



June 29, 2006

*Submitted Electronically*

Steve Hickok  
Deputy Administrator  
Bonneville Power Administration  
c/o Public Affairs Office – DKC-7  
P.O. Box 14428  
Portland, OR 97293

Subject: Public Power Council's Comments on Proposed Interpretation of Section 4(c)(10)(B) of the Northwest Power Act

### Introduction

On June 15, 2006, BPA issued a notice that it would be taking public comments on a proposed interpretation of section 4(c)(10)(B) of the Northwest Power Act. Section 4(c)(10) of the Act sets a cap on the level of funding that BPA may provide for the compensation and other expenses of the Northwest Power and Conservation Council ("Council"). PPC submits these comments in response to BPA's solicitation, and would like to make clear that its comments do not reflect its view on the performance or appropriate role of the Council. Rather, as called for in the June 15<sup>th</sup> notice, these comments focus on BPA's proposed interpretation of the relevant language in the Northwest Power Act.

### The Statutory Limit

The Northwest Power Act sets a specific cap on the amounts that BPA may pay for the Council's expenses by stating that "such payments shall not exceed annually an amount equal to 0.02 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded."<sup>1</sup> Section 4(c)(10)(B), however, allows BPA to spend up to an amount "not in excess of 0.10 mill multiplied by the kilowatt hours of firm power" forecast to be sold, if the Council demonstrates that it would otherwise not be able to carry out its functions.<sup>2</sup> BPA believes that the Council

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<sup>1</sup> 16 U.S.C. § 839b(c)(10)(A).

<sup>2</sup> *Id.* § 839b(c)(10)(B).

has made such a showing, and is issuing its proposed interpretation to determine the cap at the higher, 0.10 mill level.

### BPA's Proposed Interpretation

BPA is proposing to interpret the words “kilowatthours of firm power forecast” in section 4(c)(10)(B) as “including BPA’s forecast of [Residential Exchange Program (“REP”)] firm power sales when BPA has settled disputes regarding implementation of the REP through REP Settlement Agreements.”<sup>3</sup> Apparently, unless BPA includes these amounts in its firm power sales forecast for purposes of determining the cap on Council funding, the level of BPA’s proposed funding will exceed the statutory cap.<sup>4</sup> BPA is therefore proposing to include a forecast of REP firm power sales in the calculation, even though it is not actually forecasting any firm power sales under the REP.<sup>5</sup>

### PPC's Position on the Proposed Interpretation

PPC understands that the statutory limit has caused BPA and the Council some difficulty. The Council contends, for example, that Congress could not have foreseen the effects of the cap if literally applied,<sup>6</sup> and that the cap is an “outdated funding formula.”<sup>7</sup> For several reasons, however, PPC believes that BPA’s proposed statutory interpretation regarding the cap is an inappropriate response.

First, the proposed interpretation is contrary to the plain language Congress used in the Act. Congress plainly stated that the cap was to be based on the number of “kilowatthours of firm power forecast to be sold.” BPA’s proposed interpretation varies from the express statutory language by basing the cap on the number of kilowatthours of firm power forecast to be sold *plus* a number of kilowatthours of firm power that BPA *might* have forecast *would* be sold under different circumstances. In short, BPA’s interpretation departs from the Act by substituting hypothetical forecasts of hypothetical power sales where the Act calls for amounts of power forecast to actually be sold during the year.

BPA argues that its interpretation does not conflict with the plain language of the Act because the Act refers to the REP as a purchase and sale of power.<sup>8</sup> However, regardless of whether REP purchase and sales would qualify as “firm power forecast to

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<sup>3</sup> Proposed Interpretation of Section 4(c)(10)(B) of the Northwest Power Act [Proposed Interpretation] (June 15, 2006) at p. 3.

<sup>4</sup> As explained on pages 26-27 of the Brief of the Western Public Agencies Group filed in the current power rate case (WP-07-M-68), BPA is projecting firm sales obligations in the rate case of 8,251 aMW, 8,313 aMW, and 8,303 aMW in FY 07, FY 08, and FY 09. WP-07-E-BPA-01A, pages 10-12. Based on these firm sales, BPA could only provide funding to the Council of approximately \$7.2 million, \$7.3 million and \$7.3 million in FY 07, FY 08, and FY09, respectively.

