest Power Act. *Id.* This argument adds nothing to the PPC’s claim. BPA established the PF-96 rate consistent with section 7(b)(2). As a result, customers purchasing under the PF-96 rate have been afforded the appropriate rate protection as required under section 7(b)(2). *See* Wholesale Power Rate Development Study, WP-96-FS-BPA-05A, at 195 (*see, e.g.,* RDS 30 and RDS 31).

The Ninth Circuit Court of Appeals has recognized and upheld BPA’s broad authority to design rates. “In short, the statute does not require BPA to impose any particular type of rate on its customers. Rather it restricts BPA only to ‘sound business principles’ in setting rates to meet its revenue requirements.” *City of Seattle v. Johnson*, 813 F.2d 1364, 1367 (9th Cir. 1987). Given the multiple rate directives on which the TACUL is grounded, it is not “apparent” to BPA, as claimed by PNGC, that BPA’s TACUL is fatally flawed or is violative of statute. To the contrary, the TACUL is legal. Based on this evaluation and analysis of the law and the record, BPA disagrees with OURCA’s claim that it has “erroneously failed to eliminate the TACUL.” *See* OURCA Ex. Brief, WP-02-R-OU-01, at 6.

Decision

The TACUL does not violate the concepts of preference and FBS cost-based rates. The TACUL is consistent with BPA’s rate directives and is legal.

Issue 2

Whether TACUL is a market rate that violates BPA’s statutory ratemaking authority.

Parties’ Positions

PNGC argues that TACUL is a market rate that violates BPA’s statutorily constrained ratemaking authority. PNGC Brief, WP-02-B-PN-01, at 4; PNGC Ex. Brief, WP-02-R-PN-01, at 4. PPC argues that the TACUL is not grounded on the cost-based rate provisions found at 16 U.S.C. §839e(b)(1). PPC Brief, WP-02-B-PP-01, at 30. ICNU argues that BPA witnesses admit that imposition of TACUL charges makes the cost of BPA power higher than the market price. ICNU Brief, WP-02-B-IN-02, at 9. OURCA contends that BPA is obligated to serve public preference customers at the posted PF-96 rate through September 30, 2001. OURCA Ex. Brief, WP-02-B-OU-01, at 6. When requested, BPA has an obligation to serve the net requirements load of preference customers. *Id.* The public preference customers are entitled to purchase power from the FBS at the cost of the FBS resource or at the rate test rate, whichever is lower. *Id.*

BPA’s Position

BPA serves requirements loads with FBS resources. The TACUL is an adjustment to the PF-96 rate for those customers who place their uncommitted load on BPA. Kitchen *et al.*, WP-02-E-BPA-36, at 1. The costs that are included in the TACUL are FBS replacement costs.

Kitchen *et al.*, WP-02-E-BPA-50, at 2. The TACUL is a cost-based rate that is set to recover the cost of purchasing to meet load that is returning to BPA. *Id.* Under the TACUL, BPA will determine if firm power is available to serve a request. Kitchen *et al.*, WP-02-E-BPA-36, at 3. If firm power is available, it will be used to serve the request, and the customer will be served at PF; if firm power is unavailable, the request will be served with incremental purchases and will face the TACUL. *Id.* BPA will establish the price based on the lesser of BPA's monthly cost to serve the incremental load by purchasing resources at market, or the average monthly cost of BPA recallable power contracts. Wholesale Power Rate Schedules, WP-02-E-BPA-07, at 128.

Evaluation of Positions

PNGC and PPC claim the TACUL includes fees (*i.e.*, handling fees and brokerage fees) totally unrelated to the FBS and which are outside the ratemaking framework established by Congress in the Northwest Power Act. PNGC Brief, WP-02-B-PN-01, at 4; PPC Brief, WP-02-B-PP-01, at 30. PNGC claims that TACUL charges are in direct violation of section 7(b) of the Northwest Power Act, section 825s of the Flood Control Act, and section 832c(a) of the Bonneville Project Act. PNGC argues further that TACUL has nothing to do with "the cost of production [sic] and transmitting such electric energy" or the "amortization of the capital investments over a reasonable period of years" as required by the referenced statutes. PNGC Brief, WP-02-B-PN-01, at 4. PPC claims that the TACUL is not grounded on the cost-based rate provisions found at 16 U.S.C. §839e(b)(1). PPC Brief, WP-02-B-PP-01, at 30.

PNGC acknowledges that BPA has "broad authority to design rates to recover its total costs to meet its revenue requirement," but PNGC argues that broad authority is "constrained by the fundamental principles of preference which mandate that rates be 'drawn having regard to the recovery . . . of the cost of producing and transmitting such electric energy.'" 16 U.S.C. §825s. PNGC Ex. Brief, WP-02-R-PN-01, at 4. PNGC argues that the TACUL rate is a rate based on market purchases and/or a market index of the costs of electricity, and thus, does not meet BPA's statement that rates must "recover the costs of all of the resources in the FBS used to serve public body, cooperative, and Federal agency customers." *Id.*

PNGC, PPC, and OURCA fail to recognize and understand that the cost that BPA incurs in acquiring resources to meet load is a cost that must be recovered. Contrary to PNGC's claim that BPA has statutorily constrained ratemaking authority, BPA's rate directives grant BPA broad authority to establish a rate such as the TACUL to recover the cost incurred to serve returning uncommitted load. Similarly, OURCA's argument that public preference customers are entitled to purchase power for the FBS at the cost of the FBS resource or at the rate test rate, whichever is lower, is not correct and does not recognize BPA's broad authority to set rates such as the TACUL. Regardless of whether the cost is related to a low-cost generation resource or to a power purchase in the wholesale market (including associated fees), when BPA includes such cost in the FBS it must recover that cost. *See Kitchen et al.*, WP-02-E-BPA-50, at 2. Pursuant to section 3(10) of the Northwest Power Act, BPA may acquire resources to replace reductions in capability. Section 3(10) expressly provides that such replacement resources are FBS resources. For this reason, BPA's costs included in the TACUL to replace reductions in the capability of the FBS resources constitute FBS resources. Contrary to PNGC's and PPC's claim that the TACUL is in violation of section 7(b) of the Northwest Power Act and section 825s of the Flood Control

Act, and PNGC's claim that TACUL violates section 832c(a) of the Bonneville Project Act, the TACUL is legally grounded on multiple BPA rate directives. BPA's rate directives provide BPA with the authority to recover its costs and to establish a rate or rates that will recover the costs of the FBS used to serve BPA's public body, cooperative, and Federal agency customers, 16 U.S.C. §839e(b)(1), as well as broad rate design authority under section 7(e).

Section 7(e) of the Northwest Power Act grants the Administrator considerable rate design discretion, including the ability to employ rate designs that use a value-of-service approach or market-based approach, or rate designs which recover BPA's costs through formula rates or pricing methodologies. Section 7(e) provides that:

Nothing in this chapter prohibits the Administrator from establishing, in rate schedules of general application, a uniform rate or rates for sale of peaking capacity or from establishing time-of-day, seasonal, or other rate forms.

16 U.S.C. §839e(e). BPA's rates are certainly "cost based" in the sense that BPA's rates "have regard to" cost recovery and, in the aggregate, do ultimately result in total cost recovery. Nevertheless, within the context of those directives, section 7(e) and its legislative history make clear that the cost allocation directives concern the amount of revenues to be recovered from customer classes, and not the design of the rates to recover those revenues. Congress did not direct BPA to use specific rate structures or billing practices to show the cost of new power supplies. As a result, it was recognized that many provisions could lead to rate reforms. *See, e.g., Comptroller General of the United States, Comments on Pacific Northwest Power Planning and Conservation Act—H.R. 8157*, reprinted in Cong. Rec. H 10687 (November 17, 1980).

The language PNGC cites in support of its argument that TACUL is unrelated to BPA's cost further ignores section 7(a) of the Northwest Power Act, which requires that BPA's "rates shall be established and, as appropriate, revised to recover, in accordance with sound business principles, the cost associated with the acquisition, . . . of electric power, . . ." Contrary to PNGC's assertion, BPA's rate directives do not limit BPA from including the cost of resources, including power available from the market, acquired to replace the FBS in the rates established under section 7(b)(1).

