

**NEW LARGE SINGLE LOAD POLICY ISSUE REVIEW**

**ADMINISTRATOR'S RECORD OF DECISION**

**MARCH 2002**

## TABLE OF CONTENTS

<b>I.</b>	<b>Introduction</b> .....	<b>1</b>
<b>II.</b>	<b>Public Review and Comment</b> .....	<b>1</b>
<b>III.</b>	<b>Issue 1: No Decision</b> .....	<b>2</b>
<b>IV.</b>	<b>Issue 2: Response to Comment</b> .....	<b>2</b>
	<b>2A. Does the statute provide for the transfer of CFCT loads between customers of the same preference agency class?</b> .....	<b>3</b>
	<b>2B. Would permitting transfers of CFCT load increase BPA’s load obligations?..</b>	<b>4</b>
	<b>2C. Should BPA recognize circumstances in which a third party takes over the obligations of the original utility supplying the CFCT load and treat those transfers as retaining the CFCT status of the load?</b> .....	<b>5</b>
	<b>2D. Should BPA consider a large single load transferred from one preference customer to another preference customer to be a CFCT load if it does not change BPA’s loads and resource balance, or BPA’s overall Federal system load?</b> .....	<b>8</b>
	<b>2E. Should BPA permit CFCT transfers to promote competition?</b> .....	<b>9</b>
	<b>2F. Does BPA have the authority to change its designation of CFCT status for a load due to change in circumstances or subsequent events?</b> .....	<b>10</b>
	<b>2G. Should BPA develop a definition of “utility switching” and exclude a change in utility as a direct or indirect result of implementation of a state electric industry restructuring law?</b> .....	<b>11</b>
<b>V.</b>	<b>Issue 3: Response to Comment</b> .....	<b>13</b>
<b>VI.</b>	<b>Environmental Compliance</b> .....	<b>15</b>
<b>VII.</b>	<b>Conclusion</b> .....	<b>15</b>

# NEW LARGE SINGLE LOAD POLICY ISSUE REVIEW

## ADMINISTRATOR'S RECORD OF DECISION

### I. Introduction

This record of decision (ROD) accompanies the Bonneville Power Administration's (BPA) publication of its policy issue review arising under BPA's New Large Single Load (NLSL) Policy. BPA's NLSL policy is a combination of contract and policy decisions recorded in several documents. Those decisions have been consolidated into one document, which BPA has made available on BPA's web site at:

<http://www.bpa.gov/Power/pl/subscription/announcements.shtml>

Once at the website, scroll to the June 25, 2001, announcement to view the document. BPA sought public comment and review on only the following three issues:

- (1) whether BPA should change its NLSL policy to allow current and former direct service industrial (DSI) customer production load served at BPA's Industrial Firm (IP) rate, or any other rate, to transfer and receive service from a public body, cooperative, or federal agency customer with power purchased at BPA's Priority Firm (PF) rate;
- (2) whether a load at a facility that has previously been determined a "contracted for, committed to" (CFCT) load should be allowed to receive service from a different BPA preference customer and retain its CFCT status; and
- (3) whether BPA should close the class of CFCT load served by BPA customers.

The first two issues arose when preference customers sought to serve a DSI and/or a CFCT load. The concern that these parties have regards the applicable rate treatment for service to such loads, which depends on the status of such loads. BPA raised the third issue to address the issue of future administration of CFCT determinations.

### II. Public Review and Comment

On June 25, 2001, BPA announced the Opportunity for Public Comment Regarding Issues Arising Under Bonneville Power Administration's New Large Single Load Policy. 66 Fed. Reg. 122. On July 10, 2001 BPA held a public meeting in Portland, Oregon, to take public comment on the three issues. The written public comment period was set to end July 27, 2001, but was later extended through August 10, 2001 at the request of many parties. BPA received sixty-two written comments.

### **III. Issue 1: No Decision**

At this time BPA has not made a decision on Issue 1. Many comments received in response to Issue 1 raised concerns that went beyond the scope of the notice. In particular, many parties commented that BPA ought to address large load migrations, or the “phasing on” of large load in 9.9 aMW increments, onto public agency utilities, without limiting the issue to one of only DSI load. In fact, under current NLSL Policy, any load of 10 aMW or more at a single facility that becomes a new load of a BPA utility customer, would be subject to a NLSL determination even if such transfers took place at no more than 9.9 aMW in any twelve-month period. Several comments suggested that the issue of future DSI load service should also be addressed as well and that BPA not treat the shifting of incremental DSI load to preference customer service in isolation. As published in 66 Fed. Reg. 212 (November 1, 2001), BPA announced a change in the schedule for NLSL policy review and determined that additional regional discussion would benefit the resolution of Issue 1. The discussion and review of Issue 1 is expected to take place during fiscal years 2002 and 2003; therefore, until Issue 1 and its related issues have been addressed BPA will continue to apply its existing NLSL policy.

