

Clarifications Issued on BPA's Policy for Determining Net Requirements of Pacific Northwest Utility Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act, dated May 23, 2000

The Bonneville Power Administration (BPA) issued a "Policy on Determining Net Requirements of Pacific Northwest Utility Customers Under Section 5(b)(1) and 9(c) of the Northwest Power Act" and Administrator's Record of Decision (the 5(b) 9(c) Policy) in May of 2000. The 5(b) 9(c) Policy addresses numerous issues regarding the amount of Federal power a customer would be eligible to purchase under section 5(b)(1) of the Northwest Electric Power Planning and Conservation Act, P.L. 96-501, (Northwest Power Act) as firm requirements power for the customer's firm power loads in the Pacific Northwest.

The 5(b) 9(c) Policy also addresses issues regarding BPA's 1994 policy and statutory interpretation of section 9(c) and 3(d), retaining the policy in part and modifying it in part. The 5(b) 9(c) Policy covers circumstances when reductions (decrements) in the amounts of Federal power that a customer could buy would, or would not, occur due to the customer's disposition or sale outside of the Pacific Northwest region of nonfederal power from its resources.

After publication of the 5(b) 9(c) Policy, several preference utility customers, direct service industries, and investor owned utility customers filed challenges to the 5(b) 9(c) Policy in the United States Court of Appeals for the Ninth Circuit, in *Goldendale Aluminum Co., et al v. United States Department of Energy, et al*, nos. 00-70717; 00-70719; 00-70743; 00-70778. The petitioners, interveners and BPA jointly moved for a stay and referral of the case to the Circuit Mediator granted on December 29, 2000. Settlement discussions focused on specific "clarifications" of the 5(b) 9(c) Policy. Preference customer petitioners and petitioner-interveners identified specific issues and submitted them to BPA.

BPA then conducted discussions first with the preference customer petitioners and interveners over several months that produced a proposal for settlement. BPA then discussed specific issues identified by the investor-owned utility petitioners in several meetings. BPA then held discussions with the direct service industry attorneys. Finally, BPA met with the mediator and the parties on the proposed settlement. The parties have executed a settlement agreement and made a joint motion for dismissal of the consolidated actions in cases nos. 00-70717; 00-70719; 00-70743; 00-70778 filed in the United States Court of Appeals for the Ninth Circuit, or do not oppose the dismissal of the litigation. The following are the clarifications to BPA's 5(b) 9(c) Policy and Record of Decision resulting from this litigation settlement process.

Clarifications Regarding Section 5(b) 9(c) Policy.

1. For purposes of section 5(b)(1), a resource is only declared as dedicated to serving the customer's load under section 5(b) of the Northwest Power Act when it is named as so used in section 2(a) of Exhibit C of the BPA Power Sales Agreement.

A customer only declares a resource, whether it is a generating resource or a firm power purchase, as serving load when it is shown as dedicated to serve the customer's load in Exhibit C, section 2(a) of the customer's BPA Power Sales Agreement. Any specific resources that the

customer does not include in this Exhibit are not "declared or dedicated" to serve the customer's regional load under section 5(b) of the Northwest Power Act.

2. A customer can use all or a portion of a resource as an unspecified resource (no identification beyond amount) to serve the customer's load under section 2(b) of Exhibit C of the customer's BPA Power Sales Agreement, and such use does not constitute a declaration of a specific resource under section 2(a) of Exhibit C of such BPA Power Sales Agreement or under 5(b) of the Northwest Power Act.

A customer may use all or a portion of a resource as an unspecified resource, stated in a whole megawatt and megawatt-hour numbers. However, the portion of the resource used as an unspecified resource cannot be otherwise dedicated or declared under section 2(a) of the customer's BPA Power Sales Agreement to serve a portion of its consumer load.

3. A customer can use an undeclared resource to serve its load with no long-term consequences to its 5(b) entitlements. Only resources specifically named as committed to load in section 2(a) of Exhibit C of the customer's BPA Power Sales Agreement will be expected to be committed to load in subscription and follow-on contracts.

The use of undeclared resources to serve the customer's firm load is not a declaration under section 5(b)(1) of the Northwest Power Act. A customer may or may not apply such resource to its load under the next contract.