PNGC makes the assertion that the TACUL is an "opportunity cost" based rate that BPA views as a cost-based rate. PNGC Brief, WP-02-B-PN-01, at 4. PNGC provides no evidence in the record to support its claim that the TACUL is an "opportunity cost rate." BPA rejects this characterization of the TACUL. BPA has testified that the TACUL is a cost-based rate that is set to recover the cost of purchasing to meet load that is returning to BPA. Kitchen *et al.*, WP-02-E-BPA-50, at 2. PNGC then claims the PF-96 rate, which it thought it was contracting for, was either the existing PF-96 rate or some updated embedded cost rate. PNGC Brief, WP-02-B-PN-01, at 5. PNGC describes its understanding of what it thought "cost-based rates" meant, and states that if PNGC understood that the TACUL would expose PNGC to a market rate, PNGC would have simply stayed in the market itself. *Id.*; PNGC Ex. Brief, WP-02-R-PN-01, at 3. PNGC argues that the actual contracts entered into between BPA and the diversifying utilities explicitly provide that returned load would be served at a "PF rate or rates"

and not at full incremental cost. *Id.* at 4. Despite what PNGC may have understood, BPA discussed the nature of the type of rate BPA would establish to serve uncommitted load later returned to BPA service in the Administrator’s ROD on Templates (New Power Sales Contracts) and Amendatory Agreement No. 7 (AA7) (published May 13, 1996) [hereinafter AA7 ROD]. Under these agreements, customers that chose to diversify their load away from BPA agreed to allow BPA to establish a separate or new rate to serve load subsequently returned to requirements service. The AA7 ROD was published after many public meetings with BPA customers on contract templates and the future business relationship between BPA and its customers. In particular, the AA7 ROD states that customers who diversify and wish to “reestablish service will not get the PF rate available to the loads which stayed with BPA, but will pay at least the *full incremental cost* associated with providing that service, as set through a 7(i) process.” AA7 ROD at 10 (emphasis added). PNGC argues that the contract language “PF rate or rates” negated the AA7 template language. PNGC Ex. Brief, WP-02-R-PN-01, at 4. PNGC’s logic appears to be that if the contract did not actually state an incremental cost rate, then the language “a PF rate or rates” cannot include incremental costs. The language “a PF rate or rates” is consistent and predicated on BPA’s rate directives. BPA serves customers purchasing PF power under the PF power rate. The language in the contract acknowledges this. At the same time, the contract does not specify the particular PF rate such load would be served under. No PF rate assurance was given in the contract concerning which PF rate or rates would apply to serve uncommitted load. Therefore, the contract language did not negate the AA7 policy to charge returned load the full incremental cost associated with serving such load, as claimed by PNGC.

Finally, ICNU argues that BPA admits the TACUL will be higher than market. ICNU Brief, WP-02-B-IN-02, at 9. ICNU cites to BPA witnesses’ cross-examination testimony (Tr. 1439, lines 15-23) to support this claim. Review of the transcript makes clear that BPA made no such admission.

Q. Had these customers stayed in the market with this diversified load for August and September and not returned to BPA until October 1st, they would be paying about the same thing, would not they, except for maybe they would save BPA’s internal handling fees?

A. (Ms. Arrington) That’s probably right.

As this dialogue shows, the BPA witness was engaged in a purely hypothetical line of questioning regarding what costs may be included in the TACUL. Because ICNU’s claim is not supported by the record, it is rejected. Moreover, it is not certain that TACUL will always result in a higher charge than the base PF-96 rate. If firm power is available, it will be used to serve the request, and the customer will be served at PF. Kitchen *et al.*, WP-02-E-BPA-36, at 3.

Decision

The TACUL is a rate based on BPA costs to replace the FBS and is not a market rate that violates BPA’s statutory ratemaking authority.

Issue 3

Whether the TACUL was set in violation of the Northwest Power Act section 7(i) ratesetting directives.

Parties' Positions

PNGC argues that the TACUL was set in violation of the 7(i) process. PNGC Brief, WP-02-B-PN-01, at 5; PNGC Ex. Brief, WP-02-R-PN-01, at 5.

BPA's Position

BPA decided to use this current section 7(i) rate proceeding to establish the TACUL because BPA determined that it was necessary only to add a charge to the PF-96 rate to reflect the cost it incurs to serve returned incremental load. Kitchen *et al.*, WP-02-E-BPA-50, at 9. Since it is not certain that BPA's service to such load will result in increased costs, the TACUL provides flexibility to recover costs only when the cost is certain to occur. Second, parties can take advantage of the timing of this current section 7(i) rate proceeding. *Id.* This lessens the administrative burden and cost associated with having an additional section 7(i) process for the sole purpose of establishing a new PF rate to apply to returned load. *Id.*

Evaluation of Positions

PNGC notes that it and other parties argued in their testimony that BPA failed to begin a 7(i) proceeding for purposes of developing a new PF rate. PNGC Brief, WP-02-B-PN-01, at 5; Sabala *et al.*, WP-02-E-PN-06, at 11; Opatrny *et al.*, WP-02-E-PP-02. PNGC argues that the PF-96 rates were set in the PF-96 proceeding, using loads and costs for that test period, pursuant to duly noticed and procedurally accurate proceedings, and that there is no PF-96 proceeding open for the purpose of establishing a new PF-96 rate. PNGC Brief, WP-02-B-PN-01, at 5. Further, PNGC argues that the TACUL is being discussed in the current public process but that the revenue and load data needed to support a PF rate were never provided. PNGC Ex. Brief, WP-02-R-PN-01, at 5.

PNGC's argument is not persuasive. This current section 7(i) rate proceeding is the appropriate forum to establish the TACUL. PNGC argues that the revenue and load data that are needed to support a PF rate were never provided. However, BPA determined that it was necessary only to add a charge to the PF-96 rate to reflect the cost BPA incurs to serve returned incremental load. Kitchen *et al.*, WP-02-E-BPA-50, at 9. The load will be served at the PF-96 rate, for which load and resource data are available from the 1996 rate case, plus the TACUL. The TACUL will be determined individually and based on BPA's cost to replace the FBS to serve the specific uncommitted load the customer wishes to return to PF service. *Id.* at 9, 10. BPA proposed to establish an adjustment to the PF-96 rate, which is in effect through September 30, 2001. These customers participated in the 1996 rate case and again in this 7(i) proceeding that is establishing the TACUL. Thus, due process is being served in the current 7(i) process.

Although PNGC argues that it is not within BPA's discretion to determine who is and who is not entitled to have their rate set according to the specific procedures required by law, PNGC Brief, WP-02-B-PN-01, at 5; this adjustment, the TACUL, is targeted to apply to those customers that request BPA to provide service to load that was not committed to BPA for service under contract nor forecast to be served under the effective PF-96 rate. Kitchen *et al.*, WP-02-E-BPA-36, at 2. PNGC argues that for due process to afford any benefit, the diversifying customers should be able to make their decisions with advance knowledge of the possibility of a non-PF TACUL. PNGC Ex. Brief, WP-02-R-PN-01, at 5. BPA rejects PNGC's characterization that the TACUL is a non-PF based rate. The TACUL is PF based. The TACUL will recover the additional cost of serving uncommitted customer load returned to requirements service. Kitchen *et al.*, WP-02-E-BPA-36, at 2. The methodology of the TACUL provides that if no incremental cost is incurred, then the TACUL will be the PF-96 rate. *Id.* at 3.

PNGC, like other parties, is being provided all the procedural opportunities and safeguards consistent with Northwest Power Act section 7(i) to make its case regarding the proposed TACUL. PNGC even describes the procedures that have been provided in this section 7(i) proceeding: publication of notice of the proposed rates in the Federal Register, holding one or more public hearings, providing the opportunity to be heard through direct and rebuttal testimony, allowing cross-examination of the evidence, and the other procedural safeguards inherent in any contested quasi-judicial proceeding. PNGC Brief, WP-02-B-PN-01, at 5. It is apparent that the instant proceeding is working, as is evident from the testimony filed by parties opposing BPA's proposed TACUL. Kitchen *et al.*, WP-02-E-BPA-50, at 9. PNGC claims, however, that it is working in the wrong rate case. PNGC Brief, WP-02-B-PN-01, at 5. PNGC notes that the PF-02 rate proceeding is progressing in the same manner as the PF-96 proceeding, using loads and costs for that test period, pursuant to duly noticed and procedurally accurate proceedings. *Id.* PNGC's argument is not persuasive. In forecasting the load that is subject to the TACUL in this section 7(i) proceeding, BPA testified that BPA's basis for identifying uncommitted loads is the actual load customers elected to serve with non-Federal power during the 1996-2001 rate period. Kitchen *et al.*, WP-02-E-BPA-50, at 3. A number of customers have given notice that they will return previously uncommitted load to BPA requirements service. Kitchen *et al.*, WP-02-E-BPA-36, at 4. BPA is forecasting, on an annual average basis, that this load will total approximately 72 aMW in Operating Year (OY) 2001 and 43 aMW in OY 2002. *Id.* BPA will price the TACUL to apply to each individual customer requesting service based on the size of that customer's request and the cost to BPA to purchase power to meet that request. *Id.*

PNGC argues that there is a due process harm because the TACUL was proposed, and if it is adopted, PNGC alleges, it will have a retroactive effect. PNGC Brief, WP-02-B-PN-01, at 6; PNGC Ex. Brief, WP-02-R-PN-01, at 5. PNGC adds that the customers who are going to be subject to TACUL have made decisions relative to whether to diversify based on what they know about BPA's rate structure and financial goals adopted in the 1996 rate case. *Id.* PNGC contends the TACUL is proposed to be assessed against customers who signed up to diversify their load years ago without any advance notice or knowledge that a market-based TACUL rate would be applied to their returned load. PNGC Brief, WP-02-B-PN-01, at 6.

