UNITED STATES OF AMERICA

UNITED STATES DEPARTMENT OF ENERGY

BEFORE THE

BONNEVILLE POWER ADMINISTRATION

PROPOSED RESIDENTIAL EXCHANGE	)	
PROGRAM SETTLEMENT PROCEEDING	)	BPA Docket REP-12

ALCOA INC.'S BRIEF ON EXCEPTIONS

FILED: JUNE 24, 2011

I. INTRODUCTION

In accordance with § 1010.13(d) of the Procedures Governing Rate Hearings, Alcoa Inc. ("Alcoa") takes exception to the *Residential Exchange Program Settlement Agreement Proceeding (REP-12) Administrator's Draft Record of Decision* ("Draft ROD") published by the Bonneville Power Administration ("BPA") on June 14, 2011.[1]

In the Draft ROD, BPA proposes to adopt a settlement (the "Settlement") negotiated by certain of BPA's preference customers and investor-owned utilities ("IOUs"). The Settlement is intended to resolve numerous long-standing disputes concerning BPA's implementation of the Pacific Northwest Electric Power Planning and Conservation Act's ("NWPA") Residential Exchange Program ("REP") and section 7(b)(2) rate protection framework.

BPA previously attempted to settle its obligations under the REP, but those efforts were unsuccessful. In 2007, the Ninth Circuit held that BPA's 2000 REP settlements were unlawful. *See Portland Gen. Electric v. BPA*, 501 F.3d 1009 (9th Cir. 2007) ("*PGE*"). The court subsequently invalidated BPA's rates which included unlawful settlement costs. *See Golden Nw. Aluminum Co. v. BPA*, 501 F.3d 1037 (9th Cir. 2007) ("*Golden Nw.*").

In 2007, BPA issued its "2007 Supplemental Wholesale Power Rate Case, Administrator's Record of Decision," ("WP-07S ROD")[2] which represented BPA's response to *PGE* and *Golden Nw.* In his introductory comments to the WP-07S ROD, the Administrator urged the preference customers and IOUs to work towards a long-term settlement, observing that a settlement negotiated

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[1] REP-12-A-01.

[2] WP-07-A-05.

by the parties would have "greater political equity than what any single Administrator, acting within the confines of the law, can provide."[3]

The preference customers and IOUs heeded the Administrator's call. The Settlement under consideration in this proceeding radically departs from numerous provisions of the NWPA, including sections 5(c), 7(b)(2), 7(b)(3), and 7(c). The negotiating parties have effectively rewritten the NWPA in a manner that Congress could never have recognized. Among other things, the Settlement fixes REP benefits for the next 17 years, and the aggregate benefits BPA will pay out via its section 5(c) authority are no longer predicated on participating utilities' actual costs of power (average system costs or "ASCs"). Moreover, the Settlement does away with the section 7(b)(2) rate protection test, and replaces it with a new rate protection construct negotiated by the parties.

The manner in which the Settlement departs from the NWPA (and BPA's long-held interpretations of the NWPA) directly impacts the rates Alcoa will pay for power over the next 17 years – potentially detrimentally so. For example, the Settlement ensures that Alcoa and other direct service industrial ("DSI") customers will bear responsibility for redressing the unlawful payments made to the IOUs as a result of BPA's flawed 2000 REP settlement. The Settlement also departs from the statutory requirement, adhered to by BPA in prior rate cases, that a portion of the costs of preference customer rate protection must be recovered from sales of surplus power. That will no longer happen under the Settlement.

The parties that negotiated the Settlement provided BPA with precisely what it asked for – an agreement that provides far more than BPA "acting

[3] WP-07-A-05 at xx-xxi.

within the confines of the law, can provide."[4] BPA repeatedly argues that Alcoa will benefit from lower rates under the Settlement. But there is no guarantee that Alcoa will actually benefit from lower rates over the Settlement's 17 year term. In effect, BPA asks Alcoa to trust the parties that negotiated the Settlement – notably, preference customers who have waged a relentless campaign to deprive Alcoa of access to BPA power at the statutory IP rate.

BPA must now either adopt the Settlement without exception, or it must effectively reject the Settlement in its entirety.[5] The fact that the Settlement will "establish a rough equity"[6] is irrelevant. BPA has a duty to uphold the law, comply with the NWPA, and protect Alcoa's rights (and the rights of all non-settling parties) under the statute.

In light of the comments below, as well as the testimony and arguments Alcoa has previously filed in this proceeding[7], the Draft ROD should be revised to ensure that BPA is complying with its obligations under the NWPA.

II. ARGUMENT

A. The Draft ROD Mischaracterizes the REP Mediation

BPA begins its evaluation of the issues raised during the REP-12 proceeding by objecting to Alcoa's contention that it was not afforded a meaningful opportunity to participate in the mediation discussions that resulted in the Settlement. BPA agrees that "the DSIs were not present when the

[4] WP-07-A-05 at xx-xxi.

[5] REP-12-E-BPA-11 at § 3.7 (providing that the Settlement will void *ab initio* if the Administrator, among other things, does not adopt its major substantive terms and apply them to the rates of non-settling parties).

[6] Draft ROD at 224.