<sup>5</sup> See BPA filing in rate case, WP-07-E-BPA-09 at p. 9 (“BPA forecasts no power sales to regional IOUs for FY 2007 through 2009.”).

<sup>6</sup> Northwest Power and Conservation Council Fiscal Year 2007 Budget and Fiscal Year 2006 Revisions (July 2005), p. 2, available at <http://www.nwccouncil.org/library/2005/2005-10.pdf>.

<sup>7</sup> *Id.* at p. 3.

<sup>8</sup> Proposed Interpretation at p. 3.

be sold” for purposes of calculating the cap, BPA’s argument does not support its interpretation since BPA is not even forecasting any REP sales. Instead, BPA has agreed to pay monetary benefits in lieu of the REP program. BPA has consistently treated these monetary benefits differently from exchanges of power under the REP, and PPC does not see a justification for treating them as firm power sales only in the context of determining the cap on payments to the Council.

Second, even if BPA’s proposed interpretation could be squared with the plain language of the statute, PPC questions whether the interpretation is reasonable given that it conflicts with BPA’s description of its obligation to IOU residential and small-farm load in all other contexts. For example, for rate setting purposes, BPA forecasts zero kilowatthours of firm power sales to the IOUs during FY 2007-09.<sup>9</sup> Then, in describing the financial benefits provided to the IOUs, BPA has stated that the benefits are the equivalent of 2200 aMW of power.<sup>10</sup> In calculating the cap on payments to the Council, however, BPA does not use either of these numbers, and instead assumes for the sole purpose of calculating the cap an IOU Residential Exchange of “3400 to 3700 aMW.”<sup>11</sup> PPC does not believe that such an inconsistent characterization of IOU residential and small-farm loads can lead to a reasonable implementation of the Act.

Finally, the interpretation is, in any event, not clear enough to inform interested parties of precisely what BPA is proposing to do. The June 15<sup>th</sup> document sets forth BPA’s proposed interpretation by simply stating, “BPA proposes to interpret the words ‘kilowatthours of firm power forecast’ in section 4(c)(10)(B) . . . as including BPA’s forecast of REP firm power sales when BPA has settled disputes regarding implementation of the REP through REP Settlement Agreements.”<sup>12</sup> This statement leaves several core questions unanswered, including at least the following:

- How is BPA proposing to forecast REP firm power sales in light of the fact that BPA has determined it will not have any REP firm power sales?
- What methodology is BPA proposing to use in calculating the forecast?
- Is BPA proposing to include all of the IOUs’ residential and small-farm loads as “firm power” loads, even if they would not qualify for the Residential Exchange Program?

Without these answers, PPC is not sure of exactly what the proposed interpretation entails.

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<sup>9</sup> Load Resource Study Documentation, filed in WP-07 rate case as WP-07-E-BPA-01A, at p. 10.

<sup>10</sup> See BPA rate case filing WP-07-E-BPA-09 at p. 9 (“BPA forecasts no power sales to regional IOUs for FY 2007 through 2009. This is consistent with the Residential Exchange Program (REP) Settlement Agreements that provide monetary benefits equivalent to 2196.8481 aMW of power to the six regional IOUs.”).

<sup>11</sup> March 8, 2006, BPA Power Function Review Materials, Appendix at p. 6, *available at* [http://www.bpa.gov/power/queue/review/03-08-2006\\_Discussion/Mar%208%20Manager%20Workshop%20Appendix%20-%20queue.pdf](http://www.bpa.gov/power/queue/review/03-08-2006_Discussion/Mar%208%20Manager%20Workshop%20Appendix%20-%20queue.pdf)

<sup>12</sup> Proposed Interpretation at p. 3.

PPC notes that BPA's proposed method for determining the proper implementation of section 4(c)(10)(B) is somewhat rushed. The proposed interpretation was issued on June 15<sup>th</sup>, with comments due June 29<sup>th</sup>. PPC submits that a more appropriate resolution might be reached if BPA set forth more clearly its proposed implementation, and allowed more time for discussion and exchange of views on the topic.

Conclusion

Although PPC can appreciate that the statutory cap on Council funding may be problematic for BPA and the Council, PPC does not endorse BPA's proposed interpretation of the statutory language imposing it. PPC does not believe that BPA's proposed interpretation is a reasonable reading of the statute, and believes that the proposed interpretation as currently presented is, in any event, unclear.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Showalter', written in a cursive style.

Marilyn Showalter  
Executive Director  
Public Power Council