### **IV. Issue 2: Response to Comment**

BPA asked whether a load that was determined to be a CFCT load of a preference customer should continue to have that status if the consumer transferred its load service to another BPA preference customer. A CFCT retail load is an amount of load at a single facility that is excluded from the application of Northwest Power Act section 3(13)'s definition of NLSL. Such CFCT loads must have been served, been under contract for service, or been under some written commitment for service from a specific BPA utility or agency customer on or before September 1, 1979. Under section 3(13)(A) the large consumer loads of a preference customer which were CFCT receive Federal power service at the lower section 7(b) Priority Firm Power rate rather than at the section 7(f) New Resources rate. Such loads are excluded from the definition of New Large Single Loads.

The Administrator makes a determination of CFCT status of the retail load at a consumer's facility by a specific utility or federal agency customer that was providing service, or planned to provide service, before September 1, 1979. A contract or other written record must demonstrate a contemporaneous contract or a commitment to serve the consumer's facility load by that BPA customer. The Administrator reviews information made available by the customer in making the determination, which includes a calculation of an amount of power service for the retail facility load in average annual megawatts. Once a load is determined to be a CFCT, the Federal power service up to the amount of load service as of 1979 is served at the PF rate. The CFCT amount for the retail load does not change and it serves as a “floor” amount of power from which any additional increases in power service to that facility's connected load will be measured. BPA's policy and interpretation have been that such determinations are specific to the

utility serving the load as of September 1, 1979 and the CFCT status is lost when a new utility serves the load.

**2A. Does the statute provide for the transfer of CFCT loads between customers of the same preference agency class?**

**Party Comments**

Some parties' comments argue against allowing the CFCT status to be retained when the consumer load is served by a different utility than served the load in 1979. The Northwest Power Act does not provide for the transfer of CFCT loads between preference customers. *Clallam, NLSL-039*. If BPA concludes that a consumer of a preference customer could retain its CFCT status when switching to take service from a different preference customer, there is nothing in the Act that would prevent the NLSL policy from being further expanded to allow for CFCT loads to be transferred from preference customers to IOUs or from IOUs to preference customers. *Id.* Requiring that CFCT load that is transferred from one utility to another utility be classified as NLSL is consistent with the definition of NLSL in section 3(13) of the Northwest Power Act's NLSL provisions. *PacifiCorp, et al., NLSL-047*. A CFCT load, which migrates to another preference provider, falls under the statutory definition of an NLSL with respect to the second preference provider. *PGE, NLSL-051*. BPA should not allow a CFCT load to receive service from a different BPA preference customer and retain CFCT status. *Id.* Allowing an industrial customer to switch service from one preference utility to another without losing its CFCT status encourages "cream skimming" or "load piracy." *EWEB, NLSL-052*. BPA should not support a means to facilitate or reward load piracy. *PPC, NLSL-040*. Neither the text of the Northwest Power Act nor the legislative history indicate that effects on BPA's load are relevant to the determination of CFCT status, and accordingly, this should not be a consideration in BPA's decision whether to retain its current policy. *PacifiCorp, et al., NLSL-047*.

The CFCT status is the result of a commitment to supply power by the serving utility to a retail consumer made in a bilateral contract between them. *WPAG, NLSL-044*. It constitutes an obligation of the serving utility and a right of the particular retail consumer. *Id.* It is contrary to the nature of this bilateral contractual relationship that the retail consumer be permitted to transfer this contractual commitment to serve onto a second utility that was not a party to the original contract. *Id.* The retail consumer's right as a CFCT load arises under contract with a specific utility, and it should remain solely an obligation of that utility. *Id.*

**BPA Response**

A number of preference customers and investor owned utilities took the position that a transfer of load between two preference customers should not be treated any differently than transfers between an investor owned utility and a preference utility. In effect these commenters support BPA's existing policy and interpretation that Congress intended the

CFCT status be tied directly to the service the consumer was taking from the utility that served it or planned to serve it in the year prior to the Act. The legislative history of the Northwest Power Act and the language of the statute support an interpretation that the CFCT status is specific to the utility serving the load as of September 1, 1979. The House Interior Committee report states:

Under the definition, September 1, 1979, is the ‘cut off’ date for all categories of new large single loads; no cut-off date distinction is made between industrial and non-industrial loads of this type. Thus, a large single load of a utility is a ‘new large single load’ if it was not contracted for or committed to by that utility prior to such date.

