COMMENTS OF THE WESTERN PUBLIC AGENCIES GROUP AND THE PUBLIC POWER COUNCIL REGARDING THE POST-2028 RESIDENTIAL EXCHANGE PROGRAM

Date Submitted: July 27, 2023

A. Introduction.

The utilities that comprise the Western Public Agencies Group ("WPAG") and the Public Power Council ("PPC") appreciate the opportunity to submit these comments as a follow-up to the June 27, 2023 customer-led presentations on the Post-2028 Residential Exchange Program ("REP"). Specifically, these comments respond to the claims made by the investor-owned utilities ("IOUs") that their participation in the REP entitles them to a share of the environmental attributes associated with the Federal Base System ("FBS").[1]

In support of the their contention, the IOUs focus on the language of Northwest Power Act ("NWPA) §5(c)[2] in an attempt to cast the REP as an actual purchase of physical power by BPA from the IOUs that BPA then intermingles with the single system FBS before selling an equal amount of physical power (now imbued with the environmental attributes of the FBS) back to the IOUs.[3] As asserted by the IOUs during the meeting, this would mean that in 2030 an IOU subject to Washington's Clean Energy Transformation Act ("CETA") could, for example, sell non-CETA compliant power to BPA and receive back from BPA via the exchange FBS power that meets CETA's carbon neutral standard. Under such a scenario, the IOU would, in addition to the direct financial subsidy traditionally provided under the exchange, receive the added benefit of avoiding some quantum of the cost the IOU would otherwise incur to ensure that its own system is CETA compliant.

As further discussed below, this novel interpretation seeks to replace the REP established by Congress with a new residential exchange benefit system that aims to address a wider scope of issues and provide expanded benefits to the IOUs—at the additional expense of BPA's preference customers—than was intended or authorized by Congress more than four decades ago. Such a program would conflict with BPA's governing statutes, is inconsistent with the Congressional record and, for this reason, would not be in accordance with law if it were adopted by BPA.[4] For purposes of the Post-2028 REP Process, we instead recommend that BPA and stakeholders focus on the REP actually established in §5(c) and §7(b) of the NWPA rather than alternative programs IOUs wish were in its place to assist them with state regulatory compliance.

---

[1] IOU REP Presentation at 3-8 (June 27, 2023).
[2] Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839c(c).
[3] *Id*.
[4] See *PGE v. BPA*, 501 F.3d 1009, 1036-1037 (9th Cir. 2007) ("*PGE*") (holding that BPA's adoption of REP settlement agreements with the IOUs that better suited BPA's goals but failed to meet the requirements of BPA's statutes were not in accordance with law).

B. <u>The REP Depicted by the IOUs Does Not Resemble the REP Created by Congress</u>.

Congress designed the REP to address a specific issue and to do so in a specific way. The issue was the differential in retail rates paid by the residential and small farm customers of the region's IOUs compared to those paid by the residential and small farm customers of BPA's preference customers.[5] The singular way that Congress decided to address this narrow and specific concern was to provide for a wholesale rate subsidy that could trigger when and to the extent conditions warrant under the §7(b)(2) rate test.[6]

The IOU's depiction of the REP as an actual exchange of power does not resemble the REP created by Congress in §5(c) and §7(b) of the NWPA. This is because "[i]n reality the exchange is a paper transaction."[7] It "amounts to a mechanism for calculating a subsidy, not for establishing a traditional cost of purchased power."[8] "The REP essentially acts as a cash rebate to the IOUs where the IOUs' power costs exceed those of BPA."[9] As such, and contrary to claims made by the IOUs, "the exchange actually transfers no power to or from BPA because the 'exchange' is simply an accounting transaction: In practice, only dollars are exchanged, not electric power."[10] For instance, under the REP, "BPA's system schedulers do not dispatch any electric power and transmission line losses are not incurred in any power transfer."[11] Accordingly, the IOUs' assertion that §5(c) provides for an actual exchange of power for purchase and sale is incorrect as a matter of law and actual practice. As such, it is unlikely that the concept laid out by the IOUs in their presentation would meet the delivery requirements under CETA's implementing regulations.[12] Thus, it appears that the concept would be of questionable value under CETA, even if it cleared all the other legal hurdles identified in these comments.

