



## Department of Energy

Bonneville Power Administration  
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EXECUTIVE OFFICE

June 22, 2010

In reply refer to: A-7

To Regional Customers, Stakeholders, and Other Interested Parties:

On June 10, 2009, the Bonneville Power Administration (BPA) issued a letter indicating it would commence a potentially bifurcated process to address Lookback issues that arose in connection with the United States Court of Appeals for the Ninth Circuit's remand in *Pacific Northwest Generating Cooperative, et al. v. Bonneville Power Administration*, 550 F.3d 846 (9th Cir. 2008) (PNGC). Publication of the attached Draft Record of Decision ("DROD") marks the beginning of the first phase of that process and initiates the public comment period needed to enable the Administrator to reach a final determination of issues associated with the Lookback.

As explained more fully below, the purpose of this DROD is limited to addressing specific contractual issues identified by the court that must be resolved to determine whether Lookback amounts are owed by or to any party. If a final determination is made that no Lookback amounts are owing and/or recoverable, the second phase of this process will be unnecessary and the final record of decision on this initial phase of the direct service industrial customer (DSI) Lookback process will constitute the Administrator's final action on the subject. However, if it is determined that Lookback amounts are owing, a second phase of the process will be initiated to determine the amounts of any Lookback obligations and the Administrator's determination will not constitute a final action until that phase of the process is also completed.

### **Background**

On December 17, 2008, the United States Court of Appeals for the Ninth Circuit issued its opinion in *PNGC*, a case involving the challenge by certain parties to BPA's FY 2007 – 2011 DSI service construct and contracts.

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 being addressed by this DROD 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.

It should also be noted that on August 28, 2009, the Court issued its opinion in *Pacific Northwest Generating Cooperative v. BPA*, 580 F.3d 828 (9th Cir. 2009) (“*PNGC II*”), which challenged an amendment to BPA’s contract with Alcoa. Specifically, *PNGC II* invalidated an amendment that would have governed service to Alcoa for the nine month period ending September 30, 2009. For purposes of this process, the opinion expanded the potential refund period that would have to be covered by any Lookback involving Alcoa. As indicated in the DROD, no petition for review was filed challenging CFAC’s amended contract, so the potential refund period for CFAC was not expanded beyond the initial contract period.

On January 12, 2010, BPA sought panel rehearing of *PNGC II*, and on January 7, 2010, Alcoa sought panel rehearing and suggested rehearing *en banc*. On March 2, 2010, the court issued its amended opinion in *PNGC II* and denied all petitions for rehearing.

### **Process**

With all petitioner requests in *PNGC* and *PNGC II* exhausted, BPA is releasing for public comment a DROD addressing the threshold legal issues identified in the court’s remand order, as well as other issues set forth in the DROD. Initial written comments from interested parties on BPA’s DROD must be filed with BPA by July 23, 2010.

The DROD is available for public review (along with BPA’s letters on this matter, the challenged Contracts, and the Court’s final Opinions in *PNGC* and *PNGC II*) on BPA’s Website at:

<http://www.bpa.gov/power/pl/regionaldialogue/implementation/documents/>

Beginning on July 26, 2010 and continuing through August 9, 2010, BPA will also receive cross comments from parties who may wish to respond to specific issues raised in the opening round of comments. At the close of the cross comment period BPA anticipates evaluating the record for four to six weeks at which time it will issue a final Record of Decision on Part 1 of the bifurcated process on the DSI Lookback. 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.

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 the amount of any required Lookback Amounts. BPA anticipates that this second part of the bifurcated process, if necessary, will commence with a workshop, the date and time of which will be announced following release of the final record of decision for this initial phase of the process. The purpose of the workshop will be to identify issues that would require resolution and determine what type of process would be most suitable to resolving those issues.

We look forward to seeing your comments, which should be provided via BPA's electronic comment system at [www.bpa.gov/comment](http://www.bpa.gov/comment), by 5 p.m., on July 23, 2010 (for initial comments) and August 9, 2010 (for cross comments). If you have additional questions about this issue, please call Jon Wright at (503) 230-7596 or Heidi Helwig of the Public Affairs Office at (503) 230-3458.

Sincerely,

/s/ Stephen J. Wright

Stephen J. Wright  
Administrator and Chief Executive Officer  
Bonneville Power Administration