UNITED STATES OF AMERICA
US DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION

FY 2012-2013 WHOLESALE POWER RATE ADJUSTMENT PROCEEDING	BPA Docket BP-12

INITIAL BRIEF OF GEORGIA-PACIFIC LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONS

STATUTES

CASES

LEGISLATIVE MATERIAL

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Pursuant to the Order Establishing Schedule[1] in this matter and Rule 1010.13(b) of the Rules of Procedure, Georgia-Pacific, LLC submits this Initial Brief.

I. INTRODUCTION AND SUMMARY

The proper treatment of CF/CT Load (load which is "contracted for or committed to") provides significant value to Georgia-Pacific's Wauna Mill, as BPA Staff has agreed.[2] However, the rates proposed in this case will destroy that value, violating GP's rights under the Northwest Power Act (NWPA), and subverting the mill's competitive advantage and GP's incentive to further expand manufacturing capacity at the site.

The rates proposed in this case implement the Tiered Rates Methodology (TRM), and in their implementation embody the very defects GP identified in challenging the adoption of the TRM.[3] There is a very significant difference between Tier 1 and Tier 2 rates to be charged Preference Customer load. This differential means that service to some of the CF/CT Load of Preference Customers suffers a significant financial penalty,

1 BP-12-HOO-01, as modified by HOO-53.

2 BP-12-E-BPA-36, p. 17, lines 5-7.

3 *Initial Brief of Georgia*-Pacific, TRM-12-B-GP-01.

in violation of rights created by the NWPA. Such CF/CT Load if and when it comes on-line would not share the advantageous costs of the Federal hydroelectric resources in the Tier 1 cost pool which was promised by BPA to the entities incurring that load at the tie of passage of the NWPA. Instead, it must pay the costs of purchases at market-based prices for Tier 2 service.

The proper treatment of CF/CT under the NWPA requires that, as the remaining CF/CT amount is utilized by the consumer, such loads must receive service at the lowest Preference rate.

In imposing on future CF/CT Load the significant financial penalty created by the Tier 2 rates proposed in this case, BPA is appropriating a property interest of GP. The mill's interest in its contract with Clatskanie PUD includes the statutory right to be served at the lowest Preference rate. The value of the mill and its continued operations has been significantly diminished by the imposition of Tier 2 rates on any expansion, and GP is entitled to just compensation.

For these reasons, the proposal in this case to serve any CF/CT load at Tier 2 rates is contrary to law and BPA's statutory authority.

II. CF/CT LOAD IS A PART OF A PREFERENCE CUSTOMER'S LOAD THAT MUST BE SERVED AT THE LOWEST PREFERENCE RATE

A. CF/CT Load Is Entitled To Certain Statutory Benefits

Congress granted CF/CT Load some specific benefits in the NWPA to ensure that the commitments to existing industrial facilities in the Northwest were honored. The basis for that protection can be found both in the language of the statute as well as in the legislative history of the NWPA. In the 1970s, BPA and its customers faced the

likelihood that the Federal resources available to BPA would be insufficient to meet the requirements of its existing Preference Customers.[4] To resolve this issue, Congress passed the Northwest Power Act (NWPA), granting BPA authority to acquire additional resources to meet new load requirements.[5] The higher marginal costs of such new resources would be allocated to the customer classes whose load growth was being served.[6] Congress also recognized that commitments had been made to serve expanding load for existing customers, and Congress preserved for such load the cost advantages of the existing resources, rather than force them to join in bearing the costs of the new resources.

The concept of CF/CT Load was developed to preserve that opportunity for melded rates that blended the costs of the Federal hydro system and the other resources in the Federal base system. CF/CT Load represents certain load growth from new or expanded facilities that a utility had committed to serve prior to September 1, 1979. BPA designated load as CF/CT based on a utility's *actual commitment to serve*, not simply a forecast of potential load. BPA also required, in order to designate CF/CT Load, that the utility *"should have made a request from BPA for assurances of a supply to serve the load."*[7] This ensures that BPA has preserved a portion of its existing resource base to serve the future requirements of the CF/CT Load. The requirement of both a commitment from the utility to serve and a request from the utility to BPA to

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4 H.R. Rep. No. 96-976, Part II, 96th Cong. 2nd Sess., at p. 30.