It is clear that PNGC simply does not like the proposed TACUL and does not like its members' contracts with BPA that afforded them notice that if BPA determined it necessary, BPA would establish a rate such as the TACUL. Despite PNGC's contention, customers who diversified their load under new contracts or amendatory agreements were given notice that load subsequently returned to BPA requirements service would be subject to a separate or new rate established to recover the full incremental cost of serving such load. AA7 ROD, at 10. BPA does not agree that customers that diversified did so based on BPA's rate structure and financial goals in the 1996 case. BPA believes that customers' decisions to diversify were based largely on economics and were manifest through their desire to access resources that were less expensive than BPA's rates. In the process of developing the contracts, BPA was explicit regarding the fact that BPA would reserve the right to charge the customer for the cost of serving the load returned such that BPA's other, non-diversified customers would not be impacted. *Id.*

The two-year notice period will give customers the right to return but allow BPA the opportunity to establish a separate requirements rate that ensures the returning customer pays the actual cost of their return and that their return does not economically harm customers that had chosen to leave their load on BPA.

Id.

Contrary to PNGC's account, notice of a new or separate rate or rates, such as the TACUL, was given in the AA7 ROD. BPA and those customers with the right to return load under AA7 and the 1996 contracts agreed that BPA could establish a rate to apply to the service of any such customer-returned load. Kitchen *et al.*, WP-02-E-BPA-36, at 2. Moreover, in general rate case workshops held before BPA filed its initial rate proposal, the subject of TACUL was discussed with representatives of customers. Tr. 1119. Application of the TACUL would not have a retroactive effect.

Decision

The TACUL is being set consistent with the rate directives of Northwest Power Act section 7(i).

19.2 Uncommitted Loads/Diversification Issues

Issue 1

Whether TACUL unjustly discriminates both between and among diversified customers and between diversified customers and other preference customers of BPA.

Parties' Positions

PNGC argues that the TACUL rate is applied on an arbitrary basis and is unduly discriminatory. PNGC Brief, WP-02-B-PN-01, at 9. PNGC states that the decision as to which customers would be forced to pay the TACUL was made internally at BPA with no customer input. *Id.* PNGC argues that BPA had no basis upon which it could assume these customers would no longer be preference customers after the expiration of their diversification contracts. *Id.* ICNU notes that

a preference customer will pay different rates for power depending on whether its load was served before or after 1996, and regardless of whether the customer is currently serving that load. ICNU Brief, WP-02-B-IN-01, at 8.

PNGC states that the customers that are potentially subject to the TACUL have a statutory right to continue their preference service, and that BPA has no basis on which to deny these customers their entitlement to preference power. PNGC Brief, WP-02-B-PN-01, at 10. PNGC argues that the TACUL charge treats one set of preference customers of BPA differently from another without any cost basis for doing so. *Id.* PNGC argues that the impacts of higher overall costs should rightfully be borne by all classes of customers. *Id.* PNGC estimates that the difference between the projected market price of electricity for August and September 2001, and the PF-96 rate for those months for the 32 aMW at issue is at least \$5 million. *Id.* PNGC further argues that the TACUL unduly discriminates because there is no difference in the cost to serve the returned load from other load on BPA's system. PNGC Ex. Brief, WP-02-R-PN-01, at 6.

BPA's Position

Customers subject to the TACUL are PF customers that currently purchase requirements firm power from BPA under: (1) 1981 power sales contracts that expire on or before July 31, 2001, as may be amended; and (2) AA7 to the 1981 power sales contracts, or new "1996" power sales contracts, where the customer provides BPA notice after December 7, 1998, for requirements service for the period after December 7, 2000, and prior to September 30, 2001, consistent with the terms of the customer's power sales contract. Kitchen *et al.*, WP-02-E-BPA-36, at 3. Customers that diversified their power supply by signing either an AA7 or a new "1996" power sales contract agreed that BPA had the right to establish a rate to serve loads should these customers return to firm power requirements service. *Id.*

The cost of the TACUL will be based on BPA's cost to replace the FBS to serve the specific uncommitted load the customer wishes to return to PF service. Kitchen *et al.*, WP-02-E-BPA-50, at 9-10. Because these loads are returning to BPA service, they are an additional load to the base 1996 rates and may require additional FBS resources. *Id.* at 10. Since these loads can be identified as loads in addition to the customer's load that BPA is already obligated to serve during the FY 1996-2001 rate period, the costs incurred to serve such additional loads can be identified. *Id.* BPA will base the cost to serve these additional loads on the costs that BPA will incur to serve the additional load. *Id.*

Evaluation of Positions

PNGC makes several arguments to support its contention that the proposed TACUL is unjust and unduly discriminatory both between and among diversified customers, and between diversified customers and other preference customers of BPA. First, PNGC argues that the TACUL discriminates against customers that diversified and those that did not. To support its argument, PNGC relies on the Federal Power Act, 16 U.S.C. §824d(b), and selected pages in publications on regulating public utilities. PNGC Brief, WP-02-B-PN-01, at 7; citing Phillips, *The Regulation of Public Utilities*, 411-12 (2d ed. 1988), and Bonbright, *Principles of Public Utility Rates*, 515-546 (1988).

BPA notes that neither the section of statute cited by PNGC nor the publications govern BPA's ratemaking. BPA establishes rates in accordance with section 7 of the Northwest Power Act. The TACUL is neither unjust nor unduly discriminatory. TACUL targets and applies to customers with uncommitted load who now request to return such load to requirements service. Kitchen *et al.*, WP-02-E-BPA-36, at 2. The TACUL will provide BPA revenue protection against the cost of additional power that will be required to serve such load. *Id.* Such a rate is consistent with the primary directives of section 7 that BPA recover its total costs. BPA is forecasting that market prices will be above BPA's PF power costs and that firm inventory will be unavailable to serve this additional load. *Id.* If market prices are above PF and BPA is required to serve incremental loads by purchasing at market, then the TACUL would hold BPA financially harmless from having to purchase at market to serve incremental loads. *Id.* Customers that diversified their power supply by signing either an AA7 or "1996" power sales contract agreed that BPA had the right to establish a rate to serve loads should these customers return to firm power requirements service. *Id.* at 3.

PNGC argues that the TACUL is arbitrary and *per se* unduly discriminatory because it would apply to some but not all load of the customers who diversified. PNGC Brief, WP-02-B-PN-01, at 7.

ICNU concludes that the end result is that preference customers will not be treated the same and will pay different power rates based on when they seek to purchase power under BPA's PF rate. ICNU Brief, WP-02-B-IN-01, at 8. PNGC refers to a December 7, 1998, decision by BPA to establish the TACUL as arbitrary because there was no customer input or notice. PNGC points out that some customers that were not subject to the TACUL had already made requests to return load to BPA. PNGC Brief, WP-02-B-PN-01, at 7. PNGC also argues that the timing of BPA's decision is not relevant to BPA's cost to serve. *Id.* at 8. PNGC argues that BPA ignored the argument that temporal discriminatory actions by utilities are *per se* discriminatory absent other discrete distinguishable cost causing factors. PNGC Ex. Brief, WP-02-R-PN-01, at 6. That is, the returned load in August and September of 2001 places no different costs on BPA than customers who provided notice of returned load prior to December 7, 1998, and there is no way for BPA to distinguish which of its customers will cause it to experience increased costs in those two months, because all of BPA's customers cause increased costs. *Id.* at 5-6. For the foregoing reasons, PNGC concludes that BPA should simply not establish the TACUL at all because those prior requests, including a large amount of PNGC's own diversified load, will not be subject to the TACUL. PNGC Brief, WP-02-B-PP-01, at 7-8.