[7] *See* REP-12-E-AL-01; REP-12-E-AL-01E01; REP-12-B-AL-01, and REP-12-B-AL-02, which are incorporated herein by reference.

substance of the framework on which the Settlement is built was put together."[8]

But BPA goes on to conclude that:

> The fact that the DSIs may have been excluded from participating in some portions of the negotiations leading up to the proposed Settlement does not make execution of the Settlement by BPA contrary to law; nor does it make execution of the agreement otherwise inappropriate.[9]

Ultimately, BPA states:

> In any event, having never taken up the offer to participate in the first place, Alcoa cannot claim that it had no avenues available to influence the final settlement.[10]

In reaching this conclusion, BPA ignores sworn testimony[11] submitted by Alcoa, and Alcoa's responses to BPA's data requests in favor of unsworn and factually-flawed argument by Mr. Paul Murphy (counsel for Joint Party 2 ("JP2")), one of the chief drafters of the Agreement.[12] Excluding one customer class from the mediation designed to settle the Ninth Circuit proceedings in which Alcoa participated (or is participating) is either legally significant or is not (a point that BPA will ultimately not resolve itself). What is certain is that it is unfair in the extreme to assert that Alcoa's concerns about the Settlement's flaws should somehow be disregarded.

The record demonstrates that although Alcoa was invited to participate in the REP mediation, it had virtually no opportunity to shape the Agreement's substantive terms – including terms that directly impact the IP rate (*e.g.*, REP Surcharge calculation and recovery, treatment of Refund Amounts / Lookback

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[8] Draft ROD at 37 (citing to the Transcript of the REP-12 Oral Arguments at 84 ("REP-12 Oral Argument Trans.")).

[9] Draft ROD at 39.

[10] Draft ROD at 38.

[11] REP-12-E-AL-01 at 6:21-23 ("Alcoa and other DSI customers were excluded from participating in the negotiations of the REP Settlement Agreement through the process developed by the mediators of the COU/IOU dispute.").

[12] Draft ROD at 38-39.

payments). Alcoa has detailed its participation (or more accurately, its lack of opportunity to participate) in the REP mediation sessions in response to a BPA data request.[13]

BPA correctly observes that: "DSI representatives were at various mediation sessions, but there were certain portions of the mediation that the DSIs were not invited to," and that "Staff agrees that the DSIs were not present when the substance of the framework on which the Settlement is built was put together."[14] Following the mediator's decision not to include the DSIs in the mediation, Alcoa was not invited to any further negotiation sessions leading up to the Agreement in Principle ("AIP").[15]

BPA's conclusion that Alcoa was presented with, but did not take advantage of, opportunities to participate in the post-AIP negotiations that resulted in the Settlement is contrary to fact (whether or not the point has legal significance).[16] BPA bases its argument on the unsworn representations made by JP02's counsel at oral argument, while ignoring the sworn testimony presented by Alcoa.[17] Specifically, BPA relies on the unsworn representation of Mr. Murphy during argument that "[t]he settling parties extended opportunities to Alcoa to participate, but Alcoa 'never returned [their] calls, a statement that every other fact, sworn to in this case suggests is mistaken."[18]

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[13] *See* Alcoa's response to BPA data request BPA-AL-18, which is attached as Exhibit A to the Affidavit of Michael C. Dotten ("Dotten Aff't"). The Dotten Aff't is attached as Exhibit 1 hereto.

[14] Draft ROD at 37.

[15] Dotten Aff't, ¶ 4.

[16] Draft ROD at 38-39.

[17] Draft ROD at 38-39; REP-12-E-AL-01 at 6:21-23.

[18] Draft ROD at 38 (quoting REP-12 Oral Argument Trans. at 150).

It is true, as JP02's counsel stated at oral argument, that "we did exclude Alcoa from certain elements of the discussion leading up to the agreement in principle."[19] What Mr. Murphy fails to note is that "certain elements" included the entire effort to negotiate the AIP, including the $2.05 billion in negotiated REP benefits that will be collected, at least in part, from the rates Alcoa pays for power, and the drafting sessions in which the definitive agreement that became the Settlement was produced.

Mr. Murphy's other representations at oral arguments are mistaken. Alcoa has attached to this brief the sworn affidavit of Alcoa's counsel, Michael Dotten, that corrects Mr. Murphy's faulty recollections. Mr. Murphy and Mr. Dotten did speak on several occasions concerning the mediation and settlement.[20] In early November 2010 (after the AIP was executed), Mr. Dotten called Mr. Murphy to ask whether the preference customers and IOUs were prepared to release the draft settlement language.[21] Mr. Murphy subsequently forwarded Mr. Dotten a partial draft of the agreement.[22] Mr. Dotten also asked Mr. Murphy when Alcoa would have an opportunity to comment on the settlement.[23] Mr. Murphy replied that some of the negotiating parties would have a problem with DSI participation, and that he understood that the purpose of the REP-12 proceeding was to provide an opportunity for Alcoa and other non-negotiating parties to comment on the settlement.[24]

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[19] REP-12 Oral Argument Trans. at 150.

[20] Dotten Aff'd, ¶ 6.

[21] Dotten Aff'd, ¶ 7.

[22] Dotten Aff'd, ¶ 7.

[23] Dotten Aff'd, ¶ 7.

[24] Dotten Aff'd, ¶ 7.

After BPA commenced the REP-12 case, Mr. Murphy called Mr. Dotten to ask whether Alcoa would likely sign the settlement.[25] Mr. Dotten informed Mr. Murphy that Alcoa was troubled by several aspects of the agreement, specifically provisions that would preclude Alcoa, if it were a signer of the document, from seeking redress of its primary concerns – the lack of a long-term supply of power from BPA at the statutory rate.[26] Mr. Murphy subsequently informed Mr. Dotten that it was unlikely that the majority of preference customers would agree to waive, as to Alcoa, the prohibition on signatories seeking to resolve issues not included in the agreement during the Congressional ratification process.[27]

Mr. Dotten did not receive any invitations to attend any specific meetings concerning the negotiations to finalize the Settlement from Mr. Murphy or any other party.[28] Mr. Murphy's recollection that Mr. Dotten failed to return his calls is faulty – Mr. Dotten did not fail to return any of Mr. Murphy's phone calls, and in fact, reached Mr. Murphy's voicemail when returning calls on more than one occasion.[29] As a consequence of Mr. Murphy's faulty recollection, BPA 's finding that "the settling parties extended opportunities to Alcoa to participate, but Alcoa never returned [their] calls"[30] is incorrect.