4. A customer can sell the unplanned output, which cannot be output included in section 2(a) of Exhibit C of its resources declared under section 2(a) of Exhibit C, anywhere for any price without a 9(c) decrement.

From time to time, generating resources are able to produce power in excess of planned amounts that the customer has declared under section 2(a) due to water conditions that exceed the planning criteria, increased heat rate due to temperature, or other conditions. Such temporary over-generation is not part of the firm power that a customer declares under its section 2(a) resource dedication as being applied to load. Such temporarily available power is not conservable by the fact that the customer has dedicated firm power from the resource to meet consumer load. Such over-generation available on a temporary basis is not subject to section 9(c) determinations and may be sold in or out of the region without consideration of a reduction in BPA's obligations.

5. A customer can sell the planned firm output of a regional resource to any regional utility, joint operating agency (JOE), or direct service industry (DSI) for use in the region for any price for any term without a 9(c) decrement. Such sales must be made to a utility, JOE, or DSI with a planned or actual load deficit in the region for the period of the sale. An unspecified resource amount listed in section 2(b) of Exhibit C constitutes a planned deficit.

Any firm power from a resource, other than a declared resource under section 2(a) of Exhibit C, sold by one BPA regional utility customer to another BPA regional customer for use in a

regional load may be sold at any price – the cost plus a reasonable rate of return does not apply – and without a decrement.

6. Customers are responsible for the use of resources or portions [parts] of resources [output] or contract resources that they own as follows:

6(a). If a customer sells a resource or its output to a third party that does not have a 5(b) power purchase from BPA, the selling customer remains responsible for the in-region use of that power in order to avoid a 9(c) decrement to its BPA entitlement. A customer may include a contract provision requiring in-region use of the power in the sales contract with the third party that does not have a 5(b) power purchase from BPA. However, the selling customer remains responsible for the in-region use of the power.

6(b). If a customer sells a resource or its output to a third party that does have a 5(b) power purchase from BPA, the 5(b) 9(c) Policy obligations transfer to the third party, and in such case the selling customer is no longer responsible for the use of the power by the purchaser under the 5(b) 9(c) Policy.

Because the third party purchaser has a section 5(b)(1) power sales contract with BPA including obligations to report its exports, BPA and the seller will rely upon the BPA customer to use the resource purchased for its regional load.

7. A customer may declare as dedicated to its load service under section 5(b)(1) of the Northwest Power Act, a part of a resource by naming that part in section 2(a) of Exhibit C, without causing the remainder of the resource to be dedicated to serving load under section 5(b) of the Northwest Power Act.

8. Customers may resell purchases of less than 12 months running from the date of commencement of delivery of power to termination of delivery, without 5(b) or 9(c) decrements, provided that the customer has not accepted any section 5(b) or 9(c) obligations as part of its purchase.

9. The customer may sell a resource that has been used as an unspecified resource under section 2(b) of Exhibit C, consistent with the 5(b) 9(c) Policy. The fact that the unspecified resource has been used to serve load is not pertinent to the 5(b) 9(c) Policy application.

BPA will not treat a resource that is used to meet an unspecified resource obligation under its 5(b) 9(c) Policy as if it were a declared resource under section 2 of Exhibit C to the power sales contract, or under section IV. B. 6(b) of the 5(b) 9(c) Policy. Resources used to meet a portion of, or all of a customer's obligations for "unspecified resource" or its market purchase commitment, may be sold consistent with the terms of these clarifications, and BPA's 5(b) 9(c) Policy.

10. New Resources, as defined in 10(d) below may be sold in the following manner and remain consistent with the 5(b) 9(c) Policy:

10(a). Sales for the balance of the month and the prompt month may be made without restrictions regarding price, purchaser or location where power sold is used.

Power from New Resources sold on a short-term basis for the month and the prompt month will not be considered as subject to reductions in BPA's obligations if they are sold for export out of the region.