5 *Id.*, at p. 35.

6 H.R. Rep. No. 96-976, Part 1, 96th Cong. 2nd Sess., at p. 51.

7 *Synopsis*, Attachment A.

reserve resources is consistent with the notion embedded in the NWPA of preservation of an existing cost structure to benefit those prior commitments.

This CF/CT Load, as it materializes, becomes part of the "general requirements" load of the utility, which must be served by BPA as part of the utility's "firm power load" under §5(b) of the Northwest Power Act.[8] But it must be served on the same basis as the other firm load of Preference Customers existing at the time of the passage of the NWPA. This ensures that CF/CT Load has access to power at the embedded cost of the Federal hydro system, and is not required to be served at the incremental cost of the new resources that BPA might be required to procure in the future.

There are multiple references in the NWPA legislative history to the requirement that such Preference Customer load be served at the lowest rate, to distinguish it from the additional load to be served at the marginal rate of new procurements. Indeed, if CF/CT were served at a rate higher than other Preference load, it would render the original concept of CF/CT utterly moot. That is, CF/CT would be treated much like other marginal load, and this would fly in the face of the statute's requirements, a result obviously disallowed in Anglo-American jurisprudence.

The "Section By Section Analysis" of the NWPA prepared by BPA in its description of §3(12), which defines New Large Single Load, states that general requirements of Preference Customers, exclusive of NLSLs, must be served at the "lowest rate." [9] Further, the same document, in discussing §7(b), states that:

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[8] 16 USC §839c.

[9] *Section-by-Section Analysis of Pacific Northwest Electric Power Planning and Conservation Act,* as republished in BPA Legislative History (1981), at p. 77.

> *Section 7(b) establishes the rate for power sold to meet the general requirements of preference customers…. This rate will be BPA's lowest firm power rate.*[10]

The House Report describes the rate directives of §7:

> *The lowest rates will be reserved for the normal loads ("general requirements") of preference utilities….*
>
> *A higher rate will apply to the load growth of the region's investor-owned utilities and for the power needed …[to serve] NLSLs….*[11]

Similarly, the House Report on the Northwest Power Act in its Section-by-Section Analysis explains that §7(b) *"contains the rate directives for power sold to meet the 'general requirements' … of BPA's [Preference Customers]. This will be BPA's lowest firm power rate, based on BPA's lowest cost resources."* [12] The Senate Report contains the same language.[13]

It is not true that the only purpose of a CF/CT designation is to distinguish it from New Large Single Load. NLSL is defined as additional load from a new or expanded facility exceeding 10 MW. If that were the only purpose, there would be no need to designate commitments of less than 10 MW as CF/CT. But the Synopsis includes three designations of less than 10 MW.[14]

Congress created CF/CT Load designations in order to preserve access to the melded cost of existing federal resources for that load that had already obtained commitments to serve from their local utilities.

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10 *Id.*, at p. 92 (emphasis added).

11 H.R. Rep. No. 96-976, Part II, 96th Cong., 2nd Sess., at p. 36.

12 *Id.*, at p. 52.

13 S. Rep. No. 96-272, 96th Cong., 1st Sess., at p. 15.

14 Attachment A.

B. Tier 2 Rates Impose Material Financial Harm on CF/CT Load

The rates proposed in this case do not allow CF/CT Load coming on-line in 2012-2013 to receive those statutory benefits. Rather, CF/CT Load that comes on-line in the future will suffer the significant financial harm of being served at Tier 2 rates. This rate would be based on the costs of the new resources procured to serve this load.[15] Such costs would be driven by current market conditions and generally would be higher than the embedded costs of the Federal hydro system. BPA Staff agreed that the resources procured to serve Tier 2 load in this case have been purchased at market-based prices.[16]

