



Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

POWER SERVICES

May 6, 2015

To: Regional Customers, Stakeholders, and Other Interested Parties

On September 18, 2014, the U.S. Court of Appeals for the Ninth Circuit issued *Industrial Customers of Northwest Utilities, et al. v. Bonneville Power Administration*, 767 F.3d 912 (2014) (“*ICNU*”). *ICNU* is the third case in a series of related cases involving challenges to Bonneville’s contracts with its direct service industrial customers, primarily Alcoa. In *ICNU*, the Court remanded to Bonneville to address four specific questions, discussed more fully below. This notice to the region initiates an administrative process to respond fully to the questions posed by the court. At the outset, however, a brief review of the history of this litigation might be helpful to those who wish to submit comments.

Background

***PNGC I* – The Block Sale Contracts**

In 2006, Bonneville entered into five year power sales contracts with Alcoa and Columbia Falls Aluminum Company, two aluminum smelting direct service industrial customers (DSIs), for service from 2007-11. These contracts are generally referred to as the Block Sales Contracts. Under the Block Sales Contracts, the parties agreed that, for the first three years of service, in lieu of selling physical power to the DSI at the Industrial Firm Power (IP) rate, Bonneville would “monetize” these power benefits in the form of financial payments to the DSI up to a pre-established cost cap. The Block Sales Contracts also gave the DSI the option of locking in the financial benefits for the entire five-year period if the DSI purchased a five-year block of power in the market. Alcoa and Columbia Falls Aluminum Company exercised this option. In addition, Bonneville entered into a contractual arrangement with its only non-aluminum DSI, the Port Townsend Paper Company. Under this arrangement, Bonneville sold power to Port Townsend’s public utility provider, Clallam PUD, who then resold the power, at the same rate, to Port Townsend. The power was sold to Clallam PUD at Bonneville’s priority firm (PF) power rate, plus a margin typically charged by public utilities to their industrial customers.

The Block Sales Contracts and Port Townsend contracts were challenged by Bonneville’s public power customers and Alcoa in *Pacific Northwest Generating Cooperative, et al. v. Bonneville Power Administration*, 550 F.3d 846 (9th Cir. 2008) (“*PNGC I*”). In *PNGC I*, the court found that, (1) Bonneville has the discretionary authority, but not an obligation, to sell power to the DSIs; (2) if Bonneville chooses to sell power to the DSIs, it must first offer industrial firm power at the IP rate before offering any other form of power at a price below the IP rate; and (3) the sale, as structured, did not comport with sound business principles. The court held that, although

Bonneville has the authority to monetize its power sales contracts, its decision in this instance with respect to the Block Sales Contracts failed to satisfy its statutory obligation to provide the “lowest possible rates to consumers consistent with sound business principles.” Similarly, the court rejected the Port Townsend contracts because, even though the transaction involved a sale of physical power rather than a payment of funds, the power sale was at a rate below the IP rate. In terms of relief, the Court stated that it was not rendering the contracts void. Instead, it remanded to Bonneville for a determination of the construction, applicability, and effect of the severability and damage waiver provisions that were part of the Block Sales Contracts. The Port Townsend contracts were also remanded in light of the findings of the court.

PNGC II – The Alcoa Amendment

In response to *PNGC I*, Bonneville suspended service under the Block Sales Contracts to consider near term responses to the Court’s remand. Within a few weeks, Alcoa and Bonneville entered into a nine-month amendatory agreement (the Alcoa Amendment). The purpose of the Alcoa Amendment was to establish a short-term solution that would allow Alcoa to continue operations without disruption while Bonneville conducted an administrative process to respond to the court’s remand. The Alcoa Amendment provided that Bonneville would continue to provide Alcoa with monetary benefits during this interim period, but that such benefits would be calculated based on the IP rate as Bonneville understood the court’s opinion to require. Bonneville’s public power customers challenged the Alcoa Amendment as suffering from the same defects identified by the court in *PNGC I*. The court agreed, and in *Pacific Northwest Generating Cooperative, et al. v. Bonneville*, 596 F.3d 1065 (9th Cir. 2010) (“*PNGC II*”), remanded to Bonneville to determine whether and how it would seek recovery of the benefits provided to Alcoa under the Alcoa Amendment.

The *PNGC I & II* Remands

In June 2009, Bonneville issued a letter to the region stating that it would begin an administrative process, referred to as the “Lookback,” to address the issues remanded in *PNGC I*. Because the remand in *PNGC I* was ongoing when *PNGC II* was issued, Bonneville expanded the scope of the Lookback to include the remand in *PNGC II*.

On February 18, 2011, Bonneville issued its final record of decision (“Lookback ROD”) on the remands in *PNGC I* and *II*. In the Lookback ROD, Bonneville decided that it would not pursue a recovery of funds for the following reasons.