[25] Dotten Aff'd, ¶ 8.

[26] Dotten Aff'd, ¶ 8.

[27] Dotten Aff'd, ¶ 9.

[28] Dotten Aff'd, ¶¶ 9-10.

[29] Dotten Aff'd, ¶¶ 9-12.

[30] Draft ROD at 38 ("The settling parties extended opportunities to Alcoa to participate, but Alcoa 'never returned –their] calls.'") (quoting REP-12 Oral Argument Trans. at 150).

B. The Draft ROD Fails to Adequately Review the Settlement in Light of Section 7(c)

BPA argues that it considered the rate directives applicable to Alcoa and the DSIs (NWPA section 7(c)) when evaluating the Settlement.[31] Section 7(c)(1)(B) of the NWPA requires BPA to set the IP rate "at a level which the Administrator determines to be equitable in relation to the retail rates charged by the public body and cooperative customers to their industrial consumers." Despite its protestations to the contrary, the Settlement does not heed the "equitable in relation to" standards of section 7(c)(1)(B).

Since BPA will set the IP rate for the next 17 years pursuant to the Settlement, numerous aspects of the Settlement require evaluation under the "equitable in relation to" standard. The treatment of Refund Amounts / Lookback costs under the Settlement will exacerbate the ever-growing difference between the rates the preference customers' industrial consumers pay and the rates Alcoa and the other DSIs pay. As detailed below and in Alcoa's other filings in this proceeding,[32] the Settlement unlawfully assigns Lookback costs / Refund Amounts to the IP rate. Furthermore, the Settlement will return overpayments resulting from the unlawful 2000 REP settlement to the preference customers as billing credits, rather than as rate adjustments required by *Golden Nw.* 501 F.3d at 1053 ("We therefore remand to BPA to set rates in accordance with this opinion").

The billing credits will ultimately lower the rates paid by the preference customers' industrial consumers, and BPA must evaluate whether the IP rate is still "equitable in relation to" the industrial consumers' rates in light of the Settlement's billing credit construct.

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[31] Draft ROD at 57-63.

[32] REP-12-E-AL-01, REP-12-E-AL-01E, REP-12-B-AL-01, and REP-12-B-AL-02.

As BPA correctly observes, BPA evaluated the Settlement in light of three "primary" and two "secondary" criteria:

- the Settlement would provide COUs with at least as much rate protection compared to the rate protection afforded under section 7(b)(2) of the Northwest Power Act;
- the Settlement would provide REP benefits in a manner consistent with section 5(c) of the Northwest Power Act and distribute such REP benefits among the settling IOUs in a manner consistent with BPA's current ASC Methodology and with rates that are consistent with section 7 of the Northwest Power Act;
- the Settlement would resolve, in a fair and equitable manner, all of the outstanding issues with BPA's development and implementation of the Lookback for the FY 2002–2011 period;
- the Settlement would recognize that not all COUs were equally harmed by the costs of the 2000 REP Settlements and that IOUs were differentially affected by BPA setting off REP benefits for Lookback Amounts;
- the Settlement would provide reasonable rates for non-settling parties and other classes of BPA's customers.[33]

BPA argues that the section 7(c) rate standards are included within the fifth criteria (whether non-settling parties will have "reasonable rates" under the Settlement).[34] According to BPA, any rate that does not comply with the law cannot be "reasonable."[35]

BPA misses the point of Alcoa's argument. It is true that BPA staff opined during cross examination that the section 7(c) standards were considered in the fifth "reasonable rates" criteria.[36] But there is no testimony or other evidence backing that assertion up. The record in this proceeding is void of any conclusion that rates set pursuant to the Settlement's terms will result in an IP rate that

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[33] *E.g.,* REP-12-E-BPA-01 at 179:16-180:8.

[34] Draft ROD at 57-58

[35] Draft ROD at 57-58.

[36] Draft ROD at 58 (citing REP-12 Cross Examination Transcript at 155-156).

complies with the section 7(c) "equitable in relation to" standard. BPA's disregard of the section 7(c) rate standard is particularly egregious given the multiple ways that the DSIs are inequitably treated by the Settlement (*e.g.,* treatment of Refund Amounts and Lookback amounts, failure to allocate 7(b)(3) surcharge to surplus power, etc.).

BPA also makes the telling admission that it views the "equitable in relation to" standard as a "tertiary ratemaking issue" that is "not being resolved through the Settlement" and suggests that Alcoa can raise arguments concerning the rate impact of the Settlement in subsequent ratemaking proceedings.[37]

In making that argument, BPA ignores the manner in which it has narrowly delineated the scopes of the BP-12 and REP-12 proceedings. BPA defined the scopes of the BP-12 and REP-12 proceedings in its Federal Register notices.[38] Even though the FY 2012-2013 rates at issue in the BP-12 proceeding are "interrelated" with the Settlement, BPA has "chosen to exclude certain issues from the development of power rates in the BP-12 rate proceeding and address them in the REP-12 proceeding."[39] Those issues include virtually all aspects of the Settlement, including 7(b)(2), Lookback, and REP issues.

Alcoa attempted to present evidence and argument concerning the manner in which the Settlement will impact its FY 2012-2013 rates in the BP-12

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[37] Draft ROD at 61.