BPA's decision to establish the TACUL was not arbitrary. Nor is the TACUL arbitrary and *per se* unduly discriminatory. Contrary to PNGC's argument that the timing of when BPA decided to establish the TACUL is *per se* discriminatory absent "discrete distinguishable cost causing factors," the increase in the amount of uncommitted load returning to BPA relates to the timing of BPA decisions to establish the TACUL to recover the "discrete distinguishable cost" associated with serving such load. As more customers made requests to return diversified load, which increased the amount of power BPA would be obligated to supply, BPA took the prudent step to determine the availability of its supply on a planning basis. Kitchen *et al.*, WP-02-E-BPA-50, at 8. Making this determination was consistent with BPA's contract right to establish the TACUL. The December 7, 1998, decision to establish the TACUL was based on

preliminary results from BPA's Loads and Resources Study, WP-02-E-BPA-01, which showed that on a planning basis BPA would be required to purchase power to meet further requests by customers to return additional diversified load. *Id.* Recognizing its contract right to establish a separate or new rate to serve such load, BPA made the decision to exercise that right. This decision was BPA's alone. It did not require customer notice or input. BPA determined that it would be financially harmed if it served additional loads without having a charge to reflect BPA's costs of purchasing resources to serve additional returning uncommitted load. Tr. 1116.

PNGC states that BPA had no basis on which it could assume "these customers" would no longer be preference customers after the expiration of their diversification contracts. PNGC Brief, WP-02-B-PN-01, at 9. BPA is not certain who "these customers" are that PNGC refers to; nonetheless, BPA has not stated such a basis, nor has BPA denied preference to customers accorded preference. PNGC member cooperatives are certainly assumed to continue to be preference customers upon expiration of their diversification contracts. PNGC argues that because its members are preference customers they should be entitled to cost-based rates like all other preference customers, and that the cost BPA would otherwise incur to serve PNGC members should be borne by all classes of customers. PNGC Brief, WP-02-B-PN-01, at 10. PNGC contends that section 7(g) of the Northwest Power Act constrains BPA to apply generally accepted ratemaking principles which disfavor undue and unjust discrimination. PNGC Brief, WP-02-B-PN-01, at 10. PNGC contends further that nothing in the history of the Northwest Power Act contemplates the notion that BPA would discriminate in ratemaking against a class of customers who acquired a contract resource which then expired, resulting in the load coming back to BPA. *Id.*

The TACUL does not, as claimed by PNGC, result in undue and unjust discrimination. Section 7(g) requires that BPA "equitably allocate" to power rates certain costs in accordance with generally accepted ratemaking principles and other provisions of the Northwest Power Act. But even this directive to allocate was premised upon the over-arching obligation of the Administrator to recover total costs. Congress stated with regard to section 7(g) that:

The costs and benefits under this section 7(g) are intended to be applied in an equitable manner and as appropriate to any or all of the rates for power sales of the Administrator in order to assure that [she] can meet the requirements of section 7(a) to collect sufficient revenues to recover all of [her] costs . . .

S. Rep. No. 96-272, 96th Cong., 1st Sess. 32 (1979). BPA believes it is appropriate that those customers that cause the costs to be incurred related to serving uncommitted load should be subject to the TACUL. If one accepts PNGC's proposition, BPA would not be allocating costs and benefits in an equitable manner if the costs BPA incurs to serve returning uncommitted load are borne by all customers. BPA believes that in this situation it is appropriate to protect those customers not causing the costs to be incurred. The causation for these costs is easily identified and attributable to returning uncommitted load; therefore, it is just and reasonable to design the TACUL to recover the specific incremental power costs associated with supplying such load.

Decision

The TACUL is not discriminatory either between and among diversified customers or between diversified customers and other preference customers of BPA.

Issue 2

Whether the PF TACUL is discriminatory and is a charge against loads that cannot be distinguished from the other PF loads that will not be assessed a TACUL charge.

Parties' Positions

PPC argues that the PF TACUL is a charge against loads that cannot be distinguished from other PF loads that will not be assessed a TAC charge. PPC Brief, WP-02-B-PP-01, at 31. PPC argues that BPA's "TAC logic" compels the conclusion that PF TACUL loads are "expected," because BPA has known about the loads well in advance of the September 30, 2000, cutoff for "expected" loads. *Id.* In addition, PPC argues that there is nothing to distinguish these PF TACUL loads from the IOU loads, including the 100 aMW of incremental load at issue in this case under BPA's IOU settlement sales, which would be immune from TAC. *Id.* PPC claims that BPA characterizes the IOU 100 aMW as "expected" load. *Id.* PPC argues that such characterizations are arbitrary and discriminatory and produce a rate structure that cannot be supported under the law. *Id.*; PPC Ex. Brief, WP-02-R-PP-01, at 6.

BPA's Position

The TACUL will be charged to all customers that meet certain criteria; that is, the TACUL will be paid by all customers that return uncommitted customer load to requirements service after December 7, 2000, through September 2001. Kitchen *et al.*, WP-02-E-BPA-36, at 2. BPA and those customers with the right to return load under AA7 and the 1996 contracts agreed that BPA could establish a rate to apply to the service of any such customer-returned load. *Id.* The cost of the TACUL will be based on BPA's cost to replace the FBS to serve the specific uncommitted load the customer wishes to return to PF service. Kitchen *et al.*, WP-02-E-BPA-50, at 9-10. Because these loads are returning to BPA service, they are an additional load to the base 1996 rates and require additional FBS resources. *Id.* at 10. Since these loads can be identified as loads in addition to the customer's load that BPA is already obligated to serve during the FY 1996-2001 rate period, the costs incurred to serve such additional loads can be identified. *Id.* BPA will base the cost to serve these additional loads on the costs that BPA will incur to serve the additional load. *Id.*

Evaluation of Positions

PPC's argument that BPA's "TAC logic" renders load that would be subject to the TACUL as "expected" is misplaced and illogical. PPC's argument would require that BPA replace the PF-96 rate basis and current contract terms used for determining uncommitted load and substitute them with the timeframe that will be used to determine or measure when load is "expected" for purposes of the PF-02 rate. PPC makes a secondary argument that nothing

distinguishes uncommitted load subject to the TACUL from IOU loads, such as the 100 aMW incremental load at issue in the 2002 power rate case. PPC Brief, WP-02-B-PP-01, at 31. PPC further states that it has demonstrated that the loads to which BPA seeks to apply a TACUL charge are indistinguishable from other loads that will not be assessed a TACUL charge, including the proposed 100 aMW of incremental load to be sold to the IOUs. PPC Ex. Brief, WP-02-R-PP-01, at 6. PPC contends that “[d]isparate treatment of similar loads is arbitrary, capricious and produces a rate structure unsupported by law.” *Id.*

Contrary to PPC’s assertion that BPA characterizations are arbitrary and discriminatory, the fact is that uncommitted load that is returning to requirements service under current contracts is distinct in several ways from IOU loads that may be served in the future. First, the 100 aMW of IOU incremental load that PPC points to is included in studies of load that BPA is forecasting will be served by BPA under future contracts and under a new rate schedule, not the PF-96 rate. *See Arrington et al.*, WP-02-E-BPA-49, at 5. Second, neither the 100 aMW of load nor any other amount of load has been requested by any IOU to be served as uncommitted load returned under their existing BPA contracts. Any such requests to serve uncommitted IOU load will be similarly subject to an NR TACUL. *Kitchen et al.*, WP-02-E-BPA-36(E1). Finally, the amounts of uncommitted load that customers wish to return now were not forecast, *i.e.*, “expected,” to be served under the PF-96 rate. BPA made forecasts of the amount of diversification that could be expected to occur in the rate period. *Kitchen et al.*, WP-02-E-BPA-50, at 3. That information was an estimate. Indeed, the actual amount of diversification by BPA’s preference customers was greater than that which BPA forecasted, which results in a greater amount of load being uncommitted during the FY 1996-2001 rate period. *Id.* The 1996 ROD described this situation clearly:

In fact, BPA has continued to lose sales during the course of this rate proceeding . . . [P]rojections of public utility purchases from BPA have been reduced to account for utilities that are seeking actively other suppliers . . . Even so, customers represented by the WPAG argue that BPA has misjudged its position in wholesale market, and has grossly underestimated the desire of its preference customers to diversify their power supply. *Beck, et al.*, WP-96-E-WA-13, at 6, 10-11. They note that, at the time their testimony was submitted in November 1995, preference customers had made submissions to BPA pursuant to their power sales contracts to reduce their load on BPA by over 780 aMW, and that they expected to see this number increase. *Id.* Since that time, some of these customers have sued BPA in an attempt to access alternative power suppliers.

1996 ROD, at 18. In summary, PPC confuses the basis for determining uncommitted load for purposes of TACUL under the PF-96 rate with the application of the TAC to the PF-02 rate.