10(b). Sales of power from New Resources made for beyond the prompt month up to 1 year (generally, 61 – 365 days) may be made without section 9(c) restrictions provided that 50% of such sales are for in-region use in each month. The customer will provide BPA with a tally of sales to check for the 50% limit and such check will be performed no more frequently than monthly. The selling customer will maintain records of these sales and upon a BPA request, will provide copies with the price and other proprietary information redacted. Such requests will be made no more frequently than once each month, and the selling utility will provide BPA with information necessary to reasonably determine compliance with this section 10(b).

10(c). Sales made for delivery periods of 366 days or longer and sales of portions of a year with the delivery period in future years may be made via a 'must take auction' that will be open to BPA customers with regional retail loads. Power sold will be for in-region use, with the minimum bid limited to cost plus a reasonable rate of return, or alternatively power sales may be made bilaterally with one or more parties, all of whom will make in-region use of the power.

10(d). "New Resources" are those generating resources, or the contractual right to the output of such resources, that were not in commercial operation as of the date of the 5(b) 9(c) Policy, May 23, 2000, that is the subject of this settlement. New Resources do not include those resources customers have developed solely for export and that are not for use in anticipation of service to the customer's present or future firm loads. Such resources that are developed solely for export, may qualify as a "market resource," in accordance with the meaning of such term under BPA's section 9(c) policy and ROD. If so qualified, the market resource is not subject to subsection 10 (a)-(c) above, and may be exported without a reduction in the customer's BPA firm power requirements obligation.

10(e). If the limitations in 10(b) and 10(c) above result in no sales for in-region use of the New Resources, the power may be sold for use outside the Pacific Northwest. If the outside purchaser was making the purchase at a price less than that offered by or to in-region users, then the New Resource must be offered in the region to BPA and BPA customers at such lower price before the out of region sale is made.

10(f). The customer has the responsibility for demonstrating that the resource is a New Resource by providing to BPA the pertinent information and data such as date of commercial operation, size, location, etc.

11. A customer has demonstrated that a power sale is for use in the region under the following circumstances:

11(a). The sale is to a Northwest Power Act section 5(b) customer of BPA with unspecified resource amounts declared in section 2(b) of Exhibit C.

11(b). The sale is to a Northwest Power Act section 5(b) customer of BPA as displacement of a resource or contract resource declared in either section 2(a) or section 2(b) of Exhibit C. The use of the displaced resource is subject to the 5(b) 9(c) Policy. The displacement of a resource that is declared in section 2(a) of Exhibit C does not represent a removal or replacement of that resource from service to load.

11(c). The sale is to a Northwest Power Act section 5(b) customer of BPA with a slice/block contract when the delivery of Critical Slice Amounts is forecast to be or is actually less than the Initial Critical Slice Amount.

11(d). The power sale is to a Northwest Power Act section 5(b) customer of BPA when it replaces a resource or contract resource declared in section 2(a) of Exhibit C that to have been lost in accordance with the 5(b) 9(c) Policy.

11(e). The sale is to a Northwest Power Act section 5(b) customer of BPA to supplement a resource or contract resource up to the amounts declared in section 2(a) of Exhibit C when such resource or contract resource does not produce, or is forecast not to produce, power in accordance with its declared amounts.

A sale of power by a Northwest utility from a resource that is not otherwise committed to its load, to supplement or make up power stated in 2(a) of Exhibit C of a purchaser and used for the purchaser's load, is a use of the power in the region.

11(f). The sale is to a DSI with a facility operating in the Pacific Northwest for service to that operating facility.

The portion of DSI loads not directly served by BPA are regional loads for the purpose of section 9(c) and 3(d) in determining use in the region when a power sale is made by a Pacific Northwest utility to a DSI.

11(g). The sale is to a Northwest Power Act section 5(b) customer of BPA for service to an operating NLSL. If the purchasing entity has a resource or contract resource declared for service to that NLSL then the sales of that resource or contract resource is subject to the 5(b) 9(c) Policy.

A Pacific Northwest utility may sell power to another Pacific Northwest utility for an operating NLSL. BPA will consider the sale an in-region use for purposes of section 9(c) and 3(d), provided that the load is operating and the power sold exceeds the other resource(s) identified for the NLSL by the purchaser, if any, but does not exceed the load; and provided that the purchase is not displacing any resources specifically identified for service to the NLSL.

