

**BONNEVILLE POWER ADMINISTRATION**  
**RESIDENTIAL EXCHANGE TERMINATION AGREEMENT**  
**FOR HARNEY ELECTRIC COOPERATIVE, INC.**

**RECORD OF DECISION**

**NOVEMBER   , 1996**

## Record of Decision

### Termination of Residential Purchase and Sale Agreement and Exchange Transmission Credit Agreement for Harney Electric Cooperative, Inc.

#### I. Background

Bonneville Power Administration (Bonneville) was established by the Bonneville Project Act of 1937 (Project Act), 16 U.S.C. 832 *et seq.* After enactment of the Project Act, Bonneville marketed the low cost hydropower generated by Federal dams in the Pacific Northwest. While Federal appropriations were used in the construction of the Federal hydrosystem, Federal taxpayers did not ultimately pay these costs. The costs of the hydrosystem are repaid with interest over time by Bonneville's ratepayers through Bonneville's wholesale power revenues. Thus, Bonneville's ratepayers have paid the costs of the Federal hydrosystem.

Section 4(a) of the Project Act requires Bonneville to "give preference and priority to public bodies and cooperatives" when selling power. 16 U.S.C. 832c(a) This preference had little significance in Bonneville's early years, however, because Bonneville had sufficient power for to serve the needs of all customers in the region. These customers include public bodies and cooperatives, known as "preference customers" because of their statutory first right to Federal power under the preference clause noted above. *Id.* These customers also include investor-owned utilities (IOUs) and direct service industrial customers (DSIs). In 1948, the increasing demand for power caused Bonneville to require that contracts with the DSIs must include provisions to allow the interruption of service when necessary to meet the needs of Bonneville's

preference customers. In the 1970's, forecasts showed that preference customers would soon require all of Bonneville's power. Therefore, in 1973, Bonneville gave notice that new contracts for firm power for IOUs would not be offered and that as DSI contracts, expired between 1981-1991, the contracts were not likely to be renewed. *Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 383-385 (1984). In 1976, Bonneville advised preference customers that Bonneville would not be able to satisfy preference customer load growth after 1983 and that Bonneville would have to determine how to allocate power among preference customers.

The high cost of alternative sources of power caused Bonneville's non-preference customers to attempt to regain access to cheap Federal power. Many areas served by IOUs moved to establish public entities designed to qualify as preference customers and be eligible for administrative allocations of power. Because the Project Act provided no clear way of allocating power among preference customers, and because the stakes involved in buying cheap federal power had become very high, the competition for administrative allocations threatened to produce contentious litigation. The uncertainty inherent in the situation greatly complicated the efforts by all Bonneville customers to plan for their future power needs. In order to avoid the prospect of unproductive and endless litigation regarding access to the Federal power marketed by Bonneville, Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839 *et seq.*, in 1980. *Central Lincoln Peoples' Utility Dist. v. Johnson*, 735 F.2d 1101, 1107 (9th Cir. 1984).

The Northwest Power Act expressly reaffirmed the right of Bonneville's preference customers to first call on Federal power before such power could be offered to

Bonneville's IOU or DSI customers. 16 U.S.C. 839g(c). The Act also established the Residential Exchange Program. 16 U.S.C. 839c(c). As noted above, when Bonneville had insufficient Federal power to meet the needs of investor-owned utilities in the 1970s, such utilities developed their own resources which were generally more costly than Federal hydropower. The Residential Exchange Program provides Pacific Northwest utilities a monetary form of access to low-cost Federal power. *See California Energy Resources Conservation and Dev. Comm'n v. Johnson*, 807 F.2d 1456, 1459-60 (9th Cir. 1986). Under the program, Pacific Northwest utilities may sell power to Bonneville at a rate based on the utility's average system cost (ASC) of its resources. Bonneville is required to purchase that power and sell, in exchange, an equivalent amount of power to the utility at Bonneville's Priority Firm Power (PF) rate. This is the same rate that applies to Bonneville's sales of power to its preference customers, although the Act expressly provides that the PF rate for the Residential Exchange Program may be higher than the PF rate for preference customers due to a rate ceiling for preference customers established in section 7(b)(2) of the Act. 16 U.S.C. 839e(b)(2); 16 U.S.C. 839e(b)(3). The Residential Exchange is simply "a mechanism for calculating a subsidy, not for establishing a traditional cost of purchased power." Federal Energy Regulatory Commission Order No. 400-A, 30 F.E.R.C. 61,108, 61,195-96 (1985); *see Central Elec. Cooperative v. Bonneville Power Admin.*, 835 F.2d 199-1, 200-01 (9th Cir. 1987). No power is actually transferred to or from Bonneville since the "exchange" is simply an accounting transaction: "in practice, only dollars are exchanged, not electric power."