H. Rep. 96-976, 96<sup>th</sup> Cong., 2d Sess., Part II (1980) at 39.

WPAG points out the CFCT determination is based on a contractual relationship between a consumer and a utility that is bilateral and individual. As such, the obligations under that relationship are unique to the parties to that contract. BPA acknowledges that execution of a contract with another utility for service extinguishes the former contractual relationship, and that generally when a third entity was not a party to the original service contract, the assumption of service by the third entity leads to another contractual relationship. Generally, BPA agrees that it should retain its current policy and interpretations regarding transfers of load between utilities whether public or private, but with the refinements stated in section 2C. For reasons addressed in 2C below, some events may result in a third entity, not originally a party to the contract, taking over the original entity’s contract service obligations and in those instances the status of CFCT for the consumer’s load should be retained.

## **2B. Would permitting transfers of CFCT load increase BPA’s load obligations?**

### **Party Comments**

Some customers were concerned about the potential for increasing BPA load as a result of adopting the transfer of CFCT load between public customers. This issue raises a concern: does the proposal create the opportunity to increase the net requirements placed on BPA through transfers of loads from one public agency to another? If “yes,” then we do not support this proposal. *OPUC/OOE, NLSL-049*. Providing incentives for the placement of existing loads from one public agency to another in order to obtain a greater share of federal system benefits does not enhance economic efficiency and is blatantly unfair. *Id.*

### **BPA Response**

BPA has not performed an economic analysis to determine whether an impact of a change in the policy would result in additional load were transfers permitted. BPA is not interested in providing incentives for additional load at this time, but BPA must meet its current obligations. It is conceivable that transfer of CFCT load between one public

customer and another may give certain incentives to a consumer which could result in expansions of load at current facilities rather than construction of new production facilities in the region. BPA's NLSL policy and utility requirement contracts have tracked increases in a consumer's load by measuring the connected load at the consumer's facility, and we acknowledge that a consumer's load may increase beyond the CFCT floor. Any increase in load at the facility would be served at PF if it does not exceed 10 average megawatts in any 12 consecutive months. Current CFCT loads may increase even without a transfer of the load between customers but it is possible that in the competitive retail electricity market, the retail rate, or other incentives offered by one utility over another utility's service, could favor expansions of load at existing consumer plants, if they were transferable between customers. Because there have been few transfers, there is little statistical information to base an economic analysis upon. BPA is not relying on this potential effect of a transfer as a reason to change or not change its current policy.

**2C. Should BPA recognize circumstances in which a third party takes over the obligations of the original utility supplying the CFCT load and treat those transfers as retaining the CFCT status of the load?**

**Party Comments**

Many commenters proposed that there be exceptions to BPA's current policy when the serving utility changes due to no fault or action of the retail consumer. When the utility that made the initial service commitment to the retail consumer is subject to a merger or is purchased, or if the location of the retail consumer is subject to annexation by another public utility, then they argue that a CFCT load should be assumed by the successor utility. *WPAG, NLSL-044; NRU, NLSL-025; PPC, NLSL-040; SUB, NLSL-048*. If two adjacent preference customers were to merge and form a single customer, or if one preference customer becomes the successor in interest to another preference customer, then BPA should consider the CFCT status of the end-use consumers involved on a case-by-case basis. *PGE, NLSL-051*.

Other commenters saw a broader standard as appropriate. As long as the CFCT load remains a public utility load, and does not change from its current location (if it is an active load), or does not change from the location identified in its CFCT certification documents (if it has for some reason not yet begun commercial operation), and there is no change in BPA's obligation to serve, the load should remain a CFCT load and be eligible for service at BPA's lowest PF rate as envisioned by the Act. *Cowlitz, NLSL-056; PGP, NLSL-042*. BPA should limit access to the low cost FBS resources in order to avoid increased augmentation costs, but existing or CFCT loads--or the public power utilities which serve them--should not be penalized if BPA's obligations are unchanged; the load in question is unchanged; and the public power utility relinquishing service is held harmless as a result of the transfer. *PPC, NLSL-040*. BPA should allow load switching from one preference customer to another with the retention of CFCT status if both preference customers are in agreement and the preference customer relinquishing the load

is satisfied that it has been fully compensated for any stranded costs (distribution or generation related). *EWEB, NLSL-052*.