11(h). The sale is to a Northwest Power Act section 5(b) customer of BPA for other transactions that are described prior to their deliveries and can be demonstrated to serve loads in the region.

11(i). The sale is to a Northwest Power Act section 5(b) customer of BPA as a substitute for a 5(b) resource declared under that customer's 5(b) contract, which the purchaser no longer owns, and is to provide the declared amount for such resource for the purchaser's load service obligation.

11(j). The sale is to a Northwest Power Act section 5(b) customer of BPA to serve the retail load of such customer in excess of planned levels.

11(k). The sale is to a BPA customer utility that has entered into an agreement with BPA to reduce its load requirements on BPA.

An alternate purchase of nonfederal power from another regional utility by a BPA customer to reduce its load under a specific load reduction agreement with BPA, that meets such load reductions, is power used in regional load.

12. BPA will not impose a 9(c) decrement on the selling customer if the selling customer retains the contractual right to terminate immediately the sale to a regional utility, DSI or JOE without a Northwest Power Act section 5(b) contract with BPA, if the selling customer discovers, or when BPA determines that the purchaser is not making in-region use of the power to serve load, and such right of termination is promptly exercised upon such discovery or determination.

13. Does the 5(b) 9(c) Policy apply to the export of any secondary firm energy? If so, under what circumstances would a utility's net requirement be decremented for exporting secondary firm energy?

Response: The 5(b) 9(c) Policy does not apply to sales of secondary energy. Secondary energy is unplanned over-generation from hydroelectric resources due to water conditions above critical water planning, thermal plant over-generation running at higher capacity due to ambient air conditions for limited time durations, or generation held until the month of delivery or prompt month to meet unanticipated loads. It is not firm purchased power. These conditions occur temporarily on a utility system, are variable as to the time of occurrence, and are dependent upon factors beyond those normally planned for continuous operation of the resource. A reduction in BPA's firm obligations to a customer would not result from sales of such temporary over-generation as opposed to planned generation available on a continuous firm basis during a year.

The 5(b) 9(c) Policy applies to all exports of firm power by a BPA customer. A customer must identify its planned resources to be used to serve its regional firm load annually under the contract. These planned resources (except for resources that are held to meet unanticipated load) include seasonal purchases on a multi-year basis; power purchase contracts with delivery periods greater than one year; customer-owned generation; and purchase power contracts with delivery periods less than one year, and obligate the customer to serve regional load with the power. Sales of any planned firm power from these resources in excess of the customer's forecasted regional firm load would be subject to the 5(b) 9(c) Policy. If a customer exported such planned firm power without a BPA determination that such power could not otherwise be retained to serve regional loads, a customer faces a decrement of its net requirements purchase. BPA could request information regarding any exports not reported by a customer. If BPA determines the

power has been exported and could have been retained to serve the customer's or another BPA customer's regional loads, then BPA would reduce the exporting customer's net requirement by adding an amount of power equal to the resource exported into the customer's Net requirements Exhibit and modify the customer's federal power purchase from BPA.

14. Does the 5(b) 9(c) Policy apply to any exports of non-firm energy?

Response: As discussed above, the 5(b) 9(c) Policy does not apply to the class of energy which is available only temporarily from over-generation of a customer's non-Federal resources and which is sometimes called non-firm or secondary energy.

15. Does the requirement of an offer at cost plus a reasonable rate of return apply only to exports of firm energy and not to exports of non-firm energy?

Response: Yes. The cost plus a reasonable rate of return standard for offers applies to planned firm power sold by a customer to other BPA customers in the region for their regional loads or to BPA and only applies to offers of firm power, and not to offers of non-firm energy by a customer.

16. Clarify the language in the 5(b) 9(c) Policy which appears to be inconsistent with the decision BPA made regarding the Residential Purchase and Sale Agreements ROD.

Response: The 5(b) 9(c) Policy and ROD was issued on May 23, 2000. On page 12 of the Attachment that includes the section 9(c) Policy, BPA stated that BPA would address the effect of exports of resources on section 5(c) contracts on a case-by-case basis. BPA's Record of Decision on Residential Purchase and Sale Agreements (RPSA) issued in October 4, 2000, addressed the application of the section 9(c) policy to deliveries of power under a section 5(c) contract. On page 74, BPA determined that section 5(c)(6) of the Northwest Power Act precluded any reductions in exchange sales due to the operation of section 9(c). BPA's policy decision under the RPSA ROD eliminates the need to address section 9(c) under section 5(c) contracts on a case-by-case basis.