What is more, the IOUs' proposal completely ignores the fundamental tenant that statutes must be interpreted as a whole, "giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous."[13] If the IOUs desire to purchase and receive actual power from BPA to serve their loads, §5(b) rather than §5(c) is the provision under the NWPA that authorizes them to request, and obligates BPA to sell, actual power. However, §5(b) power sold by BPA to the IOUs does not include a rate subsidy, but instead is to be sold at a rate based upon the actual cost of the resources the Administrator determines are applicable to such sales after applying the other rate directives under NWPA §7 (including the actual and full cost of any exchange resources the Administrator determines are used to serve such loads).[14] Consequently, the IOUs proposal for

---

[5] <u>See</u> *CP Nat. Corp. v. BPA*, 928 F.2d 905, 907 (9th Cir. 1991) ("*CP Nat. Corp.*"); *Pacificorp v. F.E.R.C.*, 795 F.2d 816, 818-819 (1986) (*"Pacificorp*"); H.R. Rep. No. 96-976, Pt. II, 96th Cong., 2d Sess., at 34-35 (1980).
[6] *Id.*; NWPA §§5(c) and 7(b).
[7] *Pacificorp*, 795 F.2d at 818; <u>see also</u> *PGE*, 501 F.3d at 1015.
[8] *CP Nat. Corp.*, 928 F.2d at 907 (9th Cir. 1991) (internal quotes omitted).
[9] *PGE*, 501 F.3d at 1015.
[10] *CP Nat. Corp.*, 928 F.2d at 907 (internal quotes omitted).
[11] *Public Utility Com'r of Oregon v. BPA*, 583 F. Supp. 752, 754 (D. Or. 1984).
[12] <u>See generally</u> WAC 480-100-650(1)(d).
[13] *Boise Cascade Corp. v. U.S. E.P.A.,* 942 F.2d 1427, 1432 (9th Cir. 1991).
[14] NWPA §7(f).

BPA to sell them actual power but to retain the discount authorized under §5(c) effectively merges §5(b) and §5(c) while ignoring the dictates of §7, including §7(f). This is inconsistent with the careful overall framework of the NWPA adopted by Congress and is a fundamentally unsustainable interpretation of the statute.

It is also important to understand that at the time the NWPA was passed by Congress, the REP was a precisely fenced compromise between preference customers and the IOUs to provide retail rate relief to the IOUs' residential and small farm customers while also "assur[ing] that BPA preference customers' ratepayers will not lose the financial benefits resulting from the preference clause in the Bonneville Act."[15] To maintain this delicate balance, and compliance with the law, the subsidies paid to the IOUs pursuant to §5(c) and §7(b) are in exclusion to any other benefits the IOUs might seek or desire from BPA and the FBS under the exchange.[16] As held by the 9th Circuit in *PGE*, "[w]hile it is unfortunate that some customer classes may receive greater benefits than other customer classes, BPA cannot unilaterally change the law" to create additional benefits to the IOUs than would be allowed under §§5(c) and 7(b).[17] This includes the purported "sharing" of the environmental attributes of the FBS now sought by the IOUs, which would be impermissibly additive to the rate subsidy allowed under the statute. And, as further discussed below, would directly abrogate the rights of public bodies and cooperatives to preference and priority in the sale of federally generated electric power from the FBS.

C. <u>The IOUs' Proposal Would Unlawfully Violate Preference</u>.

As the 9th Circuit affirmed in *PGE,* in creating the REP "Congress made clear that its primary purpose remained to protect BPA's preference customers."[18] To this end, Congress included provisions within the NWPA "designed to protect the entitlement of both existing and new preference customers to the full Federal base system. These provisions seek to protect preference as to both supply and price."[19] For instance, with respect to preference to supply, NWPA §§5(a)[20] and 10(c)[21] ensure that nothing in the NWPA, including purchases from and sales to the IOUs under §5(c), "alter, diminish, abridge, or otherwise affect" the rights of public bodies and cooperatives "to preference and priority in the sale of *federally generated electric power*." To protect preference to price, and in addition to §5(a) and §10(c) (which also protect preference to price), Congress included the §7(b)(2) rate ceiling to "assure that the financial benefits of the preference clause in the Bonneville Act will continue to accrue to BPA preference customers."[22] Indeed, the "preference customer rate limit" amendment adopted by Congress was advocated for

---

[15] S. Rep. No. 96-272, 96th Cong., 1st Sess., at 56 (1979).
[16] <u>See</u> *PGE*, 501 F.3d at 1037.
[17] *Id.*
[18] *PGE*, 501 F.3d at 1036.
[19] H.R. Rep. 976, Part I, 96th Con., 2d Sess., at 34-35 (1980).
[20] NWPA §5(a) provides: "All power sales under this chapter shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof [16 U.S.C. 832c and 832d]. Such sales shall be at rates established pursuant to [NWPA §7]."
[21] NWPA §10(c) provides: "Nothing in this chapter shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power."
[22] S. Rep. No. 96-272, 96th Cong., 1st Sess., at 61 (1979).

by the Public Power Council to "assure that BPA preference customers' ratepayers will not lose the financial benefits resulting from the preference clause in the Bonneville Act."[23]