*Public Util. Comm'r of Oregon v. Bonneville Power Admin.*, 583 F. Supp. 752, 754 (D. Or. 1984), *aff'd*, 767 F.2d 622 (9th Cir. 1985).

Where a utility's ASC is higher than Bonneville's PF rate, the difference between the rates is multiplied by the utility's jurisdictional residential load to determine an amount of money that is paid to the utility as Residential Exchange Benefits. These benefits must be passed through directly to the utility's residential consumers, generally through lower retail rates. 16 U.S.C. § 839c(c)(3). The cost of providing these benefits to exchanging utilities is borne primarily by Bonneville's publicly owned utility and DSI customers, subject to the rate ceiling established in section 7(b)(2) of the Northwest Power Act, which protects Bonneville's preference customers from excessive costs of the Residential Exchange Program. 16 U.S.C. 839e(b)(2).

The Residential Exchange Program is implemented through contracts called Residential Purchase and Sale Agreements and the related Exchange Transmission Credit Agreements (collectively referred to hereafter as the Residential Exchange Agreements). These agreements have been executed with Pacific Northwest utilities interested in participating in the Residential Exchange Program, including Harney Electric Cooperative, Inc. Bonneville and Harney previously executed a Residential Purchase and Sale Agreement (RPSA), Contract No. DE-MS79-81BP90698, and an Exchange Transmission Credit Agreement (ETCA), Contract No. DE-MS79-83BP91680. Harney has been participating in the Residential Exchange Program since the execution of these agreements.

## II. Procedural History

In the fall of 1996, Harney expressed interest to Bonneville regarding the possible buyout of its current Residential Exchange Agreements. As noted above, these agreements establish the terms governing a utility's participation in the Residential Exchange Program. The agreements currently run through June 30, 2001. Subsequent to Harney's request, Bonneville and Harney conducted negotiations regarding the proposed buyout. Bonneville and Harney desire to settle any disputes between them regarding their rights and obligations for the period from and including October 1, 1996, through and including June 30, 2011, under the Residential Exchange Agreements or subsequent agreements and section 5(c) of the Northwest Power Act, by terminating the Residential Exchange Agreements and receiving the payment of liquidated amounts from Bonneville. As a result of the negotiations, Bonneville and Harney developed a proposed Agreement to terminate Harney's participation in the Residential Exchange Program, as described in greater detail below.

On September 25, 1996, Bonneville sent a notice to all interested parties announcing a 30-calendar day comment period regarding a proposal by Bonneville and Harney to terminate Harney's participation in the Residential Exchange Program through June 30, 2011. Interested parties were encouraged to express their views. Bonneville's notice also described the proposed Agreement. In summary, Bonneville proposed to pay Harney a specified sum of money to buy out Harney's current Residential Exchange Agreements through June 30, 2011. The specific proposed provisions of the buyout Agreement and the reasons for those provisions are summarized below.

III. Summary of Agreement

A. Section 1. Definitions. This section defines a number of terms used in the Agreement, including “Residential Exchange,” “Residential Exchange Benefits,” and “Residential Load.”

B. Section 2. Termination of Prior Agreements. This section provides that Harney’s Residential Exchange Agreements and all amendments thereto would be terminated effective at 2400 hours on October 1, 1996.

C. Section 3. Payment by Bonneville. This section provides that Bonneville would, in full and complete satisfaction of all of its obligations for payments to Harney for the Residential Exchange Program under section 5(c) of P.L. 96-501 for the period ending July 1, 2011, pay to Harney the sum of \$1,040,328 in twelve equal monthly payments commencing on or before the last business day of December 1996 and ending on or before the last business day of November 1997. Bonneville determined the amount of the payments based upon the present value of Residential Exchange Benefits to Harney for the period ending July 1, 2001, using Bonneville’s final proposed 1996 wholesale power rates and an interest rate of 7.65 percent. As consideration for the period from July 1, 2001, through June 30, 2011, BPA did not reduce the present value for risk or any other adjustments.