As to the Block Sales Contracts, Bonneville concluded that the damage waiver provision was valid and enforceable, thereby prohibiting Bonneville from seeking a recovery. Bonneville also determined that, even if the damage waiver provision could not be enforced, there was no legal or equitable basis for recovery of the payments made under the contract that had a reasonable chance of succeeding. Bonneville’s analysis included a limited discussion of Alcoa’s purported claim against Bonneville but did not reach a definite conclusion regarding its merits. Bonneville did conclude, however, that it was reasonable to believe that if Bonneville initiated legal action, Alcoa would respond with a counter-claim as described in Alcoa’s comments.

As to the Alcoa Amendment, which did not include a damage waiver, Bonneville found that it had no legal or equitable basis for a claim against Alcoa. Bonneville also found once again that if Bonneville did attempt to recover funds from Alcoa, Alcoa would most likely counter-claim against Bonneville for its alleged damages, which on its face could substantially exceed Bonneville's claim against Alcoa. Therefore, Bonneville determined that it would be unlikely to prevail in an action against Alcoa. Finally, Bonneville found that it had no legal or equitable basis for recovering funds from Port Townsend because it had no direct contractual relationship with Port Townsend, and no basis for an equitable claim.

The *ICNU* Remand

In *ICNU*, Bonneville's public utility customers challenged Bonneville's decisions in the Lookback ROD, alleging Bonneville had constitutional, statutory and contractual obligations to seek a recovery of funds under all the challenged contracts. The Court upheld Bonneville's determinations with respect to the Block Contracts and the Port Townsend contracts, but found that Bonneville's decision with respect to the Alcoa Amendment was not supported by the record.

In terms of relief, the Court remanded the Alcoa Amendment to Bonneville and directed Bonneville:

- (1) "to provide a defensible estimate of the amount of the subsidy it provided to Alcoa under the Alcoa Amendment prior to its invalidation;"
- (2) "to provide some analysis of whether Alcoa's claim of net underpayment has any fair chance of success;"
- (3) "to analyze alternative plans for recovery of any overpayment to Alcoa; and,"
- (4) "either adopt one of those plans or to explain why, with respect to each of them, the costs and downside risks justify abandonment of the opportunity to recover any overpayment."

ICNU, 767 F.3d at 929.

The *ICNU* Remand Administrative Process

Shortly after the issuance of *ICNU*, representatives from Bonneville, Alcoa and public power met to determine if there might be a satisfactory way to resolve and settle the ongoing dispute regarding service to Alcoa and the recovery of funds. Following this initial meeting, representatives from Alcoa and public power expressed their interest in continuing to meet, without Bonneville, to attempt to reach a resolution among themselves for presentation to Bonneville. However, Bonneville was recently advised that these meetings have reached an impasse.

As a result, Bonneville issues this notice to request public comment and input on all four of the issues identified by the Court, above. Bonneville has already provided public power representatives and Alcoa its initial response to the first issue, that is, a “defensible estimate of the amount of the subsidy it provided to Alcoa under the Alcoa Amendment.” Bonneville has calculated that the amount of monetary benefits provided to Alcoa under the Alcoa Amendment was \$25,627,143.95. Attachment 1 to this notice contains Bonneville’s support for this conclusion. Nevertheless, Bonneville requests public input and comment on this issue as well as the other three issues to assist Bonneville in its decision-making process.

Bonneville believes the second and third issues set forth by the court are legal issues, and the fourth issue involves business considerations, in addition to the legal issues, that should inform Bonneville’s analysis and ultimate conclusions. Bonneville especially urges commenters to provide Bonneville with any legal arguments they believe support their respective positions that Bonneville should or should not pursue a recovery of benefits provided under the Alcoa Amendment.

This administrative process will proceed under the following schedule:

May 6, 2015:	Bonneville issues this notice to the region and opens comment period.
June 8, 2015:	Public comments due on the four issues identified above.
July 31, 2015:	Bonneville issues its draft Record of Decision.
August 31, 2015:	Public comments due on the draft ROD.
October 30, 2015:	Bonneville issues its final ROD.

Comments may be submitted to BPA:

- 1) online at: www.bpa.gov/comment;
- 2) via mail to Bonneville Power Administration, Public Affairs Office – DKE-7,
P.O. Box 14428, Portland, OR 97293-4428; or,
- 3) via fax to (503) 230-4019.

If you have any questions, please contact David Adler, Attorney, at 503-230-4313. He can also be reached at djadler@bpa.gov.

Sincerely,



Suzanne B. Cooper
Vice President, Bulk Marketing

Attachment 1

Alcoa Payments Pursuant to Contract No. 06PB-11744 Amendment No.1

Payment Period	Payment Date	Payment Amount
Dec-08	1/23/2009	\$ 3,232,281.40
Jan-09	2/11/2009	\$ 3,430,491.68
Feb-09	3/11/2009	\$ 3,039,137.29
Mar-09	4/10/2009	\$ 3,327,322.80
Apr-09	5/12/2009	\$ 3,153,476.37
May-09	6/10/2009	\$ 3,218,385.38
Jun-09	7/13/2009	\$ 3,065,786.43
Jul-09	8/12/2009	\$ 3,160,262.61
Aug-09	-	0
Sep-09	-	0
	Total	\$25,627,143.95