Lincoln Wolverton, witness for ICNU, identified the differing Tier 1 and Tier 2 rates in his testimony.[17] Relying on that calculation, Michael Tompkins calculated that GP would suffer at least $3.5 million more a year in additional electric costs to serve a 35 MW expansion at Tier 2 as opposed to Tier 1 rates.[18]

The ability to expand the facilities at the Wauna mill and operate that manufacturing capacity with service at Tier 1 rates is an obvious financial benefit to the operating value of the assets at Wauna. Conversely, having to pay an additional $3.5 million penalty because that load came on line after 2010 is an equally-significant detriment to the value of the plant.

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15 "New resources" in this context do not refer to resources procured to serve load under the "New Resources" rate. Rather, these are resources that have not been previously included in the Federal Base System.

16 *See* Exhibits BP-12-E-GP-03, GP-04, and GP-05.

17 *Testimony of Lincoln Wolverton,* BP-12-E-IN-01.

18 BPA Staff criticized Mr. Wolverton's use of the proposed load shaping charge as a proxy for a Tier 2 rate. *See*, Response to Data Request GP-BPA-1, Exhibit BP-12-E-GP-02. However, using the proposed Tier 2 rate only increases the differential between Tier 1 and Tier 2 rates.

BPA Staff has objected to GP's claim of detriment, pointing out that Clatskanie PUD has elected to serve any load growth during the FY2012 rate period from other resources rather than from BPA under Tier 2 rates. That current election does not, however, mitigate GP's harm and the illegality of the application of tiered rates to CF/CT Load. Under the TRM, CF/CT Load coming on-line after 2010 cannot be served at Tier 1 rates, in violation of the rights of CF/CT Load under the NWPA. That injury occurs regardless of what election the serving utility makes. The consumer with the CF/CT designation is harmed whether the CF/CT Load is served at Tier 2 rates or at the current market-based rates for other resources; the CF/CT Load must pay significantly increased costs because it is not being served at Tier 1. The consumer cannot control what election its serving utility makes, and such election may vary over the 17 year term of the current Regional Dialogue contracts that incorporate TRM ratemaking. Regardless of the election, GP is harmed because any additional load will not be served at Tier 1 rates, but at the significantly increased rates of either Tier 2 or market-based procurement. That harm, now reflected in proposed rates, must be addressed and remedied.

C. CF/CT Rights Have No Expiration Date

The Tiered Rate Methodology required a CF/CT Load to take service prior to October 2010, or lose rights it has under the CF/CT designation to receive power at the *lowest* Preference rate. If CF/CT Load comes on-line after September 2010, it will be served at the higher Tier 2 rate. This required a facility with a CF/CT designation to either bring its additional load on-line prior to September 2010 or forfeit valuable rights.

As BPA acknowledged in the *NLSL Policy Review*,[19] however, the designation of CF/CT has no expiration, and the rights arising thereunder must be available in perpetuity. The use of a deadline to set the Contract High Water Mark used in determining which loads can be served under Tier 1 is contrary to the Northwest Power Act and to its previously adopted policies. It eliminates the benefit created by Congress to preserve access for such CF/CT Load to rates based on the melded costs of the Federal Base System.

III. CF/CT CONSUMERS HAVE A LEGAL INTEREST WHICH IS HARMED BY THIS PROPOSED RATE

A. BPA'S Failure To Protect CF/CT Loads In Its TRM Proposal Results In A Regulatory Taking Of GP's Contract-Based Property Rights For Which GP Must Receive Compensation

BPA's Tiered Rate Methodology disregards the designation of certain loads as CF/CT Loads in determining Preference Customers' eligibility to purchase power at Tier 1 versus Tier 2 rates. This constitutes an improper interference in GP's property rights for which BPA must compensate GP pursuant to the Takings Clause of the Fifth Amendment of the US Constitution.[20] The Takings Clause prohibits governmental entities from conducting takings of *"private property ... for public use, without just compensation."*[21] As the Supreme Court explained in *Lingle v. Chevron, U.S.A., Inc.*,[22] such takings are not limited to direct invasions of property, but can also include the

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19 NLSL Policy, March 2002, p. 14.