17. Confirm the treatment of specific resources identified to support an export sale (a system sale).

Response: Section 7 of the 5(b) 9(c) Policy requires customers to provide an operating plan identifying the firm resources that support a firm power system sale. BPA will review those firm power resources identified by the seller as planned to support the export sale and determine whether they are sufficient to support the sale. If they are sufficient, they will be deemed to be the resources supplying the power for the sale. BPA will then assume for purposes of review that the export sale is of those planned resources, and will apply the provisions of the policy and section 9(c) and 3(d) to those specific resource(s) the customer has stated is supplying power on a planned basis for the export in the amount of the system sale. The actual resources of the customer operating in any hour may differ from those resources identified by the customer as supporting the export sale on a planning basis. Such hourly operations shall not invalidate the initial designation as reviewed by BPA.

18. Clarify that purchases under the Northwest Power Act's section 5(c) residential exchange settlement are not subject to decrement under section 9(c).

Response: BPA offered two types of power purchase contracts to utilities as an offer to settle BPA's residential exchange program obligations, a purchase under section 5(b) and a purchase under section 5(c). Sales made pursuant to contracts offered under section 5(b) based on a customer's net requirements are subject to decrement under section 9(c). See, pages 131-132 of the Residential Exchange Program Settlement Agreement ROD (Settlement ROD), and pages 18-19 of the 5(b) 9(c) Policy ROD. Sales made as a negotiated "in lieu" purchase under section 5(c) are not subject to decrement under section 9(c). See, pages 18-19 of the 5(b) 9(c) Policy ROD; page 74 of the RPSA Settlement ROD; and pages 140-150 of the Settlement ROD.

19. BPA should clarify that if there were past mistakes in the utility's Firm Resource Exhibit (FRE), which are continued in the FRE under new contracts, the 5(b) 9(c) Policy will not preclude making corrections.

Response: The 5(b) 9(c) Policy does not make any factual determinations, and the 5(b) 9(c) Policy allows making corrections in contractual determinations when warranted.

20. BPA should clarify that the 5(b) 9(c) Policy will permit the "automatic" removal of Qualifying Facility contracts, *i.e.*, purchases of PURPA resources, which were not independently made by the utility when such contracts are terminated.

Response: Pages 51-74 of the 5(b) 9(c) Policy describe when a statutory discontinuance of a resource has occurred. These factual events can include loss of a contract right.

21. Clarify that a customer's resources that are sited outside the region, and used to serve consumer's loads outside the region, are not subject to the Policy. Resources so located outside the region and used outside the region do not require any section 9(c) analysis of "exports" under the Policy and cannot cause a reduction in a utility's net requirement for its regional loads.

Response: A customer's resources, generation or power purchase contracts, or any portion thereof, which have not been dedicated to serve any portion of a customer's regional firm power load under section 5(b)(1), and which are used solely for service to loads outside the Pacific Northwest Region as defined by section 3(14) of the Northwest Power Act, will not result in a reduction or decrement to a customer's net requirement due to such use.

22. BPA should clarify that any power exported by a customer in an amount equal to any retail load under direct retail access will not result in a reduction to the utility's net requirement because the application of section 9(c) to power exported due to a reduction in load by direct retail access load loss will reduce power benefits for residential and small farm consumers under the residential and small farm exchange settlement.

Response: BPA included provisions in the 5(b) 9(c) Policy addressing the concerns over the loss of loads due to retail access. Section D.2 of the 5(b) 9(c) Policy allows a customer to remove a

generating or contractual resource from use to serve its regional load if load loss would otherwise result in a reduction of the utility's net requirements. Any export from the resource that has been removed is subject to the 5(b) 9(c) Policy. If the power is exported and could have been retained to serve a customer's regional consumer loads, BPA would reduce its 5(b)(1) obligation.