[38] *See* Fiscal Year (FY) 2012-2013 Proposed Power Rate Adjustments Public Hearing and Opportunities for Public Review and Comment, 75 Fed. Reg. 70,744 (Nov. 18, 2010); Proposed Residential Exchange Program Settlement Agreement Proceeding (REP-12); Public Hearing and Opportunities for Public Review and Comment, 75 Fed. Reg. 78,694 (Dec. 16, 2010).

[39] 75 Fed. Reg. at 70,744.

proceeding.[40] BPA, however, successfully moved to strike Alcoa's arguments concerning the Settlement on grounds that those arguments were proper in the REP-12 case.[41] In its motion to strike, BPA argued that:

> Alcoa's "materials should be struck from the record because they raise arguments and evidence that have been expressly excluded from the scope of the BP-12 proceeding. Alcoa will not be harmed by granting this motion because it can raise its arguments in the ongoing REP-12 proceeding, and such arguments and litigants' responses to those arguments in the REP-12 proceeding will be incorporated into the administrative record of the instant BP-12 proceeding.[42]

BPA now proposes to disregard Alcoa's arguments concerning the agency's failure to evaluate the Settlement in light of section 7(c) on grounds that Alcoa can raise such arguments in future rate cases (but apparently not this one—on either side of the case).[43] BPA initiated the REP-12 proceeding specifically to provide non-settling parties like Alcoa with an opportunity to present evidence and argument concerning the Settlement, including whether the IP rate set pursuant to the Settlement will comply with section 7(c).[44]

BPA seems to suggest that Alcoa's arguments concerning the agency's failure to expressly consider the section 7(c) standards are inappropriate because they are "new arguments raised for the first time in this proceeding."[45] Alcoa notes that this is the first time that BPA has proposed to fix extra-statutory rate making inputs and methodologies for a 17 year period, so this proceeding is obviously the first opportunity Alcoa has had to weigh in on these issues.

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[40] *See* BP-12-E-AL-01; BP-12-B-AL-01.

[41] *See* BP-12-M-BPA-08; BP-12-HOO-39.

[42] BP-12-M-BPA-08 at 1.

[43] Draft ROD at 61.

[44] *See generally* 75 Fed. Reg. at 70,744.

[45] Draft ROD at 57.

Moreover, as BPA knows, this is the first rate case in which Alcoa has a contract for the sale of physical power in which BPA's treatment of Lookback costs will have any meaningful impact on Alcoa.

Finally, in a tacit acknowledgement that it failed to consider the section 7(c) standard, BPA has proposed in the Draft ROD to revise the fifth evaluation criteria to read:

> [T]he Settlement would provide reasonable rates that meet all relevant statutory requirements for non-settling parties and other classes of BPA's customers, including section 7(c) of the Northwest Power Act.[46]

But changing the wording of the evaluation criteria does not change BPA's analysis (or lack of analysis) on this point. BPA's record is void of any specific determination that the IP rate set pursuant to the Settlement will satisfy the "equitable in relation" standard. Including a new evaluation factor, without actually evaluating that factor and supporting it with evidence, renders BPA's decision to adopt the Settlement arbitrary and capricious. *E.g.*, *Center for Biological Diversity v. NHTSA*¸538 F.3d 1172, 1047 (9th Cir. 2008) (Holding an agency action is arbitrary and capricious when it "entirely failed to consider an important aspect of the problem.").

C. The Draft ROD Incorrectly Concludes that Negotiated Rate Protection Amounts May Be Allocated to the IP Rate.

BPA continues to maintain that it is lawful to allocate a portion of the negotiated rate protection afforded to preference customers under the Settlement (i.e. the REP Surcharge) to Alcoa and other DSI customers via section 7(b)(3) of the NWPA.[47]

[46] Draft ROD at 325.

[47] *E.g.* Draft ROD at § 5.2, Issues 2- 6 (pp. 169-80).

Alcoa has not, as BPA contends, "misstated" Staff's positions on the nature of the REP Surcharge.[48] The records in both the REP-12 and BP-12 cases are rife with Staff's acknowledgement that if the Settlement is adopted, BPA will no longer perform the section 7(b)(2) rate protection test, but will instead assess negotiated "rate protection" costs via the REP Surcharge. For example, BPA has described that under the Settlement:

> Beginning in FY 2012, BPA would not perform the traditional section 7(b)(2) rate test in its rate cases. Instead, the Settlement (developed in the context of numerous 7(b)(2) rate test scenarios) would determine the amount of REP payments to the IOUs and, concomitantly, the amount of rate protection afforded to the COUs.[49]

That is not a "misstatement" of Staff's position; rather, it is a direct quote from Staff's testimony in this proceeding that is echoed repeatedly throughout the record in both the REP-12 and BP-12 proceedings.[50]

It seems that BPA is unsure exactly how to characterize the REP Surcharge. For example, BPA has characterized the REP Surcharge as "a *form* of the 7(b)(3) Supplemental Rate Charge."[51] In another instance, BPA goes further and contends that the "REP Surcharge is *calculated* pursuant to section

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[48] Draft ROD at 169 ("Alcoa misstates Staff's position.").

[49] REP-12-E-BPA-01 at 47:9-12.