20 *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (stating that the Takings Clause is designed to *"secure compensation in the event of otherwise proper interference amounting to a taking"*) (emphasis omitted).

21 U.S. Const. Amend. V. The Takings Clause applies to federal governmental entities under the Fifth Amendment and is made applicable to state governmental entities through the Fourteenth Amendment. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005).

22 544 U.S. 528 (2005).

regulation thereof: *"[G]overnmental regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation – or ouster – and ... such 'regulatory takings' may be compensable under the Fifth Amendment."*[23]

In the instant case, by implementing the TRM through rates that would serve CF/CT Loads at a rate higher than the lowest Preference rate, BPA, a federal governmental agency, will effect a regulatory taking of GP's property rights. Under its contract for electric service with Clatskanie PUD, GP is entitled to obtain service for its Wauna Mill up to its CF/CT Load level at rates derived from BPA's lowest Preference rate. This property right has been, however, severely devalued by BPA's proposed rates in this case that impose significantly higher rates on CF/CT Loads not on-line by 2010. This devaluing occurs because the resulting higher energy costs would significantly reduce the incentive of GP to expand its operations at the Wauna Mill, and indeed, undermine the value of the mill itself. Thus, pursuant to the test enunciated by the US Supreme Court in *Penn Central Transportation Company v. City of New York*,[24] and applied in subsequent cases, GP is entitled to just compensation for this devaluation.

1. GP's Electric Service Contract with Clatskanie PUD Constitutes a Property Right Protected by the Takings Clause

The Takings Clause protects rights which qualify as "property" within the meaning of that Clause.[25] *"Contract rights are a form of property"* protected by the

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23 *Id.,* at p. 537.

24 438 U.S. 104 (1978).

25 *Consol. United States Atmospheric Testing Litig. v. Livermore Labs*, 820 F.2d 982, 988 (9th Cir. 1987).

Takings Clause.[26] *"The Fifth Amendment commands that property not be taken without making just compensation. Valid contracts are property, whether the obligator be a private individual, a municipality, a state, or the United States."*[27] Courts have found contract rights to be property protected by the Fifth Amendment in a number of contexts.[28] It is also significant to note that there is no requirement that the contract at issue be one to which the party asserting the claim and the government are both parties. This is demonstrated by the example of *Cienega Gardens*, in which the US Court of Appeals for the Federal Circuit sustained a takings claim brought by plaintiff-owners of apartments against a governmental entity – the US Department of Housing and Urban Development (HUD) – for imposing restrictions on contractual rights to prepay mortgages that the plaintiff-owners had entered into with private lenders. As explained in a subsequent case before the US Court of Federal Claims:

> *[P]laintiffs [in Cienega Gardens] entered into loan agreements with private lenders that were insured by HUD. The government subsequently restricted the plaintiffs' prepayment right, which the appeals court ruled was a takings. However, because their contracts were with private lenders, the plaintiffs . . . were not in privity with the Government.*[29]

In the instant case, GP has contractual property rights under its electric service contract with Clatskanie PUD, which include those delineated in BPA's letter to Clatskanie PUD of September 1, 1989 granting Clatskanie PUD a designation of

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26 *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 (1977).

27 *Lynch v. United States*, 292 U.S. 571, 579 (1934) (Brandeis, J.). *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (citing *Lynch*).

28 *See, e.g.*, *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (property already acquired under operation of contract); *United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946) (option to renew a lease); *Cienega Gardens v. United States*, 331 F.3d 1319, 1329-30 (Fed. Cir. 2003) (rights under contracts to prepay mortgages).

29 *Klamath Irrigation District*, 67 Fed. Cl. 504 (2005).