23. Would BPA "double count" exports under section 9(c) of the Northwest Power Act if for example, a utility sold its share of an existing generating project to a marketer and that sale were considered an export? Would the sale result in a reduction of both the utility's Net Requirement and its power allocation under its 5(b)(1) contract? Currently the utility's net requirement calculation without decrements for export is 1564 average megawatts. The utility's share of the existing resources it sold was 264 average megawatts. A reduction in net requirement equal to the existing resource sold would leave 1300 average megawatts. Would the power allocation for the utility's residential settlement of 258 average megawatts also be reduced by the 264 average megawatts or not?

Response: BPA would reduce its obligation to serve the utility by the amount of the megawatts of the export sale, but this would not result in a double counting of the 264 average megawatts exported. If the existing resource were included in the utility's Exhibit C as a dedicated resource in the amount of 264 average megawatts, then upon the sale BPA would notify the utility that it had the obligation to supply the same amount of megawatts as that sold outside the region and apply those megawatts to its load. Thus BPA's obligation to supply would not increase as a result of the sale since the utility would have to supply the 264 average megawatts.

If the existing resource is not a dedicated resource under Exhibit C and the 264 average megawatts are sold out of region, then section 9(c) applies, and BPA would have to determine if the resource could be conserved or otherwise retained by reasonable means for service to the utility's regional load, or BPA load, or other BPA customers' load that BPA was not serving. Assuming the determination concluded that the power could be retained for use in regional loads, then BPA would "decrement" its obligations to serve the utility for the duration of the export and in the amount of the export, 264 average megawatts. BPA would show the decrement by adding a nonfederal resource obligation to the utility's contract in section 2(b)(3) of Exhibit C in the amount of 264 average megawatts for the duration of the export. This would have the effect of reducing BPA's net requirement obligation to the utility by the amount of the export. It would not necessarily affect the 258 megawatts of Federal power purchased for load because the net requirement still exceeds the amount of the sale.

Only if the amount of load to be served was less than the total of the utility's dedicated resources, would the amount of both the nonfederal resource obligation included in section 2(b)(3) as a result of the 9(c) decrement and the 258 average megawatts of Federal power, result in an actual reduction of Federal power sold to the utility under its contract. The utility's current contracts also permit the removal, due to reductions in retail consumer loads, of the utility's nonfederal resources. Such removal of resources is for utility's resources other than specific section 2(b)(3) resource obligations added due to section 9(c) decrements. If the utility elects to use such removal rights for all its dedicated resources, such removal rights provide that only when the section 2(b)(3) resource obligations plus the Federal purchase exceed the total of the

utility's consumer loads would a reduction in BPA's power "allocation" sale result from a decrement for an export by the utility.

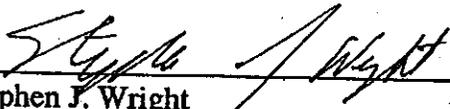
24. BPA anticipates this 5(b) 9(c) Policy will be effective for the duration of its 2001 subscription requirements contracts. However, BPA will review *de novo* its section 5(b) 9(c) Policy, including these clarifications, if there is a major change in BPA's or other statutes affecting its authority for marketing Federal power and this Policy, or if in the judgment of the Administrator, significant changes in the wholesale market require reconsideration of this Policy.

25. Please clarify that section B.6. (b) "Exports that will be decremented by BPA" does not constitute an exclusive, limited list of those regional resources that if exported, may result in a decrement to the customer firm federal power purchase.

The list in section B. 6. (b) is not an exclusive listing of customers' nonfederal resources that could result in a reduction in BPA's firm power obligations. Under the Policy other customer resources would be reviewed by BPA on a case-by- case basis for a determination of whether the resource is conservable, and if exported, whether the export requires or does not require BPA to reduce its firm power obligations to the customer.

These clarifications are adopted and will be applied under BPA's 5(b) 9(c) Policy following the filing of a settlement agreement and motions to dismiss the above referenced litigation. The 5(b) 9(c) Policy and these clarifications will be effective until BPA undertakes a review of this Policy by publishing a future notice.

Issued in Portland, Oregon, this 7th day of March 2003.



Stephen J. Wright
Administrator and CEO