[50] *E.g.,* REP-12-E-BPA-01 at 43:23-44:1 ("The amount of rate protection is calculated in the manner prescribed by the REP Settlement. . . . The cost of this rate protection is reallocated to all other power sales. . . ."; *id.* at 45:3-5 ("Under the Settlement, the IP and NR rates have been adjusted upwards by application of the REP Surcharge. . . ."); BP-12-E-BPA-01 at 40:5-6 ("The REP Settlement rate protection allocations have the effect of increasing the IP, NR, and PFx rates while decreasing the PFp rate."); BP-12-E-BPA-01 at 95:9-10 ("Under the REP settlement agreement, two utility-specific REP Surcharges replace utility-specific 7(b)(3) Supplemental Rate Charges."); BP-12-E-BPA-01 at 97:15-17 ("The cost of rate protection allocated to the IP rate is *determined pursuant to the 2010 REP Settlement agreement* and is included in the IP-12 rate.") (emphasis added); BP-12-E-BPA-11 at 38:22-24 ("The Initial Proposal proposes an REP Surcharge on the IP and NR rates, which is a form of the 7(b)(3) Supplemental Rate Charge.").

[51] BP-12-E-BPA-11 at 38:22-24 (emphasis added).

7(b)(3)."[52] BPA also describes the REP Surcharge as an amount "assessed pursuant to section 7(b)(3)."[53] But then, in a tacit admission that the REP Surcharge is <u>not</u> a 7(b)(3) surcharge, the Draft ROD states that the "REP Surcharge *performs the same function* as the traditional implementation of the 7(b)(3) surcharge,"[54] and that the "REP Surcharge is *in substance* a 7(b)(3) surcharge."[55] BPA also describes the REP Surcharge as an amount of rate protection that "*builds upon* the WP-10 7(b)(3) Supplemental Rate Charge."[56]

BPA's assorted descriptions beg the question – what exactly *is* the REP Surcharge? A "form of" a section 7(b)(3) surcharge? An amount "calculated"[57] under section 7(b)(3)? An amount "assessed" under section 7(b)(3)? An amount that "performs the same function" as the section 7(b)(3) surcharge? An amount that "builds upon" a prior 7(b)(3) surcharge?

The answer is simple. The REP Surcharge is a negotiated amount of rate protection derived from the specific formulas set out in Section 3.3.2 of the Settlement.[58] That section provides that the "REP Surcharge *will be determined* as provided in the following table."[59] As BPA staff has described it: "[t]he

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[52] Draft ROD at 171 (emphasis added).

[53] Draft ROD at 170 (emphasis added).

[54] Draft ROD at 173 (emphasis added).

[55] Draft ROD at 173 (emphasis added).

[56] Draft ROD at 172 (emphasis added). *See also* Draft ROD at 179 ("The REP Surcharge is no different in form and essence from the 7(b)(3) surcharge that would be included in the IP rate if there is no settlement.").

[57] BPA's contention that the REP Surcharge is "calculated" under section 7(b)(3) is preposterous. Section 7(b)(3) instructs BPA on how to recover costs that are not charged to the preference customers as a result of the section 7(b)(2) test. Section 7(b)(3) addresses cost recovery, and nothing in that subsection describes how rate protection should be calculated.

[58] REP-12-E-BPA-11, Section 3.3.2.

[59] REP-12-E-BPA-11, Section 3.3.2 (emphasis supplied).

Agreement includes a formula that determines an REP Surcharge Amount, which is the amount of rate protection allocated to the IP and NR rates."[60] As BPA Staff has repeatedly testified, the REP Surcharge is <u>not</u> an amount calculated pursuant to section 7(b)(2).[61]

This conclusion is supported by the NWPA's plain language, and BPA's legal interpretation of the same – both of which are ignored by the analysis in the Draft ROD. Section 7(b)(2) describes the "rate test" intended to protect the PF rate from certain costs. 16 U.S.C. § 839e(b)(2). The 7(b)(2) "rate test" provides that the PF rate should not be higher than it would be if certain provisions of the NWPA had not been adopted. *Id.* The statute sets out five assumptions that BPA must consider when evaluating whether the section 7(b)(2) rate protection will trigger. *Id.* Amounts not charged to the preference customers "by reason of" section 7(b)(2) are recovered from all other sales via a section 7(b)(3) surcharge. 16 U.S.C. § 839e(b)(3).

BPA suggests that its authority under section 7(b)(2) is broader than the statute provides – namely, that any form and amount of self-styled "rate protection" can be recovered via section 7(b)(3) because it is "an amount not charged to the public bod[ies]."[62] This interpretation conflicts with BPA's current legal interpretation of section 7(b)(2). In its "Legal Interpretation of Section

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[60] REP-12-E-BPA-01 at 33:1-2.

[61] *E.g.,* REP-12-E-BPA-01 at 47:9-12. ("Beginning in FY 2012, BPA would not perform the traditional section 7(b)(2) rate test in its rate cases. Instead, the Settlement (developed in the context of numerous 7(b)(2) rate test scenarios) would determine the amount of REP payments to the IOUs and, concomitantly, the amount of rate protection afforded to the COUs.").

[62] *E.g.,* Draft ROD at 176 ("Section 7(b)(3) requires that any added amounts recovered through a surcharge to rates other than the PF Public rate must be 'by reason of' section 7(b)(2). This statutory language does not require the amounts be determined solely by implementation of the traditional 7(b)(2) rate test."); *id.* ("'By reason of' does not demand a sole causal linkage as Alcoa postulates.").

7(b)(2) of the Pacific Northwest Electric Power Planning and Conservation Act," ("7(b)(2) Legal Interpretation"), BPA has explained that:

> BPA *will conscientiously follow the requirements of section 7(b)(2)* to perform the 'rate test' for its public body, cooperative, and Federal agency customers. If the results of the rate test indicate that BPA must recover costs in excess of those allowed under section 7(b)(2), BPA will implement the section 7(b)(3) supplemental rate charge provision for that purpose.[63]

The REP Surcharge is not an amount "not charged . . . *by reason of* [section 7(b)(2)]" because the REP Surcharge has *not* been calculated in a manner that "conscientiously follow[s] the requirements of section 7(b)(2)" (i.e. consideration of the five statutory assumptions). Indeed, nowhere in the REP Surcharge formula are the five assumptions that lie at heart of section 7(b)(2) acknowledged or considered.