Decision

The PF TACUL is not discriminatory, because the loads subject to the TACUL can be distinguished from the other PF loads that will not be assessed a TACUL charge.

Issue 3

Whether the diversification contracts between PNGC diversifying customers and BPA allow the TACUL to be imposed.

Parties' Positions

PNGC argues that BPA is prohibited from applying the TACUL to load that PNGC member utilities are returning to PF service under their existing contracts for the period from November 2000 through April 2001, because BPA was given 24-month notice as required by contract. Sabala *et al.*, WP-02-E-PN-06, at 10. PNGC argues that the original diversification agreements limit BPA's ability to apply "a separate PF rate" to just those time periods that are encompassed by the terms of the diversification agreements themselves. PNGC Brief, WP-02-B-PN-01, at 11.

BPA's Position

PNGC member utilities provided the 24-month written notice to BPA as required under the terms of their existing contracts with BPA. Kitchen *et al.*, WP-02-E-BPA-50, at 8. The load specified by each utility that is returning to PF service during the period from November 2000 through April 2001 will be served at the PF-96 rate without the TACUL. *Id.* At the time the PNGC member utilities made their request to return load, BPA determined that it did not need to set a new rate or TACUL to serve such load. *Id.*

July, August, and September 2001 are months in which some of BPA's customers will not have a contract to purchase because their existing power sales contracts expire either June 30, 2001, or July 31, 2001. *Id.* Such customers have the right to request new contracts to purchase power from BPA upon expiration of their existing contracts; or they may amend their existing contract to extend its duration through September 30, 2001. *Id.* BPA's proposal to establish the TACUL in this section 7(i) rate proceeding means that a customer that chooses either to extend the term of its existing contract or to execute a new contract would be subject to the TACUL for its previously uncommitted load during the July through September 2001 period. *Id.* PNGC members chose to extend the term of their existing contracts through September 30, 2001, and agreed that BPA may establish a new PF rate to serve their returned load. *Id.*

Evaluation of Positions

PNGC argues that because the original agreements terminated on July 30, 2001 (Tr. 1424), BPA's attempt to assess a TACUL in August and September 2001 is not permitted by those agreements, as represented by the BPA TACUL panel. PNGC Brief, WP-02-B-PN-01, at 11. PNGC argues that section 12(g) of the contract (WP-02-E-PN-14) provided only for the possibility of a new PF rate for load which was diversified during the term of the original contracts, and PNGC's member loads for August and September were not so diversified. *Id.* Thus, PNGC argues that BPA must treat this entire load as it would any other preference customer's load and assess the PF rate in effect at the time, which is the current PF-96 rate. *Id.* at 12.

BPA is not persuaded by PNGC's position for several reasons. First, section 12(g) of the contract, which PNGC references in its brief, clearly provides that the parties agreed that the provisions of section 12(g) would remain after expiration or termination of the contract. *See* PNGC Brief, WP-02-B-PN-01, at 11; WP-02-E-PN-14. Second, BPA has broad authority to design rates under section 7(e) of the Northwest Power Act. If costs that were not previously forecast to be served in the rate period will be incurred to serve uncommitted load, BPA has the authority to set a rate that will recover its cost to serve such load. Third, BPA witnesses testified in cross-examination that TACUL remains an issue for the two months because of the diversification pattern that existed in the previous five years under the PNGC members' contracts. Tr. 1433. Fourth, PNGC's portion of load that is subject to the TACUL in August and September is load that has been uncommitted to BPA service.

The TACUL is intended to apply to a customer that chooses either to extend the term of its existing contract or to execute a new contract, which would provide requirements service to previously uncommitted load during the July through September 2001 period. Kitchen *et al.*, WP-02-E-BPA-50, at 9. PNGC members chose to extend the term of their existing contracts through September 30, 2001, and agreed that BPA may establish a new PF rate to serve their returned load. *Id.*

Decision

The diversification contracts between PNGC diversifying customers and BPA allow the TACUL to be imposed.

Issue 4

Whether the diversification agreements between BPA and PNGC member cooperatives allow BPA to establish a new rate or rates.

Parties' Positions

PNGC argues that "the amended PNGC member contracts with Bonneville that permitted diversification do specifically permit Bonneville to establish a new PF rate in August and September of 2001 [sic]." PNGC Brief, WP-02-B-PN-01, at 12. But "those contracts do not permit Bonneville to establish any rate that it wishes." *Id.* Rather, the "contract as amended, provides that Bonneville may elect to establish a new *PF rate*." *Id.* (emphasis in original). PNGC argues that the TACUL violates the explicit restriction contained in BPA's contracts with the diversifying customers by attempting to establish a market rate that is not an embedded cost-based PF rate. *Id.* PNGC argues that the TACUL is not a PF rate. PNGC Ex. Brief, WP-02-R-PN-01, at 6.

BPA's Position

Customers that diversified their power supply by signing an AA7 or a new "1996" power sales contract agreed that BPA had the right to establish a rate to serve loads should these customers return to firm power requirements service. Kitchen *et al.*, WP-02-E-BPA-36, at 3. The TACUL

will apply to a customer that chooses either to extend the term of its existing contract or to execute a new contract which would provide requirements service to previously uncommitted load during the July through September 2001 period. Kitchen *et al.*, WP-02-E-BPA-50, at 9. PNGC members chose to extend the term of their existing contracts through September 30, 2001, and agreed that BPA may establish a new PF rate to serve their returned load. *Id.*

Evaluation of Positions

PNGC argues that the PNGC member contracts with BPA that permitted diversification allow BPA to establish a new PF rate in August and September 2001, but those contracts do not permit BPA to establish any rate that it wishes; rather, the contract as amended provides BPA with the right to establish a new PF rate. PNGC Brief, WP-02-B-PN-01, at 12. PNGC makes an argument based on semantics that does not overcome the applicability of the TACUL to previously uncommitted load that will be served by BPA in August and September 2001. There is no basis to support PNGC's contention that there is a distinction to be drawn over the terms used in the PNGC's members' contracts to describe the rate BPA has the right to establish. Whether the term used is "separate PF rate or rates" or "new PF rate," the fact remains that if the load was uncommitted, the TACUL will apply during the months of August and September 2001. Because these loads are returning to BPA service, they are an additional load to the base 1996 rates and require additional FBS resources. Kitchen *et al.*, WP-02-E-BPA-50, at 10. Since these loads can be identified as loads in addition to the customer's load that BPA is already obligated to serve during the 1996-2001 rate period, the costs incurred to serve such additional loads can be identified. *Id.*

PNGC states that the Draft ROD, WP-02-A-01, at 19-13 through 19-16 concludes that the diversification contracts allow the TACUL to be imposed and that the TACUL should be set as a "new PF rate." PNGC Ex. Brief, WP-02-R-PN-01, at 6. PNGC argues, however, that the Draft ROD does not recognize that "the TACUL is not a PF rate" as discussed in PNGC's initial brief. *Id.* Again, PNGC's argument is based on the false premise that language in the contract "negates" the policy intent in AA7 regarding service to returning load. As pointed out previously, customers that diversified were given no PF rate assurance in the contract concerning which PF rate or rates would apply to serve previously uncommitted load when returned. In fact, the TACUL rate is an adjustment to the PF-96 rate. Kitchen *et al.*, WP-02-E-BPA-36, at 1. Thus, customers that return diversification load under the TACUL will pay the PF rate, plus the TACUL. *Id.* at 1. Rather than developing an entire new PF rate, BPA found that it was necessary to add a charge to the PF-96 rate in order to reflect the cost BPA incurs to serve returned incremental load. Kitchen *et al.*, WP-02-E-BPA-50, at 9.

Decision

The diversification agreements between BPA and PNGC member cooperatives provide that BPA may elect to establish a separate or new "PF" rate.

19.3 Recall/Returning Diversification Loads

Issue 1

Whether BPA's refusal to recall surplus power sales to serve requirements load violates the Northwest Power Act.

Parties' Positions

PNGC argues that BPA claims to be deficit in order to impose a TACUL, then claims not to be deficit when it comes to refusing to exercise its recall rights in its extraregional contracts. PNGC Brief, WP-02-B-PN-01, at 14. PNGC claims that the use of market-based resources rather than FBS resources to serve the diversified customers' loads in August and September 2001 directly violates BPA's obligations to use FBS power that is readily available through recall provisions in BPA's extraregional power sales agreements. *Id.* NRU argues that, as a matter of law, if firm power is available, or if BPA could make it available by exercising rights to recall power, public agency customers are entitled to receive it based on their statutory rights as preference customers, and they should pay only a cost-based PF-96 rate. NRU Brief, WP-02-B-NI-02, at 28. OURCA states that if BPA has the option of exercising existing rights to recall power, the customers that are subject to the TACUL are entitled to receive the power at a cost-based PF-96 rate. OURCA Brief, WP-02-B-OU-01, at 6; OURCA Ex. Brief, WP-02-R-OU-01, at 6. PPC argues that BPA expects it will not have enough inventory to serve such PF loads, but that BPA does not plan to recall surplus Federal power sales to serve them despite approximately 180 aMW of recallable surplus sales available. PPC Brief, WP-02-B-PP-01, at 31; PPC Ex. Brief, WP-02-R-PP-01, at 7.