D. Section 4. Advocacy of Legislative Action. In this section, the Parties recognize that the payments provided by Bonneville to Harney under the Agreement would be for the purpose of buying out Harney’s participation in the Residential Exchange Program through June 30, 2011. The Parties also recognize that Bonneville’s financial flexibility is significantly constrained by, among other things, the fact that it has

established 5-year rates which cannot be revisited for many customers during the period prior to October 1, 2001. It would be unfair for Bonneville to pay Residential Exchange Benefits for the period ending July 1, 2001, which were calculated based on Bonneville's proposed 1996 rates, and then be forced to pay additional amounts for Residential Exchange Benefits for that same period. Indeed, because Bonneville's rates reflect a forecast of Residential Exchange Benefits for the period ending July 1, 2001, and because those rates determine Bonneville's revenues, Bonneville would have no funds available to pay any additional Residential Exchange Benefits that might be required by subsequent legislation. Therefore, the Parties intend that the payments under the Agreement would constitute a full and complete settlement of all amounts to be paid by Bonneville under the Residential Exchange Program and any appropriations or other legislation that may, as did the Energy and Water Development Appropriations Act, Public Law 104-46, provide for an allocation, increase, or decrease of Residential Exchange Benefits through June 30, 2001.

The Parties would also agree that consideration has been exchanged to support their mutual promises with respect to the Residential Exchange Program for the period through June 30, 2011. The Parties would agree not to request or advocate, directly or indirectly, any legislative action, including appropriations legislation, to provide greater or lesser monetary payments (or equivalent in benefits) under the Residential Exchange Program than are provided for under the Agreement for the period through June 30, 2011. Notwithstanding the foregoing, the Parties may participate in the development of legislation, other than as described in the preceding sentence, regarding the Residential Exchange Program or a program other than the Residential Exchange. The Parties would



not be precluded from responding to requests for information from Congress regarding any legislation being considered by Congress, provided the response is not inconsistent with the Parties' obligations under the first sentence of section 4(b) of the Agreement. In the event that it was determined by a court of competent jurisdiction that a Party had breached its obligations set forth in section 4(b) of the Agreement, the other Party would be free to request or advocate any legislative action. In the event any Party successfully advocated legislation in breach of its obligation under the first sentence of section 4(b), that Party would agree to forego any increase or decrease in the benefits, relative to those benefits provided in the Agreement, that would otherwise occur under the new legislation.

In summary, the amount paid to Harney under Section 3 of the Agreement buys out Harney's participation in the Residential Exchange Program through June 30, 2011.

E. Section 5. Challenges to Final Actions. This section provides that the payments by Bonneville under the Agreement would be in full satisfaction of amounts to be paid to Harney under the Residential Exchange Agreements and for the Residential Exchange Program for the period prior to July 1, 2011. Because the Agreement establishes total exchange benefits for the period prior to July 1, 2011, Harney would agree not to challenge issues within any final actions taken by Bonneville which are rendered moot as to Harney by the Agreement. For example, Harney would not be able to challenge issues related to the determination of the PF Exchange rate in Bonneville's 1996 rate case, which is used in determining Residential Exchange Benefits. Such issues include, but are not limited to, recovery of stranded costs, the DSI margin, the DSI value of reserves, the section 7(c)(2) adjustment, the DSI floor rate calculation, allegations of

closed mind or bias, the resources included in the Federal base system, in-lieu resource assumptions, the resources included in or omitted from the section 7(b)(2) rate test resource stacks, the inclusion of Mid-Columbia resources in the 7(b)(2) Case resource stack, the determination that there were no costs of uncontrollable events to be excluded from the Program Case, the treatment of Energy Services business revenues, or the quantification of DSI reserve benefits. See 1996 Final Rate Proposal, Administrator's Record of Decision, WP-96-A-02. Nothing in the Agreement, however, would preclude any Party from pursuing remedies for breaches of the Agreement.

F. Section 6. Termination of Filings. This section provides that, subject to section 7, by terminating its Residential Exchange Agreements and participation in the Residential Exchange Program through June 30, 2011, Harney would not be required (a) to file, calculate or track ASC, (b) to submit invoices, or to perform other duties formerly required by the Residential Exchange Agreements. Bonneville's corresponding rights and obligations would be similarly satisfied through the implementation of the Agreement. Bonneville projects that Harney will not have any debit balance under its Residential Exchange Agreements upon termination of such agreements. If and to the extent Harney had, as of October 1, 1996, a debit balance under its Residential Exchange Agreements, such balance would carry over to any subsequent agreements.