126.9 MW of CF/CT Load at GP's Wauna Mill.[30] The rates that Clatskanie PUD charges GP under this contract are directly based on the rates that BPA charges to its Preference Customers (*i.e.*, a "pass-through contract") which, during the entire term of the contract, were established as a single rate pursuant to §7(b). The Clatskanie/GP contact also provides that GP may increase its demand up to 126.9 MW, which is the amount of its existing load plus its CF/CT Load, as determined by BPA.[31] Therefore, under its contract with Clatskanie PUD, GP currently has a right to purchase power from Clatskanie PUD based on BPA's lowest rate (*i.e*., the 7(b) rate for Preference Customers) up to the level of its CF/CT Load, a right which, pursuant to the precedent cited above, is protected by the Fifth Amendment, despite the fact that BPA is not a party to the contract.

In the original TRM proceeding, BPA argued that GP's contractual right is merely "collateral" in nature,[32] analogizing GP's claim to the one asserted in *PVM Redwood Co., Inc. v. United States*.[33] In that case, the Ninth Circuit rejected a takings claim by a sawmill based on the passage of legislation that resulted in the Secretary of Interior obtaining land owned by individuals who had, in the past, supplied much of the sawmill's raw materials. However, *PVM* actually supports GP's takings claim. In *PVM*, the court distinguished between government appropriation of property, which would constitute a taking, and the mere frustration of an enterprise by reason of exercise of governmental power, which would not. The court reasoned that PVM's claim fell into

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30 *Attachment A to Tompkins Testimony,* BP-12-E-GP-AT1.

31 BP-12-E-GP-01, p. 5.

32 TRM-12-A-01 at 36-37.

33 686 F.2d 1327 (9th Cir. 1982).

the latter category because it was not clear from PVM's complaint that any existing supply contracts had been frustrated, *"rather it would seem that what had been frustrated was an expectancy based on past experience that contracts would be entered into."*[34] Thus, according to the court, PVM had done no more than prove that a prospective business opportunity had been lost.[35]

In contrast to the claim dismissed by the Ninth Circuit in *PVM*, GP's asserted loss is not merely the frustration of an expectation that it would be entitled to some future benefits. GP is not simply speculating that it would possibly be entitled to, or could receive, lower rates for power in the future if BPA did not implement a TRM rate structure. Rather, unlike PVM, GP has a present property interest in its source of supply via its existing contract with Clatskanie PUD, which affords it the contractual right to receive service at BPA's lowest possible rates for Preference Customers for up to an additional 126.9 MW of load at the Wauna Mill. Moreover, this right is derived directly from BPA's *explicit written designation of that load* as a CF/CT Load. By implementing a rate structure that excludes CF/CT Loads from eligibility to receive service at the lowest Preference rate, BPA has not merely frustrated a hope that GP might receive lower power rates in the future, but rather, directly undermined the existing value of a discrete property right – in this case, GP's contract with Clatskanie PUD. Thus, unlike the *PVM* case, GP does have a property interest in its source of supply, insofar as up to 126.9 MW of additional load at the Wauna Mill is entitled to receive service at Preference Customer rates pursuant to the CF/CT designation made by BPA itself.

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[34] *Id*., at p. 1329.

[35] *Id*.

In this sense, GP's property right is more akin to the property rights asserted in cases such as *Cienega Gardens*, [36] in which the court found a governmental taking in the promulgation of HUD regulations which involved directly limiting the contractual rights of developers to prepay certain mortgages arising, in part, based on HUD regulations and in *Armstrong v. United States*,[37] in which the Supreme Court found a taking in a case where suppliers of materials to a boat builder were unable to enforce liens against the builder because the government had seized the property to which the liens attached.

