



Department of Energy

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EXECUTIVE OFFICE

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In reply refer to: A-7

To Regional Customers, Stakeholders, and Other Interested Parties:

On December 17, 2008, the United States Court of Appeals for the Ninth Circuit (the court) issued its opinion in *Pacific Northwest Generating Cooperative, et al. v. Bonneville Power Administration*, 550 F.3d 846 (9th Cir. 2008) (*PNGC*), a case involving the challenge by certain parties to Bonneville Power Administration's (BPA's) FY 2007 – 2011 direct service industrial customer (DSI) service construct and contracts.

Among other holdings, the court granted the petitions challenging BPA's statutory authority to offer the DSIs energy at rates below both the Industrial Firm (IP) power rate and the market rate. *PNGC*, at 882. Since the *PNGC* decision was issued, BPA's preference utility customers have argued that as a consequence of this holding the DSIs received more benefits during the 25-month period preceding the court's opinion (Lookback Period) than BPA was authorized by statute to provide them, and that the excess must be recovered by BPA from the DSIs. For its part, BPA's DSI customer Alcoa, Inc. (Alcoa) has argued that if BPA had applied the IP rate as required by *PNGC*, then it would have received significantly more monetary benefits during the Lookback Period and, therefore, Alcoa is entitled to recoup those additional payments.

In addressing the contention by certain preference utility petitioners that the damages waiver provision in the contracts was void and that BPA must recover overpayments from the DSIs, the court held as follows:

The question of contractual interpretation before us is whether, if the agreements are partially invalidated, BPA is permitted to seek restitution, not whether it is 'requir[ed]' to do so. Whether BPA intended to retain the flexibility to seek *or* forgo repayment, depending on (a) the DSIs' 'commitments with respect to operating their facilities,' and (b) BPA's interest in still making sales of physical power to them, is an issue the agency did not address in the Supplemental ROD.

Id. (emphasis in original). The court then remanded to BPA "to determine in the first instance the applicability and construction of the severability clause, the damage waiver, and the physical power sale option in light of our holdings here." *Id.*

Therefore, the threshold issues before BPA on remand are whether, as a matter of law and in view of the holdings in *PNGC*,

- 1) BPA is permitted under the applicable contracts to seek repayment from the aluminum company DSIs Alcoa and Columbia Falls Aluminum Company (CFAC) for any overpayments of monetary benefits during the Lookback Period;
- 2) Alcoa is permitted to seek additional payments from BPA for the Lookback Period; and
- 3) BPA is permitted to seek additional payments directly from Port Townsend Paper Company (or indirectly through the Public Utility District No. 1 of Clallam County) for any undercharges for power delivered to Clallam by BPA for the benefit of Port Townsend, both during the Lookback Period and subsequently.

BPA will commence a bifurcated process to address these issues. In the first part, in early July, BPA plans to issue a draft record of decision on the remanded contract issue outlined above, *i.e.*, “the applicability and construction of the severability clause, the damage waiver, and the physical power sale option.” Written comments on the draft record of decision must then be filed with BPA in early August 2009. BPA plans to issue a final record of decision regarding the remanded contract issue in late September. In the event BPA’s final decision with respect to the remanded contract issue is that, as a matter of law, payments to or from BPA (Lookback Amounts) are precluded, that finding will constitute the Administrator’s final decision and no further proceedings will be necessary.

However, in the event BPA’s decision in the final record of decision is that the payment to or from BPA of a Lookback Amount is not precluded, then BPA will commence the second part of the process to determine whether, and in what amount, BPA or a DSI is entitled to a Lookback Amount. This second part of the bifurcated process, if necessary, will commence with a workshop, the date and time of which will be announced, if necessary, following release of the final record of decision. The purpose of the workshop will be to discuss whether parties believe it would be necessary to undertake a formal hearing in order to create a record with respect to whether, and in what amount, BPA or a DSI is entitled to a Lookback Amount, or whether such a record could be adequately created through an informal process, including one or more workshops and/or the submission of written arguments and evidence to BPA and other parties.

All parties should keep in mind that litigation is ongoing in the Ninth Circuit that could result in orders that have a bearing on the outcome of this process. The court is still reviewing its original decision pursuant to the filing of petitions for rehearing filed by Port Townsend Paper and BPA. Thus, the mandate has not yet issued and the court is free to change its opinion until that time. Also, the court is reviewing challenges to the contract amendment providing service to Alcoa through FY09. It is possible, then, that the timing of events under this process might have to be adjusted to accommodate any decisions of the court relevant to the Lookback determination.

Most importantly, BPA will not issue its final determination on the applicability of the damage waiver, severability clause, and power sale option on the date specified above if the mandate in the original *PNGC* case has not issued prior to that date. In that event, BPA will issue a notice to the parties describing BPA's intentions with regard to the adjusted timing of events that may be necessary to complete this process.

/s/ Stephen J. Wright

Stephen J. Wright
Administrator and Chief Executive Officer