BPA's Position

While BPA does have a statutory obligation to include a right to recall surplus firm power sold or exchanged under extraregional contracts, as well as surplus firm power sold as replacement power in the region, BPA has determined that it is not necessary at this time to exercise that right. Kitchen *et al.*, WP-02-E-BPA-50, at 7. On a planning basis, BPA has determined that it can meet all expected PNW customer requirements without having to exercise its rights to recall surplus firm power by purchasing in the market or relying on seasonal surplus firm power. *Id.*

Evaluation of Positions

PNGC, NRU, OURCA, and PPC argue that BPA is obligated by statute to recall surplus firm power sold under extraregional contracts to serve the returning uncommitted loads of preference customers at the PF-96 rate. There is no legal basis to support these parties' arguments, and none of them cites any statutory provisions that compel the result they seek.

PNGC refers to section 5(b) of the Northwest Power Act and section 4 of the Bonneville Project Act. PNGC Brief, WP-02-B-PN-01, at 13. Neither of these two sections contains language to support PNGC's argument. Section 5(b) of the Northwest Power Act establishes the manner by which BPA will offer power sales contracts to meet the net firm power load

requirements of regional utilities. Section 4 of the Bonneville Project Act sets forth the general provisions entities seeking to qualify for preference and priority must comply with in order to purchase power on a preference basis from BPA.

OURCA cites to *Aluminum Company of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 391 (1984) to support its argument that BPA must exercise the recall rights included in the contracts of the non-preference customers in order to serve the firm power loads of the public preference customers. OURCA Brief, WP-02-B-OU-01, at 6. The case OURCA cites does not support its argument regarding the TACUL. To the contrary, the case OURCA relies on concerns the recall of interruptible power in contracts between BPA and its DSI customers. The current contracts with the DSI customers, however, are firm and cannot be interrupted. Section 5(b)(2) of the Northwest Power Act also requires that contracts with IOUs include the right of the Administrator to reduce her obligations in accordance with section 5(a) of the Bonneville Project Act. Section 5(a) requires that a five-year notice be given to IOUs if the Administrator determines that power sold under such contracts is necessary to meet the needs of preference customers. BPA is not required at this time to recall any power sold to IOUs, because BPA is not providing such power under existing contracts.

BPA's obligation under statute regarding recall of surplus firm power under extraregional power sales contracts arises under section 3(a) of the Regional Preference Act, 16 U.S.C. §837b(a). Section 3(a) provides in part:

Any contract for the sale or exchange of surplus firm energy for use outside the PNW, or as replacement, directly or indirectly, within the Pacific Northwest for hydroelectric energy delivered for use outside the region by a non-Federal utility, shall provide that the Secretary, after giving the purchaser notice not in excess of 60 days, will not deliver electric energy under such contract whenever it can reasonably be foreseen that such delivery would impair his ability to meet, either at or after the time of such delivery, the energy requirements of any PNW customer.

16 U.S.C. §837b(a). Consistent with the law, the Administrator does not reasonably foresee that her ability to serve returning uncommitted load of customers subject to the TACUL is impaired because of sales of surplus firm power under extraregional contracts. The subsequent passage of the Transmission System Act and the Northwest Power Act grant BPA ample authority to acquire power to meet the Administrator's obligations under contract to serve load. As long as resources can be acquired and are available on a planning basis to meet BPA's load requirements, the Administrator can reasonably foresee that her ability to serve uncommitted load will continue unimpaired. Further, the exercise of the Administrator's right to recall surplus firm power under extraregional contracts is compelled to meet the Administrator's supply obligation only. Recall is not required to provide any customers a particular price.

PNGC argues that the Draft ROD ignores the prohibition against selling non-surplus power outside of the PNW, and ignores certain provisions in the Regional Preference Act that "inform and control Bonneville's ability to sell extraregional power." PNGC Ex. Brief, WP-02-R-PN-01, at 6-7. PNGC supports its position by arguing the following: the definition of the term "surplus

energy” as defined in section 1(c) of the Regional Preference Act requires that the “extraregional contracts must only sell electric energy that, absent the extra regional sale, would be ‘wasted’ because there is a total lack of a market in the PNW for that energy ‘at any established rate,’” *Id.* at 7; the returning utility load that is subject to TACUL is clearly an “energy requirements of any Pacific Northwest customer” as defined under section 837 of the Regional Preference Act, *Id.*; and, if there is a market in the PNW at “any established rate” for all of Bonneville’s generating capability, then there is simply no surplus power and, thus, there can be no extraregional sales, *Id.* at 8.

PNGC misunderstands and misapplies this provision of law. Section 1(f) is a definitional provision. It defines what energy is surplus.

“Surplus energy” means electric energy generated at Federal hydroelectric plants in the Pacific Northwest which would otherwise be wasted because of the lack of a market therefor in the Pacific Northwest at any established rate.

16 U.S.C. §837(c).

This definition places no limitations on BPA, it merely defines a type of power that BPA has the authority to market. Prior to BPA selling any surplus energy out of the region, BPA is required under section 2 of the Regional Preference Act to first offer it to its regional customers 30 days prior to the execution of an extraregional sale of surplus power. BPA is required to give notice to its customers of the pending sale. At the time that surplus firm power sales were made to purchasers outside the region, PNGC members, like all regional customers of BPA, received notice and had 30 days in which to purchase such power.

The Regional Preference Act does not give PNGC members, or other customers similarly situated, the right to now request specific sources of power for service when requested under section 5 of the Northwest Power Act. 16 U.S.C. §839c(b)(1). Sales of surplus firm power to purchasers outside the region are firm contractual obligations. *See, generally*, 16 U.S.C. §832d(a) (“[c]ontracts entered into under this subsection shall be binding in accordance with the terms thereof . . .”), 16 U.S.C. §837, and 16 U.S.C. §839c(f). The law grants BPA specific authority to make such sales. Section 5(f) of the Northwest Power Act states:

The Administrator is authorized to sell, or otherwise dispose of, electric power, including power acquired pursuant to this and other Acts, that is surplus to [her] obligations incurred pursuant to subsection (b), (c), and (d) of this section in accordance with this and other Acts applicable to the Administrator, including the Bonneville Project Act . . . , the Federal Columbia River Transmission System Act . . . , and the Act of August 31, 1964 (16 U.S.C. §837-837h).

16 U.S.C. §839c(f).

Because these sales are firm obligations, the Regional Preference Act is clear in its language regarding the standard that must be met before the Administrator is obligated to exercise the

right of recall. That right shall be exercised only “whenever it can reasonably be foreseen that such delivery would impair [her] ability to meet, either at or after the time of such delivery, the energy requirements of any Pacific Northwest customer.” 16 U.S.C. §837b(a).

PNGC argues that nothing in either the Transmission Act or the Northwest Power Act “obviate, or in any way alter, the prohibition against selling extraregional power when there are markets for that power in the PNW.” PNGC Ex. Brief, WP-02-R-PN-01, at 8. PNGC’s argument is without basis in either statute. These statutes, contrary to PNGC’s argument, authorize BPA to acquire power to meet its firm contractual obligations. Section 5(f) of the Northwest Power Act specifically authorizes BPA to enter into surplus power sales. Therefore, the Administrator’s ability to meet the “energy requirements” of the PNGC members’ returning uncommitted load is simply not impaired by sales of surplus firm power to extraregional purchasers, because BPA can acquire power under section 11(b)(6) of the Transmission Act, 16 U.S.C. §838i(b)(6), and section 6(a) of the Northwest Power Act, 16 U.S.C. §839d(a)(1)–839d(a)(2). BPA plans its market purchases to meet its total load obligation amounts, including PSW loads [Pacific Southwest, extraregional sales], on an annual basis to cover periods when it will not have sufficient critical period energy. Kitchen *et al.*, WP-02-E-BPA-36, at 6. Under critical water conditions, power sold to serve load subject to the TACUL and power sold under extraregional contracts is power purchased from the market to meet total loads. *Id.*

The term “energy requirements” is defined in section 837(f) of the Northwest Preference Act as:

[T]he full requirements for electric energy of: (1) any purchaser from the United States for direct consumption in the Pacific Northwest; and (2) any non-Federal utility in that region in excess of: (a) the hydroelectric energy available for its own use from its generating plants in the Pacific Northwest; and (b) any additional energy available for use in the Pacific Northwest which under a then existing contract, the utility (A) can obtain at no higher incremental cost than the rate charged by the United States; or (B) is required to accept.