### **BPA Response**

Regarding the first set of comments above, BPA agrees that in certain instances, on a case-by-case review, the transfer of load obligations between public utilities could be accomplished such that a new entity stands in the shoes of the original contracting utility's obligations with the consumer and assumes all the rights and obligations of that retail service contract without modification. One example would be when two preference utilities merge to form a single new preference utility customer. The existing contract obligations of the former utility customer are assigned in their entirety to the new entity. In such an instance, the new entity is both a new legal entity but also fully undertakes the obligation of both the prior utilities as a successor in interest to them. The CFCT status afforded to the consumer load, in the amounts as previously determined by the Administrator, should remain in place. This event would not trigger a revision of the CFCT floor amounts or the Administrator's determination.

A further example could be the occasion of an annexation of one preference customer's total and entire service area by another, rather than a merger to create a third entity. A complete annexation of a utility by another would be considered if the annexing utility both took over the full obligations of the prior utility for service to the consumer load and took assignment of the existing contracts of the first utility. Another example might be where a public cooperative utility purchases all of the assets and takes over all contracts and obligations of another cooperative, including assignment of the existing retail contracts for a large load. BPA may then consider the buyer as a successor in interest to the prior utility. Other annexations or purchases that transfer the single large load to the new utility but do not replace the former serving public utility or all its service to its loads, would be treated as a change in supplier and result in the loss of the CFCT status for the single large load.

The PPC, Cowlitz PUD, and EWEB argue that BPA should consider a policy which permits a CFCT load to receive continued PF firm power service from a new serving utility upon the following set of conditions: First, the transfer is to a public utility. Second, the load does not change location if it is an operating load, or if not an operating load, it does not relocate from its proposed site. Third, there is no change in BPA's obligation to serve. *Cowlitz, NLSL-056; PGP, NLSL-042*. The PPC would allow the transfer if conditions two and three were met and states a fourth condition that the public utility that relinquished its service must be held harmless as a result of the transfer. Further, EWEB would have the policy ask whether there was agreement between the public utilities and refines the fourth condition to provide the customer losing the load is fully compensated for any stranded costs of distribution or generation.

Although these are potential criteria for evaluating the transfer of a single load between customers, BPA declines to add these to its current policy. Each of these criteria would

cause BPA to do an oversight evaluation of the retail relationship between both the new utility and the consumer, and between the two customers, which may or may not, at any particular instance, be competing with each other for the load. For example, Cowlitz's first criterion suggests that the "takeover" could be either friendly or hostile between the two public utilities. In comparison, EWEB would only allow continued CFCT status for the load if there were "agreement" between the customers.

On the second and third criterion, it could be easy to tell if there was no change in situs of the load but the question of no change in "BPA obligation to serve the load" is more complex. The third criterion is not so easily decided. It not only involves the issue of whether there might be an increase in the total annual load of the consumer due to the change, but also asks whether the terms of service, purchasing basis, and BPA-utility subscription contract terms have to be the same.

BPA's preference customers do not all purchase Federal power on the same basis. BPA has sought to tailor its power products even more under the subscription contracts than it did under the prior contracts. The result is that two customers may not have the same service obligations for their BPA or their non-Federal load service. The shift of a consumer load to another customer may have an economic impact on BPA and be treated very differently under one utility contract as opposed to another utility. Further, BPA's role is one of being a supplier at the wholesale level. BPA could not require a consumer or a utility to enter into agreements to "hold each other harmless" or to cover any stranded cost of generation or transmission, and BPA would not be appropriately placed to evaluate whether the business relationship between utilities meets such conditions. These issues are matters for the utilities themselves to consider and should not become part of BPA NLSL policy by way of a standard.

Thus, BPA will consider on a case-by-case basis the merger of two public utilities into a single utility as being a successor in interest to the prior utilities when (1) there is a complete buyout or transfer of all of the assets of the prior utilities to the new entity; and (2) the new entity assumes in whole the retail contracts and retail load obligations of the predecessor utilities. BPA will also consider the buyout and take-over of one utility by another, when the transaction is a complete transfer of all retail service of the predecessor utility and when the existing retail contracts of the predecessor are assigned in whole to the successor utility. BPA will consider complete annexations of one public utility by another public utility under this basis. However, partial annexation or other transactions will be treated the same as a change in a utility supplier under the existing policy. Under existing policy, if the entire large consumer load transferred is over 10 average megawatts and is new load to the serving utility, the utility will purchase Federal power for the load at the NR rate.