BPA also incorrectly contends that the NWPA "does not limit the 7(b)(3) surcharge to one single form."[64] The plain language of section 7(b)(3), however, *does* limit the surcharge to one single form – specifically, "[a]ny amount not charged to public body, cooperative, and Federal agency customers by reason of [section 7(b)(2)]." 16 U.S.C. § 839e(b)(3). BPA would apparently prefer to read the "by reason of [section 7(b)(2)]" language out of the statute, leaving a revised provision stating something like: "[a]ny amount [of rate protection] not charged to public body, cooperative, and Federal agency customers." But that is not what the statute says or what Congress intended. Section 7(b)(3) is unambiguous – only amounts not charged *by reason of* section 7(b)(2) may be allocated via a section 7(b)(3) supplemental surcharge.

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[63] REP-12-E-BPA-02, Att. 1 at 6.

[64] Draft ROD at 173; *see also* Draft ROD at 179 ("The REP Surcharge is a recovery of rate protection costs (i.e., amounts not charged to public body customers) as directed by section 7(b)(3).").

The fact that the traditional section 7(b)(3) surcharge and the REP Surcharge are both expressed in dollars-per-megawatt hour is irrelevant because, as BPA concedes, they are calculated in different ways.[65] Alcoa is not simply mistaking a true Rolex for a cheap "Ralex," as BPA dismissively argues in the Draft ROD.[66] To follow BPA's analogy, section 7(b)(2) provides the agency with precise instructions on how to assemble a Rolex watch using Rolex parts (calculate preference customer rate protection). The settlement, on the other hand, provides precise instructions on how to assemble, with different parts, a clock radio. BPA now asserts (as it must) that the clock radio (the REP Surcharge) resembles a Rolex (7(b)(2) rate protection). Certainly, the Rolex and the clock radio both tell time, but they are constructed using different instructions and entirely different parts (the 7(b)(2) five assumptions versus the negotiated REP Surcharge formula in Section 3.2.2 of the Settlement). Just as a merchant could not legitimately market a clock radio as Rolex watch simply because they both tell time, BPA cannot market the REP Surcharge as a 7(b)(3) surcharge simply because they both represent an amount of rate protection expressed in dollars-per-megawatt hour.

Finally, BPA has evaluated the Settlement in light of a number of criteria, one of which is a tacit admission that the REP Surcharge differs from sections 7(b)(2) and (3).[67] BPA's first evaluation criteria is whether:

> [T]he settlement would provide [preference customers] with *at least as much rate protection* compared to the rate protection afforded under section 7(b)(2) of the [NWPA].[68]

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[65] Draft ROD at 173 ("[T]here is no difference in form between the current 7(b)(3) surcharge and the REP Surcharge; both take the form of a $/MWh adder to the affected rates. The difference lies in the manner of calculation . . . .").

[66] Draft ROD at 172-73.

[67] REP-12-E-BPA-02 at 179:16-180:8.

Underlying this evaluation criteria is BPA's assumption that it can provide the preference customers with *more* rate protection that 7(b)(2) dictates, and that it can collect such excessive rate protection from the DSIs and other customers.

But there is nothing in the statute that permits BPA to provide the preference customers with an amount of rate protection that *exceeds* the amount of rate protection calculated pursuant to section 7(b)(2). Indeed, the 7(b)(2) rate test provides a degree of rate protection to BPA's other customers by limiting the amount of preference customer rate protection that will be allocated to other sales.

The NWPA's legislative history reveals that Congress understood section 7(b)(2) as both protecting the preference customers' rates from certain costs, but also restricting the manner in which BPA could calculate rate protection. For example, the report of the House Committee on Interstate and Foreign Commerce notes that: "[t]he assumptions to be made by the Administrator in establishing this ceiling are specifically set forth," meaning that BPA is restricted in its calculation of rate protection amounts. H. Rep. No. 976-I, 96th Cong., 2d Sess. 68 (1980). The report of the House Committee on Interior and Insular Affairs similarly stated that "[s]ubsection 7(b)(2) establishes a 'rate ceiling' for BPA's preference customers, and specifies the method of calculating this ceiling. "H. Rep. No. 976-II, 96th Cong., 2d Sess. 52 (1980). BPA's own legal interpretation of section 7(b)(2) recognizes that is its limited by the statute's plain language and that it must "conscientiously follow the requirements of section 7(b)(2)."[69]

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[68] REP-12-E-BPA-02 at 179:18-19 (emphasis added); *see also* REP-12-E-BPA-01 at 179:15-180:8.

[69] REP-12-E-BPA-02, Att. 1 at 6.

The REP Surcharge, however, does not "conscientiously follow" the requirements of section 7(b)(2) because it provides the preference customers with a *greater* amount of rate protection than would be calculated under the statutory test. As BPA concluded in its evaluation of the Settlement:

> Under almost all outcomes of the analysis*, the Settlement provides superior rate protection compared to the 7(b)(2) rate test* scenarios. The analysis performs the rate test under a variety of potential future rate scenarios and litigation results and shows that except in the instance that [preference customers] prevail on every contested issue, the rate protection is greater and REP benefits smaller under the Settlement. The conclusion is that under most possible future results of the rate test, rates for COUs would be higher than the rates under the Settlement, all other factors being the same in both futures.[70]

The REP Surcharge part of recovers this excessive amount of rate protection from the DSIs, and in doing so, runs afoul of the limitations Congress placed on the calculation and recovery of preference customer rate protection. While the negotiating parties may agree that the preference customers are entitled to *more* rate protection that the statute provides, that excessive rate protection cannot lawfully be hoisted onto Alcoa's back. But the REP Surcharge construct does exactly that, in obvious violation of the NWPA.