16 U.S.C. §837(f).

This is a definitional section which applies to the Administrator’s determination of “energy requirement.” BPA does not disagree with PNGC that uncommitted load that is returned to BPA service is an energy requirement of the customer. BPA acknowledges its statutory obligation to serve this load. However, PNGC then claims “Bonneville is prohibited by section 837a [section 2] from selling extraregional energy when regional customers have a need for that energy.” PNGC Ex. Brief, WP-02-R-PN-01, at 7. BPA is at a loss to find the statutory prohibition that PNGC is claiming exists in section 2. Neither the definition of “energy requirements” in section 1(f) nor section 2 contain language prohibiting BPA from making extraregional sales of surplus power.

Section 2 of the Regional Preference Act contains no prohibition on sales of surplus firm power to purchasers outside the region. As stated above, section 2 directs the Administrator to provide notice to regional customers of pending extraregional sales to allow BPA’s regional customers the opportunity to purchase such power prior to sale outside the region. PNGC members were

notified of pending sales of surplus firm power to extraregional purchasers. All such sales were duly noticed and executed in accordance with statute. Prior to the execution of these sales of surplus firm power, PNGC members had the right to purchase such power first. They declined. BPA is under no obligation now to recall the power sold under these contracts to meet the uncommitted load of its regional customers as long as the Administrator reasonably foresees that she is not impaired in her ability to meet their energy requirements.

PNGC argues that the Draft ROD is in error regarding the statement “[r]ecall is not required to provide any customers with a particular price.” PNGC Ex. Brief, WP-02-R-PN-01, at 7, quoting the Draft ROD, WP-02-A-01, at 19-17. PNGC claims that “the definition of ‘surplus energy’ makes it clear that surplus energy is energy that cannot be sold in the PNW ‘at any established rate.’” *Id.* at 8. PNGC adds that “[i]f there is a market in the PNW ‘at any established rate’ for all of BPA’s generating capability, then there is simply no surplus power. If there is no surplus power there can be no extra regional sales.” *Id.* This argument is also misplaced. PNGC misreads the definition of “surplus energy” under the Regional Preference Act. Prior to its being offered as surplus power under contract, BPA must first determine that such power is surplus by first offering it to regional customers at any established rate. Once BPA has done this, and no regional customers elect to purchase, then such power can be sold to purchasers outside the region as surplus power. Nothing in the language of the Regional Preference Act obligates the Administrator to recall surplus firm power sales to extraregional purchasers in order to provide any customers with a particular price. Notwithstanding the existence of a market for Federal power at established rates, the Administrator is not compelled to discontinue existing extraregional sales of surplus power to sell power to regional customers. The obvious import of the situation described by PNGC is there may be no surplus firm power currently available on a long-term basis which the Administrator may offer to purchasers outside the region. However, the obligation to recall surplus firm power already being sold extraregionally arises only when the Administrator reasonably foresees that her ability to meet the energy requirements of a PNW customer will be impaired. This is not the case.

To summarize, as in all the above arguments regarding BPA’s obligation to exercise its right to recall surplus firm power, PNGC speciously argues that BPA is prohibited from continuing such sales if uncommitted load is returned to PF service. As BPA has stated several times, there simply is no prohibition in statute barring BPA from continuing such sales. The Administrator has the authority and the ability to acquire resources to serve the returning load. Because the Administrator’s ability to meet this load is not impaired as a result of deliveries under contract of surplus firm power to extraregional purchasers, no recall of such power is required.

Decision

BPA’s decision not to recall surplus power sales to serve requirements load is consistent with the directives of the Northwest Power Act. BPA has determined that it can meet all expected regional customer requirements without having to exercise its rights to recall power.

Issue 2

Whether BPA has been fully compensated for BPA's costs incurred due to diversification by some of its customers and will receive adequate revenue from other sources to compensate BPA for returning diversified loads.

Parties' Positions

PNGC makes several arguments that the TACUL is inappropriate, because BPA received "significant revenues" due to the payment by customers of exit fees to diversify and has already been fully compensated. PNGC Brief, WP-02-B-PN-01, at 15. PPC argues that BPA has not demonstrated any economic harm that it expects to bear as a result of serving these PF TACUL loads. PPC Brief, WP-02-B-PP-01, at 31. PNGC argues that the assertion made by PNGC and PPC panels remains unrefuted, that over the PF-96 rate period the revenues BPA received from exit fees and additional surplus sales (resulting from diversified load) will more than offset any additional costs BPA may incur if it chooses not to recall extraregional surplus sales. PNGC Brief, WP-02-B-PN-01, at 17.

BPA's Position

The TACUL is a prudent business decision that, as contemplated in the customer's contract, is needed to cover costs caused by an individual customer's exercise of a contract option that would otherwise have to be recovered from other customers. Kitchen *et al.*, WP-02-E-BPA-50, at 6. Exit fees were not designed to cover the costs of customers wanting to return diversified load to BPA service during the rate period. *Id.* The net revenue from both the long-term sales of surplus firm power to extraregional purchasers and the sales of firm power made surplus or excess to BPA's existing firm power obligations as a result of diversification benefits all of BPA's customers. *Id.* at 7. For this reason, BPA does not agree that these revenues should go to benefit one specific group of customers; but rather, the revenues should continue to benefit all customer classes. *Id.*

Evaluation of Positions

PNGC's witnesses argued that the TACUL is nothing more than a form of quadruple dipping. Sabala *et al.*, WP-02-E-PN-06, at 6-7. PNGC claimed that BPA will have received revenues in four ways: exit fees paid by utilities to diversify; revenue BPA received from sales of surplus power resulting from diversification; money BPA will receive from the cost-based rate established in anticipation of serving returning loads; and TACUL. *Id.* BPA disagreed with PNGC's so-called quadruple characterization and rebutted each alleged dip. Kitchen *et al.*, WP-02-E-BPA-50, at 5-6.

PNGC and PPC argue that BPA has made no attempt to credit back the revenues BPA received from exit fees and from sales of surplus power to the PF class as a whole, or against unanticipated costs within the PF-96 rate period, or to the utilities responsible for those additional revenues. PNGC Brief, WP-02-B-PN-01, at 15; PPC Brief, WP-02-B-PP-01, at 32.

Similarly, they argue the benefits should be recognized on a PF-96 class and rate period basis as an offset to any costs BPA may incur in serving load returned within the 1996 rate period.

Exit fees were not designed to cover the costs of customers wanting to return diversified load to BPA service during the rate period. Kitchen *et al.*, WP-02-E-BPA-50, at 5. In this respect, the only “benefit” covered by the payment of the exit fee was the right of the customer to remove load from BPA service. Prior to BPA’s agreement to allow customers to pay an exit fee, most requirements customers of BPA were obligated to purchase most if not all of their wholesale electric power from BPA. Payment of an exit fee gave a customer the right to reduce its contract obligation to purchase from BPA, and it provided a way to help cover BPA’s losses from such forgone sales. *Id.* at 5. BPA does not agree that these revenues should go to benefit one specific group of customers; but rather, the revenues should continue to benefit all customer classes. *Id.* BPA objects to PNGC’s inference that the uncommitted load it wishes to return be served at a new PF rate that is at or below the existing PF rate. PNGC Brief, WP-02-B-PN-01, at 17. BPA does not agree that customers that elected to serve their uncommitted load with power purchased from other suppliers should benefit by shifting the risk of their individual decisions to BPA. Erosion of BPA’s revenues to recover the purchase power cost to serve uncommitted load for the remaining rate period is unwarranted. Burns and Elizalde, WP-02-E-BPA-08, at 15.

PNGC argues that BPA’s partial denial of “windfall” sales proves PNGC’s claims that such sales occurred. PNGC Brief, WP-02-B-PN-01, at 16. PNGC states that at a minimum BPA should provide some evidence of the magnitude of those windfall sales in order to prevail on the claim that it is incurring “unrecoverable” costs due to the returned load of these diversifying customers. *Id.* PPC argues that revenues BPA obtains for the Federal power sales made in lieu of BPA’s sale to the diversifying utility may offset potential economic harm. PPC Brief, WP-02-B-PP-01, at 32.