**2D. Should BPA consider a large single load transferred from one preference customer to another preference customer to be a CFCT load if it does not change BPA's loads and resource balance, or BPA's overall Federal system load?**

**Party Comments**

CFCT loads should be able to carry their CFCT status to another public utility if the change does not affect BPA's need to acquire resources. *Emerald, NLSL-012; WMG&T, NLSL-014; Clearwater, NLSL-024; ORECA, NLSL-030; Douglas, NLSL-036; Alcoa, NLSL-034*. The net impact on Bonneville's load/resource balance is unaffected by whether that CFCT load receives service from the preference utility that originally requested the CFCT status or a different preference utility. *WMG&T, NLSL-014*. A load that meets the CFCT test is not a NLSL if it moves from one BPA preference customer to another, provided that the overall load requirements do not increase the amount of load placed on the federal system. *PNGC, NLSL-027*. The policy that Douglas supports is distinguishable from prior BPA decisions because allowing the transfer of CFCT status between public agency customers will not increase the load on the FBS; it will merely retain the status quo. *Douglas, NLSL-036*.

**BPA Response**

These customers argue that a large single load should be able to carry its designation and receive service from a different utility. The only test would be whether the shift in the load caused BPA's overall loads and resource balance to change, or caused a net increase in total loads on the FBS. They argue that BPA is unaffected by a shift of the single large load when it is between preference customers. In effect, these customers would only have BPA apply its current NLSL policy when the transfer of a load is from a non-preference customer, IOU or DSI, to a preference customer.

BPA cannot accept this construct for three reasons. First, the legislative history indicates that Congress intended to have all utility or Federal agency customers who served large loads treated the same. The Interior Committee added both investor-owned utilities and federal agency customers to the list of utilities affected by the NLSL definition. H. Rep. 96-976, 96<sup>th</sup> Cong. 2d Sess., Part II (1980) p. 3. See statement of Congressman Dingell, C.R. Nov. 17, 1980, p. H10681. Second, the legislative history indicates that the test for a CFCT load is the contractual relationship between the individual utility and the load, not whether BPA's load/resource balance or BPA's overall net load would change. *Id.* at 39. Under its utility requirements contracts and its policy, BPA has always measured the connected load at the facility of the consumer placing the load on the utility to determine the increase in utility service. As to measuring the load of the BPA customer (whether transferred or not), BPA has rejected using a standard of "netting" the loads of the utility, or "netting" total load on BPA as a basis for the application of the NLSL definition. Single large loads are separately identified with specific facilities of the consumer and subject to a different rate. The aggregation of a single large load with all other loads of

BPA, or in fact, all other loads of a utility would ignore the use of the words “any load associated with a facility” in the statute and is not the purpose of this provision. Third, BPA could face additional costs (or reduced revenues) if the load transfers from one public utility to another. This could result from a difference in costs between the services one customer contracts to buy as opposed to those of another. Differences in the applicable BPA power rates, for example a shift from a non-Low Density Discount (LDD) recipient to a LDD recipient, can result in added costs. The transfer of large single loads between any preference customers in the region could raise other significant issues such as meeting BPA’s standards for service when the load is in a different state than the serving utility’s system, or GTA or transmission costs, or load control issues. For these reasons, BPA will not adopt this broader proposed standard.

## **2E. Should BPA permit CFCT transfers to promote competition?**

### **Party Comments**

BPA should allow CFCT transfers because: (1) it is consistent with the Northwest Power Act and past BPA policy; (2) would not increase BPA's loads; and (3) could benefit the region by promoting competition. *ICNU, NLSL-035*. This policy is distinguishable from past IOU decisions intended to prevent additional loads from coming on to the FBS. *Douglas, NLSL-036*. Any restriction on the transfer of CFCT status by BPA would be anti-competitive. *Id.* BPA should be neutral on all decisions impacting load between its customers when such decisions do not impact BPA. *Id.*

### **BPA Response**

The ICNU and Douglas arguments miss the point. Congress adopted a bifurcated rate for BPA’s power service to preference customers under section 7 of the Northwest Power Act. The application of the higher NR rate to large consumer loads, as opposed to the lower PF rate, is not in itself anticompetitive. Congress directed that BPA apply the NR rate to loads which fall within the definition of section 3(13) as new large single loads and charged BPA with administering this provision, so that the application of a higher rate in and of itself is not anticompetitive if directed by Congress.

If a doubt exists over whether the single large loads, which were served by one utility as of September 1, 1979, were tied specifically to that contractual relationship in order to be a CFCT load, then the legislative history of the Interior Committee Report dispels any such doubt. That report’s language is specific. To be eligible as a CFCT, the load must be served by the utility that was providing service on September 1, 1979. Under this policy review BPA is accommodating the “successor in interest” circumstance in which one utility takes over another utility by merger, complete annexation of the other, or buyout. However, BPA finds no indication that Congress intended to promote retail competition between utilities, or intended BPA to accept transfers of single large loads between any and all regional utilities without a potential rate consequence. Although

eliminating the rate distinction might promote retail competitiveness between utilities as suppliers to single large loads, BPA does not find that purpose in Section 3(13).

