



January 4, 2005

By Hand Delivery

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BPA Communications, DM-7
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Re: PNGC Power Comments on Proposed DSI Prototype Contracts

Dear Mr. Norman:

Thank you for this opportunity to provide comments on BPA's Proposed DSI Prototype Contracts for the period FY 2007 through FY 2011, which implement the agency's June 30, 2005 Record of Decision on DSI Service for this time period.

In the Administrator's *Policy For Power Supply Role For Fiscal Years 2007-11—Administrator's Record of Decision* (February 4, 2005) ("Regional Dialogue ROD") and *Service to Direct Service Industrial (DSI) Customers for Fiscal Years 2007-11—Administrator's Record of Decision* (June 30, 2005) ("DSI Service ROD"), he explained at length the BPA's efforts to reach a regional consensus, including preference and DSI customers, on DSI service during that time period. The Administrator noted comments by a number of elected officials, DSI management and employees, preference customers, and others. The Administrator recited pros, cons and policy considerations for the various issues surrounding the proposal to provide "service benefits" to DSI customers at the expense of BPA's preference customers.

We understand that considerable effort has been devoted over several years toward developing a policy on this subject matter. We understand that the agency felt strong pressure to provide these benefits, as well as strong opposition to providing them. While we can appreciate the difficulty of reaching the compromise the DSI Service ROD sought, our review of the proposed prototype contracts leads us to conclude that the agency's direction is still wide of the appropriate mark.

For example, in both the Regional Dialogue ROD and the DSI Service ROD, the Administrator failed to identify any legal authority for doing what the proposed prototype contract does with respect to DSI service: (1) at least for the first three contract years, commit BPA to doling out huge subsidies to DSI customers by "monetizing" the benefits of heavily discounted surplus power rates, or, in later contract years, selling forecasted surplus at heavily discounted rates, and (2) charging the \$295

million or more in costs that BPA may incur to deliver these benefits over the FY 07-11 period to its preference and priority customers.

As BPA is aware, PNGC Power believes that since the statutory allocation in the Northwest Power Act of a portion of the Federal Base System resources to BPA's Direct Service Industrial (DSI) customers expired on September 30, 2000, BPA has no authority or discretion to sell power, or otherwise provide "service benefits," to DSI customers at the expense of BPA's public preference and priority customers. In addition, BPA has no authority to acquire power to serve DSI loads. These issues are before the Ninth Circuit in *Golden Northwest Aluminum, et al. v. BPA*, Nos. 03-73426 *et al.* (consolidated cases) (*argued and submitted*, November 16, 2005, Reinhardt, Fletcher, W., and Bybee, JJ). If the Ninth Circuit accepts our view of those propositions, then BPA cannot enter into "sleeving" or conduit arrangements with cooperating preference customer distribution utilities to do indirectly what it is unlawful to do directly.

We believe that BPA has neither a legal nor an economic justification for conferring these windfall benefits on a handful of private industrial companies, and it should therefore forbear from taking the step of executing these prototype DSI contracts.

The contracts are flawed for other reasons:

- To the extent they operate as power sales, these contracts purport to be sales of surplus power. But BPA has not offered this expected "surplus" to preference and priority customers, with or without the proposed "service benefits." The proposed contracts thus constitute administrative allocations of surplus power to non-preference customers in violation of public preference and priority principles. And, while the contracts would include the required statement that they are subject to preference and priority, a mere recitation of the principle does not solve the problem.
- To the extent they operate as power sales to cooperating preference customer distribution utilities, it is obvious that BPA is providing service for customers that are new large single loads of those utilities. BPA's *ipse dixit* that these sales are not sales for service to NLSLs, in violation of BPA's own policy, DSI Service ROD at 24, does not obscure this reality.
- The contracts reflect discriminatory and preferential treatment for the cooperating preference customer distribution utilities. Many other preference customers have industrial loads that could benefit from BPA "service benefits" or, for that matter, relief from BPA's NLSL policy. Even if they were lawful, handing out "service benefits" in a way that is not discriminatory would vastly increase the cost and impose extreme burdens on preference customers that have no large industrial loads. Minimizing the scale of "service benefits" and confining them to DSIs and their cooperating preference customer distribution utilities does not make the program lawful or remedy the discrimination.
- The contracts do not contain adequate creditworthiness and credit support provisions. First, there exists a material risk for BPA that PNGC Power and the PGP petitioners will prevail on the DSI rates issues in the Ninth Circuit's review of the WP-02 rates, BPA's DSI Service ROD will be held unlawful in *PNGC Power v. BPA*, Ninth Cir. No. 05-75638, and/or these proposed contracts or rates will not survive legal challenges yet to be filed. For that reason,

BPA should include robust credit support provisions that will allow prompt and full recovery of illegal benefits paid so that BPA can refund them expeditiously to the customers who were forced to pay for them. BPA should not repeat the error it made in the current DSI contracts of consciously disabling itself from recovering from DSIs and the cooperating distribution utilities the costs of refunds that BPA may owe other preference customers. BPA can and should require much stronger credit support for these contracts and this refund risk.

Second, the contract envisions Monthly Purchase Deficiencies and includes provisions for mitigating resale transactions and the payment of damages. When it is foreseeable that curtailments may take place, and when BPA is insulating the cooperating utilities from take or pay risk, BPA should be requiring robust credit support from the DSIs. Application of "then-current credit policies" and a passing reference to prepayment of damages is not adequate. Likewise, BPA must have more robust rights to police and recover Overpayment of Monetary Benefits. BPA owes the preference customers, who should not be paying any DSI "service benefits" costs whatsoever, both a commitment to require credit support for recovery of Overpayments and a commitment to vigorously police and enforce repayment of Overpayments. When BPA demands credit support from certain of its preference customers that it is obligated to serve and who have never once failed to pay their bills, BPA makes both a political and economic mistake by not insisting on credit support for customers to whom it has no obligation to sell power.

We believe that the Administrator has not given sufficient weight to his statutory and contractual obligations and limitations in developing the DSI Service ROD and the proposed prototype contracts that would implement it. The Washington legislature enacted tax breaks to benefit Alcoa to induce it to continue its operations in that state. That is a permissible outcome of that state's political process. BPA is not, however, the federal analog for the Washington legislature. BPA simply has no legal authority to dole out hundreds of millions of dollars in "service benefits" to Alcoa and others, regardless of how strong the political case for doing so may be. BPA should confine itself strictly to doing only what it is clearly authorized to do. When it does not do so, history teaches that BPA incurs political, legal and economic risks that it would better have avoided in the first place.

For these reasons, we urge the agency to reverse its decisions in the DSI Service ROD and abandon its plan to offer these contracts to the DSIs.

Thank you for considering our point of view.

Very truly yours,



R. Patrick Reiten
President and CEO