With the reduction of its firm power obligations and corresponding revenues, BPA began sales of what was then surplus firm power. Kitchen *et al.*, WP-02-E-BPA-50, at 4. PNGC’s claim that BPA made a partial denial regarding whether or not surplus firm power sales resulted in a “large revenue windfall,” PNGC Brief, WP-02-B-PN-01, at 16; is irrelevant. However, any revenue increase that BPA might experience will go to increase starting reserves and thereby benefit all customers in the next rate period. Nor is BPA compelled to offset the potential economic harm that customers subject to the TACUL may face, as suggested by PPC. PPC Brief, WP-02-B-PP-01, at 32. PNGC and PPC misunderstand the purpose of the TACUL. The cost of the TACUL will be based on BPA’s costs to replace the FBS to serve the specific uncommitted load the customer wishes to return to PF service. *Id.* at 10. Because these loads are returning to BPA service, they are an additional load to the base 1996 rates and require additional FBS resources. *Id.* Since these loads can be identified as loads in addition to the customer’s load that BPA is already obligated to serve during the 1996-2001 rate period, the costs incurred to serve such additional load can be identified. *Id.* BPA will base the cost to serve these additional loads on the costs that BPA will incur to serve the additional load. *Id.*

Decision

It is not relevant to BPA's imposition of the TACUL whether BPA was fully compensated for costs incurred due to diversification by some of its customers or whether BPA will receive adequate other sources of revenue to compensate BPA for returning diversified loads.

19.4 Equity

Issue 1

Whether BPA should eliminate the TACUL for reasons of equity.

Parties' Position

PNGC raises a new "equity" argument in its brief on exceptions. PNGC Ex. Brief, WP-02-R-PN-01, at 2. PNGC argues that there is an equitability rationale for rejecting TACUL. *Id.* PNGC contends customers who diversified were under the "legitimately held" belief that BPA would apply either the PF-96 rate to returned load, or that BPA would apply a PF-type of rate that was set using embedded cost ratemaking principles and BPA's then current financial and load data. *Id.*

BPA's Position

This is a new argument. PNGC essentially pieces together its new argument from fragments of its argument made in its initial brief. Although the Draft ROD addressed these issues as separate arguments, BPA will address them here as one.

Evaluation of Positions

PNGC states that diversified customers were informed that the returned load would be served at a PF rate. PNGC Ex. Brief, WP-02-R-PN-01, at 2. That promise is codified in the contracts BPA signed which allowed for diversification in the first place. *Id.* PNGC is correct that customers wishing to return uncommitted load to BPA will be served with a PF rate--the PF-96 rate plus a PF adjustment rate called the TACUL. As the Draft ROD states, "customers who diversify and wish to reestablish service will not get the PF rate available to the loads which stayed with BPA, but will pay the full incremental cost associated with providing that service, as set through a 7(i) process." Draft ROD, WP-02-A-01, at 19-5, quoting the Administrator's ROD on AA7 and Contract Templates, at 10. Consistent with the AA7 ROD, the AA7 and new contracts contain the following language: "BPA may elect to establish a separate PF rate or rates for power used to serve that portion of [the customer's] loads" returned to PF service. *See* PNGC Brief, WP-02-B-PN-01, at 11; WP-02-E-PN-14.

PNGC contends that the Draft ROD dismisses the fact that BPA's own contract calls for a PF rate, characterizing it as mere "semantics." PNGC Ex. Brief, WP-02-R-PN-01, at 2, citing the Draft ROD, WP-02-A-01, at 19-15. PNGC misconstrues the Draft ROD. BPA's Draft ROD at 19-15 responds to the argument made by PNGC in its initial brief that its members' contract as

amended provides that BPA may elect a “new PF rate.” PNGC Brief, WP-02-B-PN-01, at 12. PNGC argued that BPA violates the “explicit restriction” contained in BPA’s contracts with the diversifying customers by attempting to establish a market rate (the TACUL) that is not an embedded-cost based PF rate. *Id.* There is no restriction in the contract, and it is mere semantics that PNGC relies upon to imply one. The Draft ROD states, “There is no basis to support PNGC’s contention that there is a distinction to be drawn over the terms used in PNGC’s members’ contracts to describe the rate BPA has the right to establish. Whether the term used is ‘separate PF rate or rates’ or ‘new PF rate,’ the fact remains that if the load was uncommitted, the proposed TACUL will apply during the months of August and September 2001.” Draft ROD, WP-02-A-01, at 19-5. BPA’s position is unchanged.

PNGC contends that the meaning of a PF rate is that the rate would be set as have been all PF rates up to this point in time, based on BPA’s then current financial goals and conditions and load estimates. PNGC Ex. Brief, WP-02-R-PN-01, at 2. PNGC asserts that “[t]his separate PF rate was expected to come in somewhere close to PF-96 and certainly below PF-02, given BPA’s PBL’s robust financial conditions and its revenue requirement for the 1996-2002 rate period (or even just its 2002 revenue requirement.)” *Id.* at 3. PNGC contends that diversifying utilities have a legitimately held belief, induced by BPA, that their returned load would in fact be served at a PF rate set in this manner. *Id.* PNGC’s argument states its own expectation of what the TACUL would be. No doubt all parties to a section 7(i) proceeding have expectations of what any applicable rate they may be charged will be. PNGC claims that BPA induced diversified utilities into a belief regarding the manner in which the PF rate would be set. BPA denies that it induced any of its customers that diversified into any belief regarding the setting of the TACUL. The establishment of the TACUL is being subjected to the rigor of this section 7(i) proceeding. PNGC’s expectation of the price of the TACUL, however, is not based upon demonstrable evidence in the record. The actual price of any TACUL that may be applied to a customer is presently unknown, since no TACUL has been applied. What has been proposed in this 7(i) is the methodology upon which the TACUL will be calculated at the time it applies. *See Kitchen et al.*, WP-02-E-BPA-36, at 4. The TACUL will recover the additional cost of serving uncommitted customer load returned to requirements service. *Id.* at 2. The methodology of the proposed TACUL provides that if no incremental cost is incurred, then the customer will merely pay PF-96 with zero TACUL adjustment. *Id.* at 3.

PNGC asks the non-rhetorical question: “What then, is the purpose of returning load to an agency that will simply turn around and make market purchases to serve that load?” PNGC Ex. Brief, WP-02-R-PN-01, at 3. PNGC notes that its own members are making purchases in the market to serve their load before they had determined to return it to BPA. *Id.* PNGC argues that if the members of PNGC had known BPA would do the same, they would not have made the decision to return that load in the first place. *Id.* “The only explanation for their decision to return load to BPA is that they were operating under the BPA induced understanding that BPA would serve their load at a PF rate and not at a market rate.” *Id.*

If this is truly a question for BPA to answer, it may be surmised that those utilities that diversified and made resource decisions to purchase power from resources or suppliers other than BPA, *i.e.*, the market, did so for economic gain. These were independent decisions. They have also independently chosen to return uncommitted load to BPA for service. However, it has

not been promised by BPA that upon return such load would be served with the same available PF rate as those customers who did not take load off of BPA. *See* Draft ROD, WP-02-A-01, at 19-5, quoting the Administrator's ROD on AA7 and Contract Templates, at 10. Such load has, since becoming uncommitted, faced a rate uncertainty if returned to BPA service. PNGC is disingenuous in arguing that its members' uncommitted load will face a market rate when returned to BPA service. The fact is that most of PNGC's uncommitted load when returned will be served at the PF-96 rate without incurring the TACUL. This is because BPA determined at the time PNGC made its first request that it had sufficient availability of power at the PF-96 rate available to serve that portion of PNGC's uncommitted load, *i.e.* prior to December 7, 1998. *See* Draft ROD, WP-02-A-01, at 19-10. However, as more customers made requests to return diversified load, which increased the amount of power BPA would be obligated to supply, BPA took the prudent step to determine the availability of its supply on a planning basis. Kitchen *et al.*, WP-02-E-BPA-50, at 8. Based on BPA's studies of its loads and resources, BPA determined the need to establish the TACUL. *Id.*

Finally, PNGC argues that BPA must examine its course of dealing with these utilities to decide not only what is legal but what is right and equitable. BPA has considered its dealings with customers that chose to diversify their resources and the load served by such resources. Some of these customers sued or threatened to sue BPA to get the right to purchase from other suppliers. They felt compelled to leave BPA when the market was attractive and its cost was less than BPA's PF rate. On the other hand, BPA is keenly aware of its statutory obligation to meet the net requirements of its public body and cooperative customers. As such, BPA will serve, but the cost of providing service to returning uncommitted load should be borne by such load. It is not equitable for those customers that stayed with BPA, who did not accept the benefits and risks of the market, to bear any of the cost associated with serving uncommitted loads.

Decision

BPA will not eliminate the TACUL for reasons of equity.