**2F. Does BPA have the authority to change its designation of CFCT status for a load due to change in circumstances or subsequent events?**

***Party Comments***

BPA cannot take away the right for CFCT when, under circumstances or separate affairs of any industrial facility and a public agency, the relationship may change or be changed for whatever reason. *Longview Fibre, NLSL-053*. BPA must conclude that all CFCT loads are excluded from the definition of NLSLs. *Pope & Talbot, NLSL-041*. Section 3(13) does not make any distinction based on whether a CFCT load transfers from an IOU customer to a public agency customer or visa versa. *Id.* It states that CFCT loads are simply excluded from the definition of NLSLs. There is no statutory authority for BPA to determine that CFCT loads lose that designation due to subsequent events. *Id.*

**BPA Response**

Longview Fibre and Pope & Talbot are retail ratepayers and consumers of BPA customers. They assert that a CFCT determination is immutable regardless of any change of condition or circumstances. Longview states that once granted all CFCTs must be excluded from the NLSL provision and that BPA cannot take away a consumer's CFCT designation. Pope & Talbot argues that the statute makes no distinction between transfers from a public preference utility to an investor owned utility or visa versa. It then argues that there is no statutory authority for BPA to determine that CFCT loads would lose that designation due to subsequent events.

Regarding this last point, if the BPA Administrator has the authority to make a determination as to whether a load is a CFCT based on the circumstances of its load service, then the Administrator can also find that the terms of the statutory provision have not been met. If the Administrator has the authority to so determine prior to making such CFCT determination then that authority also exists if the conditions, facts, or circumstances change subsequent to the determination. Otherwise, the Administrator would be unable to correct or modify a determination based on a change in circumstances that originally allowed for the CFCT determination. Nothing in the statute suggests that these determinations are permanent or immutable and not subject to changing conditions. These determinations are made subject to the Administrator's sole review and are committed to the Administrator's discretion by statute. BPA's review of changes affecting a CFCT load have been part of BPA policy on transfer of large single loads between customers since 1982, and Pope & Talbot has not demonstrated a rational basis for changing that policy now.

Pope & Talbot states that there is no distinction made in section 3(13) between service to a large single load of a public utility and that of an IOU, and load could transfer between

utilities of either class. BPA's NLSL policy treats transfers of load equally the same between customer classes and this policy review does the same. The standard stated above will apply to transfers between public utilities and BPA's present policy will apply to transfers between IOUs or between an IOU and a public and visa versa. However, the consequences of a CFCT determination are not the same for each customer class. The statute provides federal power service to the IOUs at a different rate than that of the public agency customer. 16 USC 839e(b); 16 USC 839e(f). For example, a transfer of a large single load from a public to an IOU would result in IOU service from BPA at the NR rate. This result is mandated by the operation of the rate directives of section 7(f) in the Northwest Power Act. An IOU cannot obtain service for its CFCT loads or any other load at the section 7(b) PF rate. Conversely, if Pope & Talbot's interpretation were followed, a large single load of an IOU that was a CFCT would obtain lower cost priority firm power when transferred to a public. For reasons stated above, BPA declines to adopt such a policy. The current consequence under section 7 of a transfer of CFCT load from a public to an IOU is that the IOU cannot exclude the costs of the resources used to serve the load from its average system cost under section 7(c). It does not mean that the IOU becomes qualified to buy power at the PF rate.

**2G. Should BPA develop a definition of “utility switching” and exclude a change in utility as a direct or indirect result of implementation of a state electric industry restructuring law?**

**Party Comments**

BPA's policy needs to elaborate on what kind of utility switching is to be discouraged. *Plum Creek, NLSL-032*. When BPA determines that a large load that is not an NLSL (either because it is CFCT or because of orderly and slow load growth) is at some point being served by a different utility, BPA must then determine whether “utility switching” has actually occurred. *Id.* The policy elaboration should include a definition of “utility switching” and specify situations that should be considered as utility switching. *Id.* Specific circumstances that should not be considered utility switching are: when the load is served by a different utility as a direct or indirect result of the implementation of a state electric industry restructuring law; when an entire service territory is succeeded by a different utility; when no intent to switch utilities is exercised by the large load facility. *Id.*

### **BPA Response**

BPA declines to define its policy in the terms proposed by Plum Creek as “utility switching.” BPA has had a long established policy on the transfer of large single loads between a public utility and an IOU, which is supported by the legislative history of the Act. BPA customers are aware of this policy and could take it into consideration in any deliberations regarding state electric industry restructuring law. It is consistent with the intent of statute and results in a balanced treatment of large consumer load. BPA is not intending to modify that balance by this policy.