Moreover, the loss in value that GP will suffer to its contractual right to receive the lowest Preference rate for its CF/CT Load is a direct consequence of BPA's decision to adopt a rate structure that denies the benefits of Tier 1 rates to CF/CT loads past 2010. Indeed, in both the underlying TRM proceeding as well as the instant rate case, BPA has made clear that this result was not merely a byproduct of its decisions, but an explicit policy choice. In the TRM Record of Decision, BPA stated that allocating the costs of additional power needed to serve the general requirements of BPA's public power customers to CF/CT Loads that come online after 2010 (*i.e*. through the application of Tier 2 rates) would *"better reflect cost causation and . . . send effective marginal cost price signals."* [38] In this respect, GP's situation is analogous to the one in *Armstrong*, in which the Court found that a taking had occurred with respect to certain liens when the government seized certain property from a boatbuilder, including materials to which liens had been attached, which effectively devalued the liens

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[36] 331 F.3d at 1329-30.

[37] 364 U.S. 40 (1960).

[38] *Id*., at 25.

because the lienholders could no longer enforce them. In concluding that a compensable taking had occurred, the Court explained:

> *Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.*[39]

As in *Armstrong*, BPA has devalued GP's contract with Clatskanie PUD for its own advantage, in this case, to further its policy objectives with respect to what it believes is the appropriate allocation of future costs of obtaining power to serve its Preference Customers. BPA is the direct, positive beneficiary of GP's loss, and therefore, is obligated to pay just compensation to GP for that loss.

2. Applying the *Penn Central* Factors, the Failure of BPA to Protect CF/CT Loads Under its TRM Proposal Will Result in a Taking of GP's Property Rights under its Contract with Clatskanie PUD, for which it Must Compensate GP

In *Penn Central*, the Supreme Court recognized that defining what constitutes a taking for purposes of the Fifth Amendment was a problem of considerable difficulty.[40]

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[39] *Armstrong,* 364 U.S. at 48-49.

[40] *Penn Central*, 438 U.S. at 123.

Noting that the Court had been unable to develop any set formula for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, the *Penn Central* Court concluded that a court's inquiry into whether a regulatory taking has occurred *"is essentially an ad hoc, factual inquir[y]."*[41] This *ad hoc* inquiry, however, would be guided by examining several factors that the Court found to have particular significance.[42] The factors the Supreme Court identified were: 1) *"[t]he economic impact of the regulation on the claimant,"* 2) *"the extent to which the regulation has interfered with distinct investment-backed expectations,"* and 3) *"the character of the governmental action."*[43] Based on application of these three factors, courts have found in numerous cases that the facts justify a finding of regulatory takings.[44] Moreover, courts may find that regulatory takings have occurred based solely on application of one of these factors if its impact is sufficiently strong.[45]

Given that the *Penn Central* factors constitute the US Supreme Court's current test for assessing takings claims, GP's instant claim should be examined based on

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41 *Id.,* at p. 124.

42 *Id*.

43 *Id.* In addition to regulatory takings based on the three *Penn Central* factors, there are two *"relatively narrow categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes." Lingle*, 544 U.S. at 538. These two categories are 1) *"where government requires an owner to suffer a permanent physical invasion of her property"* and 2) where *"regulations completely deprive an owner of **all** economically beneficial us[e] of her property." Id.* (internal quotations omitted) (emphasis in original). To the extent that Tier 2 rates were to be set such that there is no cost difference between those rates and the market price for power, then GP's property right, under its contract with Clatskanie PUD, to purchase power at the Preference rate up to the CF/CT amount, would be completely devalued. Under such circumstances, the TRM would constitute a *per se* taking, because it would deprive GP of all of the economically beneficial use of its CF/CT designation.

44 *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 712-18 (1979); *Loveladies Harbor v. United States*, 28 F.3d 1171, 1175-79 (Fed. Cir. 1994); *Cienega Gardens*, 331 F.3d at 1337-53.