G. Section 7. Passthrough of Benefits. This section provides that amounts received by Harney from Bonneville under the Agreement would be passed through directly to Harney's Residential Loads (as defined in Harney's Residential Exchange Agreements). Such amounts would be identified on Harney's books of account and paid by Harney exclusively to, or credited exclusively against the retail rates of, Harney's

Residential Load by November 30, 2001. Notwithstanding the termination of the Harney's Residential Exchange Agreements, Bonneville would retain the right to audit Harney at Bonneville's expense to determine whether the Residential Exchange Benefits paid to Harney under the Agreement were provided only to Harney's eligible residential and small farm customers as required by section 5(c)(3) of the Northwest Power Act. The first audit would occur at the time prescribed by the current review cycle. A second audit may occur after the last disbursement of monies under the Agreement. Bonneville may conduct an additional audit after the second audit only if Harney has not demonstrated the passthrough of such benefits as specified. Bonneville would retain the right to take action consistent with the results of such audits to require the passthrough of such benefits to eligible customers. Bonneville's right to conduct such audits of Harney would expire November 30, 2003 (except for Bonneville's continuing right to assure compliance with such audits). As long as Bonneville has the right to audit Harney pursuant to the Agreement, Harney would agree to maintain records and documents dating back to the Effective Date of the Agreement showing all transactions and other activities pertaining to the terms of the Agreement and Harney's payments of Residential Exchange Benefits to residential and small farm customers.

H. Section 8. Settlement of Disputes. This section provides that the Parties would agree to terminate all pending, and to commence no new, litigation, contract disputes, and regulatory or administrative disputes, including ASC determinations, load determinations, billing disputes, and other issues regarding the Residential Exchange Program, with respect to Residential Exchange Benefits for the period prior to July 1, 2011, except for claims of breach of this Agreement.

I. Section 9. Survival of Obligations. This section provides that the Agreement sets forth the entire agreement of the Parties with respect to the subject matter of the Agreement and may be amended only by writing signed by each Party. The Agreement would inure to the benefit of, and be binding upon, the respective successors and assigns of the Parties. The Agreement would not be intended to confer any right or remedy upon any person or entity other than the Parties and their respective successors and assigns.

J. Section 10. Previously Accrued Benefits. This section provides that any Residential Exchange Benefits due Harney, or owed by Harney, for the period ending at 2400 hours on October 1, 1996, would not be affected by the Agreement. Such amounts would be accounted for and paid separately from the sums payable under section 3. All obligations arising under the Residential Exchange Agreements for the period prior to October 1, 1996, would be preserved until satisfied.

K. Section 11. Status as Preference Customers. This section provides that the rights and obligations of Harney as a wholesale preference customer of Bonneville would not be affected by the Agreement. Harney would continue to have the right to purchase electric power as a wholesale preference customer of Bonneville under rates established pursuant to section 7(b) of the Northwest Power Act.

L. Section 12. Final Action. This section provides that Bonneville and Harney would agree that the Agreement implements the Residential Exchange Program pursuant to section 5(c) of the Northwest Power Act and that the Agreement constitutes a final action pursuant to section 9(e)(1)(B) of that Act. Bonneville and Harney further

would agree that any action challenging the Agreement must be filed within 90 days of the final action, pursuant to section 9(e)(5) of the Northwest Power Act.

M. Section 13. Enforceability. This section provides that Bonneville and Harney would warrant and certify that the Agreement is binding and enforceable on the Parties and within the Parties' legal authority. Further, Bonneville and Harney would agree to defend any and all challenges to the validity and enforceability of the Agreement or to the rights and duties contained therein. Bonneville would defend lawsuits filed against Bonneville. Harney would defend lawsuits filed against Harney. Bonneville and Harney would agree to cooperate in defending any and all challenges to the Agreement.

N. Section 14. Invalidity. This section provides that in the event it were determined by a court of competent jurisdiction that any Party's duties or obligations under the Agreement were invalid, illegal or unenforceable, and in the further event that such determination were not reversed on appeal, then the Party to whom such duty or obligation is owed would have the right, if exercised within 60 days of the final determination on appeal, to rescind the Agreement, which then would be invalid and void ab initio, and of no force or effect.

O. Section 15. Counterpart Signature. This section provides that the Agreement may be executed by counterparts. Upon execution by Harney and Bonneville, each executed counterpart would have the same force and effect as an original instrument and as if Bonneville and Harney had signed the same instrument.

#### IV. Review of Comments

Bonneville's September 25, 1996, notice requested written comments by October 25, 1996. Bonneville received no written comments.

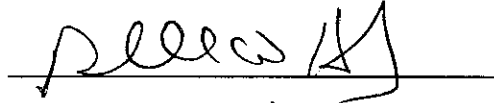
CONCLUSION

Based upon the foregoing discussion, the record compiled in this proceeding and all requirements of law, I hereby determine that Bonneville should execute the Residential Exchange Termination Agreement with Harney Electric Cooperative, Inc.

Issued at Portland, Oregon, on this 8<sup>th</sup> day of November, 1996.

UNITED STATES OF AMERICA  
Department of Energy  
Bonneville Power Administration

By

A handwritten signature in dark ink, appearing to read "R. Hardy", is written over a horizontal line.

Randall W. Hardy  
Administrator