D. The Draft ROD Improperly Endorses the Failure of the Settlement to Allocate Rate Protection to Surplus Sales

BPA next argues that recovering a portion of the REP Surcharge (which BPA consistently characterizes as a 7(b)(3) rate protection surcharge[71]) from surplus power sales is "unnecessary" and "improper."[72] As illustrated above, the

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[70] Draft ROD at 268 (emphasis added); *see also* REP-12-E-BPA-01 at 180:23-181:4 ("The analysis performs the rate test under a variety of potential future rate scenarios and litigation results and shows that except in the instance that COUs prevail on every contested issue, the rate protection is greater . . . under the Settlement.").

[71] *E.g.,* BP-12-E-BPA-11 at 38:22-24 ("The Initial Proposal proposes an REP Surcharge on the IP and NR rates, which is a form of the 7(b)(3) Supplemental Rate Charge.").

[72] Draft ROD at 183.

REP Surcharge is a negotiated amount of rate protection that has no relation to the section 7(b)(2) rate test, and section 7(b)(3) does not authorize BPA to recover non-statutory rate protection costs from Alcoa and the DSIs. *See* 16 U.S.C. § 839e(b)(3) (limiting BPA to recovering *only* rate protection costs "by reason of" section 7(b)(2)).

Assuming *arguendo* that BPA can recover the REP Surcharge via section 7(b)(3), it must collect a portion of that amount from surplus sales. Section 7(b)(3) provides that:

> Any amounts not charged to public body, cooperative, and Federal agency customers by reason of [section 7(b)(2)] of this subsection *shall be recovered* through supplemental rate charges for *all other power sold* by the Administrator *to all other customers*.

16 U.S.C. § 839e(b)(3) (emphasis added). The Ninth Circuit has referred to Sections 7(b)(2) and (3) as providing BPA with "clear instruction." *PGE*, 501 F.3d at 1028. BPA cannot lawfully conclude that it is "unnecessary" to recover a portion of the REP Surcharge from surplus sales because Congress said that 7(b)(2) rate protection costs must be recovered from sales of "all other power" sold to "all other customers." *Id.* Indeed, BPA has repeatedly interpreted section 7(b)(3) as requiring the agency to recover rate protection costs from surplus sales, and proposes to do so if the Settlement is not adopted.[73]

BPA cannot evade the plain language of the Settlement, which provides that:

> BPA will not, in any Rate Proceeding for any Rate Period, (i) apply or asses to sales of excess, surplus, or secondary energy . . . any REP Surcharge, section 7(b)(3) surcharge, or other costs.[74]

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[73] *See, e.g.,* 2010 Wholesale Power and Transmission Rate Adjustment Proceeding (BPA-10) – Administrator's Final Record of Decision at 76 (WP-10A-02) (concluding that rate protection costs "must be recovered from *all* of BPA's non-PF Preference power sales, which include surplus sales.") (emphasis in original); REP-12-E-BPA-04 at 9:16-18; BP-12-E-BPA-01 at 53:15-20.

[74] Settlement Agreement § 3.5(i), REP-12-E-BPA-11.

The agreement's language cannot be more obvious – if adopted, the Settlement precludes BPA from collecting the negotiated rate protection amounts from surplus sales ("all other power") as required by section 7(b)(3).

BPA recognizes that it has interpreted section 7(b)(3) as requiring the recovery of rate protection costs from surplus sales.[75] But BPA attempts to sidestep its prior position by observing that there are deep seated disagreements between the preference customers and the IOUs on this issue, and that the issue is currently being litigated at the Ninth Circuit. In the absence of the Settlement, BPA would presumably defend its position on 7(b)(3) and surplus sales in court, but it will not defend that position in this proceeding. Instead, BPA abdicates to the negotiating parties, observing that the preference customers and IOUs agree on the negotiated approach.[76]

BPA next argues that the Settlement "hardwires" an allocation of rate protection to surplus sales by "scaling" the REP Surcharge off the WP-10 7(b)(3) rate protection surcharge.[77] BPA contends that the result of this "scaling" is that the rate protection surcharge assigned to the IP rate is lower than it otherwise would be because it reflects the WP-10 allocation to surplus sales.[78]

BPA's argument defies the express terms of the statute. BPA is *not* allocating any of the REP Surcharge to surplus sales, and is prohibited by the Settlement from doing so.[79] The REP Surcharge is the negotiated amount of rate

[75] Draft ROD at 181 ("Alcoa is correct that BPA previously determined that section 7(b)(3) requires an allocation of rate protection costs to surplus sales.").

[76] Draft ROD at 181.

[77] Draft ROD at 181-82.

[78] Draft ROD at 182.

[79] REP-12-E-BPA-01 at 43:26-44:01 ("The cost of this rate protection is reallocated to all other power sales, with the exception of surplus sales."); *id.* at 45:3-4 ("Under the Settlement, the IP and NR rates have been adjusted upwards by application of the REP Surcharge."); REP-12-E-BPA-04 at 10:10-12 ("[I]n

protection that the preference customers will be entitled to under the Settlement, and the Settlement does not contemplate another form of rate protection that will be allocated to surplus sales. The fact that rate protection costs were allocated to surplus sales in WP-10 does not mean that BPA is allocating such costs to surplus sales under the Settlement.