45 *See Ruckelshaus*, 467 U.S. at 1005.

these factors. As explained below, BPA's decision to disregard long-standing CF/CT designations in determining eligibility for Tier 1 rates meets all three of the factors articulated by the Court in *Penn Central*, and therefore, BPA's implementation of the TRM will constitute a regulatory taking of GP's property interests under its contract with Clatskanie PUD, for which GP must be compensated.

a. *The economic impact of BPA's TRM proposal on Georgia-Pacific.*

The first *Penn Central* factor is the economic impact of the regulation on the claimant. That economic impact can be measured in a variety of ways.[46] Moreover, *"plaintiffs must show 'serious financial loss' from the regulatory imposition in order to merit compensation."*[47]

In the instant case, GP will incur serious financial loss as a result of BPA's TRM decision. First, GP will incur significantly higher costs to serve its CF/CT Load under the higher rates resulting from the implementation of TRM. As GP's witness Michael Tompkins stated in his direct testimony, GP will incur at least $3.5 million per year in additional energy costs to serve a 35 MW expansion at Tier 2 as opposed to Tier 1 rates.[48] Moreover, economic harm will result to GP regardless of whether it presently has concrete plans for utilizing the additional 41.9 MW of CF/CT capacity available to it.

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[46] *See Hodel*, 481 U.S. at 714 (measurement based on market value of the property); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-96 (1987) (measurement based on whether regulation makes the property owner's business operation "commercially impracticable"); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (measurement based on examination of other economic uses besides sale, which was prohibited by the challenged regulation).

[47] *Cienega Gardens*, 331 F.3d at 1340 (quoting *Loveladies*, 28 F.3d at 1177).

[48] BP-12-E-GP-1 at pp. 4-5. In the TRM ROD, BPA claims that the connection between the price that GP will pay from power under its contract with Clatskanie PUD and the BPA TRM rate is too attenuated to constitute economic harm because Clatskanie PUD sets its own rates for power. This argument strains credibility by ignoring that the contract between Clatskanie PUD and GP is, for all intents and purposes, a pass through contract that sets rates based on the rates charged by BPA to Clatskanie PUD.

As Mr. Tompkins explained in his testimony, the availability of less expensive energy makes manufacturing in the Northwest competitive, but if those prices were no longer available, GP would have to seriously reconsider its long-term strategic growth plans for the Wauna Mill, because the obvious incentive for the expansion of that facility would no longer be available.[49] This drastic shift in comparative advantage would seriously undermine the value of the Wauna Mill itself. Given the magnitude of the increased energy costs that GP would bear as a result of BPA's proposed rate structure, and the detrimental consequences that such increased costs would have on the value of GP's Wauna Mill and the incentive to expand that facility, BPA's proposed rate structure clearly meets the first prong of the *Penn Central* test.

b. *The extent to which BPA's TRM proposal interferes with Georgia-Pacific's investment-backed expectations.*

The second *Penn Central* factor is the extent to which the regulation has interfered with distinct investment-backed expectations. *"The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'"*[50] Moreover, *"[t]his factor also incorporates an objective test – to support a claim for a regulatory taking, an investment-backed expectation must be 'reasonable.'"*[51] One court has explained that there are *"three factors relevant to the determination of a party's reasonable expectations: (1) whether the plaintiff operated in a highly regulated industry; (2) whether the plaintiff was aware of the problem that spawned the regulation at the*

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49 *Id.*, at p. 6.

50 *Cienega Gardens*, 331 F.3d at 1346 (quoting *Loveladies*, 28 F.3d at 1177).

51 *Id.* (quoting *Ruckelshaus*, 467 U.S. at 1005).

time it purchased the allegedly taken property; and (3) whether the plaintiff could have reasonably anticipated the possibility of such regulation in light of the regulatory environment at the time of purchase." [52]

In the instant case, the rates proposed by BPA in this proceeding, which implement the TRM, interfere very significantly with GP's investment-backed expectations. As explained by Mr. Tompkins, GP has invested more than $450 million in two new machines at the Wauna facility over the past eight years.[53] As stated above, this enormous investment was made in reliance on the continued availability of low electricity rates for CF/CT Loads. Moreover, this reliance by GP was clearly reasonable. The provision of power to the Wauna facility takes place in the highly regulated electricity supply industry. At the time GP made its investments in the Wauna facility, GP reasonably relied on BPA's letter to Clatskanie PUD designating 126.9 MW of CF/CT Load at the Wauna Mill, and providing no indication that the CF/CT Load would not continue to be entitled to all of the historical rights of CF/CT Loads to receive service at the lowest Preference rate. For these reasons, BPA's proposed rate structure also meets the second prong of the *Penn Central* test.