The IOUs' claim that the purchase and sale under §5(c) entitles them to a share of the environmental attributes of the FBS implicates both types of provisions protecting preference under the NWPA. As we understand the IOUs' proposal, rather than receiving all the output of the FBS to serve their loads as required under the statute, preference customers would instead receive power from BPA that includes the same mix for carbon accounting purposes of FBS and IOU exchange resources sold by BPA to the IOUs under the exchange. Such an approach conflicts with the provisions protecting preference to supply because it would allocate some of the federally generated electric power from the FBS to the IOUs notwithstanding that the entirety of the FBS will likely be needed to serve preference customer loads during the post-2028 period. This would be a clear violation of §§5(a) and 10(c). All indications at this time are that all firm power from the FBS will be needed to meet the net requirements of preference customers during the Provider of Choice contract timeframe.

The potential harm from the IOU proposal is also one that cannot be remedied, as the IOUs appear to suggest, by allocating a portion of the IOUs' exchange resources to preference customers for carbon accounting purposes. Preference applies to all federally generated power from the FBS. Power generated by the IOUs is not federally generated, is not part of the FBS,[24] and its character and quality from an environmental attribute standpoint is less than that of the FBS. Sections 5(a) and 10(c) mean that preference customers are entitled to 100 percent of the power generated by the FBS, for all purposes, and do not have to accept (and, indeed, can reject) an amalgamation of FBS and IOU generated power that is of lesser quality than what they are guaranteed under the statute.

In addition, although it is unclear at this time how the IOUs' proposal to share in the environmental attributes of the FBS would directly impact the PF rate paid by preference customers, what is certain is that the proposal would reduce the financial benefits of preference to public bodies and cooperatives that Congress sought to preserve under the NWPA. This is because the low-carbon character of federally generated power from the FBS is, in and of itself, of tremendous financial benefit to those of BPA's preference customers who are subject to CETA or similar requirements. Compared to the FBS, the amalgamated power that preference customers would receive from BPA under the IOUs' proposal would be much more carbon intensive. With this increased carbon intensity will come increased carbon compliance costs for customers subject to such regulations, resulting in a significant reduction to them in the financial benefits of preference. This too would be a clear violation of §§5(a) and 10(c) and an affront to the manifest intent of Congress to preserve the financial benefits of preference for preference customers.

---

[23] *Id.* at 56.

[24] Contrary to the arguments of the IOUs, the resources purchased and then sold by BPA from and to the IOUs under §5(c) are notably not part the FBS. Per the NWPA §3(10), the FBS is a closed system defined to only include "(A) the Federal Columbia River Power System hydroelectric projects; (B) resources acquired by the Administrator under long-term contracts in force on December 5, 1980; and (C) resources acquired by the Administrator in an amount necessary to replace reductions in capability of the resources referred to in subparagraphs (A) and (B)."

D. <u>Conclusion</u>.

"Whenever BPA engages in a purchase and exchange of power—whether on a yearly basis, under a REP program, or pursuant to a settlement agreement—BPA acts pursuant to its §5(c) authority, and is thus subject to the Congressionally imposed limitations on that authority as expressed in §5(c) and §7(b)."[25] In creating the REP, "Congress made clear that its primary purpose remained to protect BPA's preference customers."[26] In advancing their proposal that the REP requires a sharing of the environmental attributes of the FBS in addition to the financial benefits permitted under §7(b), the IOUs seek to create a new regulatory scheme that undermines preference in pursuit of a goal never contemplated by Congress. Congress ordained one system; the IOUs appear to prefer another. Similar attempts to replace the REP established by Congress with a different system that is unconstrained by the limits of the statute have failed in the past.[27] We instead recommend that BPA and stakeholders focus our Post-2028 REP efforts on proposals that truly seek to live within the limitations expressed by Congress in the NWPA. This would be a much better use of our collective time for all the reasons addressed above.

The successful, legally sustainable resolution of REP issues is crucial to success for BPA and customers in the upcoming Provider of Choice contracts. This is true under both settlement and "traditional" implementation paths of the REP. On the issue of environmental attributes, we support the policies expressed in Section 7.1 of the Draft Provider of Choice Policy, which affirm the environmental attributes of the federal system will be conveyed "commensurate with a customer's firm power purchase amount and rate elections."[28] This approach, at a high level, is both consistent with BPA's statutes and equitable under commonly accepted ratemaking principles.

Thank you for the opportunity to comment.

[25] *PGE*, 501 F.3d at 1032.
[26] *Id.* at 1036.
[27] *Id.* at 1036-1037.
[28] Draft Provider of Choice Policy (July 2023). Retrieved on July 24, 2023: https://www.bpa.gov/-/media/Aep/power/provider-of-choice/draft-provider-of-choice-policy.pdf