Second, BPA realizes that Plum Creek was formerly served by an IOU and is now served by a preference customer. Given Plum Creek’s amount of load, some service to load would be at the NR rate if its service were from BPA. Other independent facilities of Plum Creek, as determined by BPA, that were transferred and had loads substantially less than 10 average megawatts, could receive service from BPA at the PF rate.

Third, the changes made in Plum Creek load service were the result of more than two years of state legislation and substantial negotiation between the public utility who purchased the service area and distribution system from the former IOU utility. The change was a voluntary decision by one utility to sell its system to another utility. It was not the result of the state action on restructuring the retail electric market because the state did not direct or prevent the former serving utility from continuing to serve or from making a voluntary business choice. Although Plum Creek may have had little or no input into these arrangements, the “involuntary” retail situation that Plum Creek argues resulted does not change BPA’s decision here. BPA’s statutory focus is at the wholesale electric utility level regarding the rate at which BPA can sell Federal power to the public utility and is not at the retail utility service level. The Congressional Committee considering the NLSL provision, recognized that local utilities still had the ability to structure their retail rate service so as to subsidize the local large consumer industry if they so desired. “It will remain possible, however, for a public utility to subsidize industry with lower-cost residential power. This would of course, need the consent of the utility’s governing body.” H. Rep. 96-976, 96<sup>th</sup> Cong. 2d Sess., Part I (1980) at 44. Thus, a local utility could meld its rates or tie its industrial rates to specific costs.

BPA’s issue is whether there should be some consideration given to circumstances in which one public utility transfers load to another public utility. To adopt an involuntary or voluntary transaction standard due to state retail restructuring for transfers of load between an IOU and a public utility would be a broader retail service issue. BPA’s current policy already addresses the proper scope of service at wholesale. Plum Creek was formerly served by an IOU and not by a preference customer. BPA’s 1982 policy on such IOU to public utility transfers would apply.

## V. Issue 3: Response to Comment

### Party Comments

BPA asked whether it should at this time close the class of CFCT load served by BPA customers. Many customers commented on this issue.

Twenty years has been sufficient time to present evidence to BPA of a CFCT commitment and take necessary actions. *WPAG, NLSL-044; WMG&T, NLSL-014; PNGC, NLSL-027; Clallam, NLSL-039; PacifiCorp, et al., NLSL-047; OPUC/OOE, NLSL-049*. No substantial injury would be inflicted on potential CFCT loads, since they have had ample time to request a CFCT determination. *PGE, NLSL-051; PacifiCorp, et al., NLSL-047*. It becomes more difficult to make a CFCT determination over the passing decades, as the difficulty in reconstructing an accurate paper trail increases, along with the added problems of statutory records retention requirements and multiple changes in personnel. *Id.* After providing a six-month notice period to allow any last minute loads to present evidence of the service commitment made to them close the CFCT class. *Id.*; *Umatilla, NLSL-023; Clearwater, NLSL-024*. A new CFCT load should be granted by BPA only upon clear and convincing documentation from information as of 1979. *OPUC/OOE, NLSL-049*. Close the window after a year-long grace period which would begin at the date of publication for the Record of Decision on this issue. *NRU, NLSL-025; SUB, NLSL-048*. Provide customers a 2-year timeframe to identify and request service to CFCT loads. *Clallam, NLSL-039*. BPA should close the window effective on the later of September 2, 2002, or one year after issuing its Record of Decision on this NLSL policy clarification. *PPC, NLSL-040*.

It is good public policy to establish with some degree of certainty the range of loads eligible for preference service. *EWEB, NLSL-052*. Establishment of a deadline for new prospective CFCT loads to be identified and certified would be a prudent action in order to allow BPA and its customers to more fully understand the load growth faced by BPA and the planning that needs to be undertaken to serve that load. *Cowlitz, NLSL-056; PGE, NLSL-051*. The certification process used by BPA should be no less rigid than the certification process used for CFCT loads in the past. *Id.* Even though the District advocates for a deadline for CFCT certification, the Act does not specify such a restriction; therefore, it must be recognized that the certainty sought by a deadline may be subject to challenge. *Id.*

The Act does not place any time limitations on the determination of CFCT status; consequently, PGP opposes BPA re-interpreting the Act and creating statutory limitations that Congress did not intend. *PGP, NLSL-042*. An arbitrary closure date would violate the Act; it would be an abuse of discretion to summarily refuse to consider valid evidence verifying CFCT status, which would be discriminatory and harmful to Northwest industry. *ICNU, NLSL-035*. BPA should not be setting arbitrary limitations on industry when it is only appropriate for BPA to provide service and power to industry. *Longview*

*Fibre, NLSL-053.* BPA should not close the class of CFCT load served by BPA customers. *Alcoa, NLSL-034.* If BPA intends to terminate service to Alcoa in the future, it should at least give Alcoa the opportunity to make its case for CFCT status under the Northwest Power Act. Id.