c. *The character of BPA's TRM proposal.*

The third *Penn Central* factor is the character of the governmental action at issue. This factor *"require[s] that a reviewing court consider the purpose and importance of the public interest reflected in the regulatory imposition. In effect, a court*

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[52] *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (internal citations omitted).

[53] BP-12-E-GP-1 at pp. 2-3.

[must] balance the liberty interest of the private property owner against the Government's need to protect the public interest through imposition of the restraint." [54]

In the instant case, BPA has not shown that any public interest is served by its decision to exclude CF/CT Loads from eligibility to receive the lowest Preference rate that is so compelling so as to outweigh the liberty interest GP has in preserving the value of its property interests under its contract with Clatskanie PUD. Indeed, the only explanation BPA has offered as to why it has chosen to treat CF/CT Loads in this manner is its conclusory statement in the TRM ROD that doing so will *"better reflect cost causation and . . . send effective marginal cost price signals."* [55] Moreover, even if BPA were to more thoroughly explain and justify its reasoning, it would not change the result of this analysis. As explained above, the rate structure that BPA is proposing to adopt in this case will have an enormously detrimental economic effect on GP and severely confound GP's reasonable investment-backed expectations. The Supreme Court has found that under such circumstances, there is no need even to consider other factors.[56] Thus, even if BPA were to articulate a compelling public interest rationale for excluding CF/CT Loads from eligibility to receive the lowest Preference rate, there would still be a taking for purposes of the Fifth Amendment, such that BPA must provide GP with appropriate compensation.

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54 *Loveladies*, 28 F.3d at 1176. *See also Keystone*, 480 U.S. at 485-86 (evaluation based on whether the regulation advances a legitimate public purpose).

55 *Id*., at p. 25.

56 *See Ruckelshaus*, 467 U.S. at 1005 (*"[W]e find that the force of this factor* [*i.e.*, the effect on investment-backed expectations] *is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that is disposes of the taking question regarding those data."*).

B. Georgia-Pacific Has Relied On Access To The Lowest Preference Rate

Although Georgia-Pacific is not BPA's immediate customer, the designation by the Administrator of a CF/CT amount for Clatskanie PUD specifically identified the Wauna Mill as the basis, site and justification for the designation.[57] No other industrial consumer on Clatskanie PUD's system can claim that CF/CT designation. It is therefore entirely reasonable for the Wauna Mill to rely on the CF/CT amount as available to it and treat it as a valuable business asset upon which it could rely in planning future operations. BPA recognized the reality of this reliance when it stated, in the TRM proceeding: *"effects on this mill's ability to further expand are of concern to BPA."* [58] That is precisely why Congress created CF/CT, to allow loads that anticipated growth to gain some right to service at Preference rates.

IV. CONCLUSION

The implementation of the TRM through the rates proposed in this case is unjust and unreasonable and contrary to law both in its denial of a uniform lowest rate to all Preference Customers, and more particularly in its restrictions on service to CF/CT Load. The Northwest Power Act requires that all "general requirements" of Preference Customers receive service at rates set under §7(b). Those §7(b) rates must be uniform, applying to all general requirements service. Such rates must also be the lowest rate.

CF/CT Load is part of the "general requirements" of Preference Customers. The only part of a Preference Customer's load excluded from its "general requirements" is NLSL. One of the fundamental purposes for a CF/CT designation is to separate it from

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[57] TRM-12-E-GP-1-AT1 (A.R. 1632).

[58] TRM-12-E-BPA-18, at p. 7.

NLSL so that it is treated as part of “general requirements” and not charged a new resource rate.

Respectfully submitted,

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