SUB requests that BPA establish a public process to determine whether or not existing CFCT obligations should be periodically reviewed and to determine if the CFCT should be removed or reduced. *SUB, NLSL-048.* SUB comments that it is aware of a number of relationships where CFCT status exceeds the actual industry load being served at the present time. Id.

### **BPA Response**

Many of the comments expressed support for a decision to administratively close-out the CFCT class. Many parties suggest procedures for administratively closing out the CFCT class. Other comments noted that the language of section 3(13) of the Northwest Power Act does not grant the Administrator the discretion to take such administrative action. It is noted that the provision does not place a time bar on the CFCT class. While BPA may agree with the comment that closing out the class would likely result in administrative efficiencies, the statute does not provide BPA a basis for taking such action. Therefore, consistent with section 3(13), BPA's existing policy is retained and CFCT status may be applied for at any time. Under the policy a utility customer is required to request a CFCT determination. The customer is required to make a demonstration, supported by facts contemporaneous to 1979, of the existence of a "contracted for, committed to" obligation to serve the load. Such a demonstration can only be made by proffering authenticated, written documents showing contemporaneous service existing or anticipated in the year 1979, that in fact the utility had contracted for or committed to serve the load in question. Statements made after 1979 will not be sufficient to obtain the CFCT status. BPA's policy requires a paper trail, and a lack of contemporaneous written documentation will result in a denial of the CFCT request.

In response to SUB's request to review the load levels of past CFCT determinations, BPA declines to undertake such a review. To the extent a CFCT load is not presently taking its fully determined CFCT amount, BPA is neutral in terms of its obligation to serve. BPA appreciates SUB's request; however, BPA understands that some CFCT loads might not always require all of the power they otherwise are entitled. The statute does not compel BPA to administratively review past CFCT load determination amounts for the purpose of reducing or removing them. Once the determination is made the utility customer and its load are given assurance that BPA service within the CFCT load amount will be subject to the then effective priority firm (PF) power rate. Load served in excess of the CFCT load amount and which is greater than 10 aMW in a twelve-month period is subject to NLSL treatment.

## **VI. Environmental Compliance**

The evaluations and decisions contained in this document are consistent with the environmental analysis for the 1998 Power Subscription Strategy, as documented in the National Environmental Policy Act, Administrator's Record of Decision, Power Subscription Strategy, December 21, 1998 (NEPA ROD). This tiered NEPA ROD is a direct application of BPA's earlier decision to adopt a Market-Driven approach for participation in the increasingly competitive electric power market and is consistent with BPA's Business Plan, the Business Plan Environmental Impact Statement (DOE/EIS-0183, June 1995) and the Business Plan ROD (August 15, 1995).

## **VII. Conclusion**

For the foregoing reasons, BPA adopts a policy which reviews a public utility's transfer of a large single load to a new serving utility on a case-by-case basis. Under the following circumstances that affect a change in the serving public preference utility, BPA will continue to recognize a prior CFCT designation for a large single load: (1) when a new utility is created by merger between the prior serving utility and a utility of the same class; (2) when a utility completely annexes all of the service territory of the prior utility; or (3) when a public utility completely buys all of the service area of the prior public utility, provided that the retail service contract existing and in effect at the time of the action is assumed in whole by the newly serving public utility. BPA will measure the connected load at the facility of the consumer in determining the service transferred, and will not aggregate loads of the public utility or of BPA. BPA will not close the class of the CFCT determinations but will require that only written documents contemporaneous with the cut-off date of September 1, 1979 be considered in the Administrator's review and that such documents must establish the business, contractual relationship or commitment, and the amount of load to be served. Statements made after the date of September 1, 1979, will not be considered as evidence of such a contract or business relationship. BPA continues to be concerned about the reliability and availability of contemporaneous information on any such requests for potential loads and once again encourages its utility customers to make their requests for determinations to BPA sooner rather than later.

Issued in Portland, Oregon, on March 27, 2002.

Stephen J. Wright

---

Administrator and Chief Executive Officer