BPA has not identified any evidence or testimony demonstrating that rate protection costs will actually be recovered from surplus sales. Instead, BPA simply contends that the rate protection surcharge recovered from the IP rate will be calculated "*as if BPA had continued to allocate* rate protection dollars to surplus sales."[80]

Furthermore, since there is no actual recovery of the negotiated rate protection amounts from surplus sales, there can be no "double allocation" of rate protection costs to surplus sales.[81] Again, the fact that rate protection costs were recovered from surplus sales in the FY 2010-2011 rates is irrelevant. BPA will *not* recover rate protection costs from surplus sales during the FY 2012-2028 term of the Settlement and there will be no "double allocation" of rate protection costs during those rate periods.

The record reveals why BPA abdicated its prior positions on section 7(b)(3) and surplus sales – it did so "in order to maintain the value structure agreed to

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order to maintain the value structure agreed to by the parties in the Settlement, no separate allocation of the cost of REP benefits to surplus sales will be made."); BP-12-E-BPA-01 at 48:10-14 ("Under the REP Settlement, rate protection is assumed to be afforded to preference customers. The amount of rate protection is calculated in the manner prescribed by the REP Settlement . . . [T]he rate protection reduces the costs allocated to the PF rate applicable to preference customers, the PFp rate. The cost of this rate protection is reallocated to all other sales, with the exception of surplus sales.");BP-12-E-BPA-11 at 38:22-23 ("The Initial Proposal proposes an REP Surcharge on the IP and NR rates").

[80] Draft ROD at 183 (emphasis in original).

[81] Draft ROD at 183.

by the parties in the Settlement."[82] BPA, however, cannot lawfully ignore its mandatory obligation to recover rate protection from "all other power sold . . . to all customers", including surplus sales. 16 U.S.C. § 839e(b)(3). The Ninth Circuit has held that BPA's settlement authority is constrained by the obligations imposed by the NWPA. *PGE*, 501 F.3d at 1028, 1030 ("Congress could not have made it any clearer that it intended for BPA to exercise its general settlement authority within the confines of the NWPA . . . BPA may not provide power . . . on whatever terms-whether good business or not-that BPA likes.").

Despite the fact the negotiating parties prefer a different outcome, BPA must comply with the plain language of section 7(b)(3), its prior interpretations of section 7(b)(3), and the Ninth Circuit's holdings. *Id.* at 1015 ("When the rate ceiling has been triggered, § 7(b)(3) mandates that further REP benefits must be paid for by non-preference customers (i.e., IOUs, DSIs, *and all other customers*) through supplemental rate charges.") (emphasis added).

E. The Draft ROD Incorrectly Ratifies Allocating Refund Amounts / Lookback Costs to the IP Rate

The Refund Amount construct set out in the Settlement inequitably allocates to the IP rate responsibility for redressing the injuries suffered by the preference customers as a result of BPA's prior efforts to settle its REP obligations. It is undisputed that Alcoa and the DSIs received no benefit from the REP settlement costs the Ninth Circuit found unlawful in *PGE* and *Golden Nw.* BPA concedes as much, but goes on to argue that it is "irrelevant" that the DSIs received no benefit from the unlawful REP settlement costs.[83]

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[82] REP-12-E-BPA-01 at 48:10-14.

[83] Draft ROD at 207 ("Alcoa's second point that it 'received none of the exchange payments to the IOUs resulting from the settlement' is true, but also irrelevant.").

BPA first contends that the Refund Amount / Lookback costs are not assigned to the IP rate.[84] Specifically, BPA argues that the Refund Amounts / Lookback costs are not included as a line item on the IP rate.[85] BPA acknowledges that under the Settlement, total REP costs are recovered through rates.[86] The total REP costs (referred to as REP Recovery Amounts) are comprised of two elements: (1) the Scheduled Amounts (i.e. the negotiated REP payments to the IOUs); and (2) the Refund Amounts (i.e. the negotiated Lookback payments to the preference customers).[87] BPA then states that it will "set off" the Refund Amounts from the total REP benefits the IOUs, meaning that the benefits the IOUs receive will be net of the preference customers' refunds (and aggregate REP Recovery amounts) Alcoa Inc.'s Brief on Exceptions.[88]

The Settlement is essentially a shell game. The fact that the Refund Amounts are not a line item in the IP rates (or rates in general) is relevant only to BPA's efforts to argue that the Settlement approximates the results achieved by application of the statutes. The funds that will be paid to the preference customers as refunds must come from somewhere, and BPA's testimony shows precisely where the funds will come from – BPA's rates.[89] The aggregate REP

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[84] Draft ROD at 206-07.

[85] Draft ROD at 206 ("[T]here is no 'line item' in BPA's revenue requirement on which Lookback Amount costs (or Refund Amount costs) are either allocated to the IOUs or DSIs and returned to the [preference customers].").

[86] Draft ROD at 206.

[87] Draft ROD at 206 ("Rates set under the Settlement will continue to be set to recover total REP benefits, which under the Settlement will continue to be set to recover total REP benefits, which under the Settlement are referred to as REP Recovery Amounts (*i.e.* the sum of the Scheduled Amounts and the Refund Amounts)").

[88] Draft ROD at 194 ("The Refund Amounts are funded by reductions in the IOU's REP benefits."); *see also* REP-12-E-BPA-12 at 20:11-22.

[89] *E.g.*, Draft ROD at 206 ("Rates set under the Settlement will continue to be set to recover total REP benefits, which under the Settlement will continue to be set

benefits, including the Refund Amounts, form a part of BPA's revenue requirement.[90] As BPA explained in the Draft ROD, "[a]ll rates will be set to recover [the Refund Amounts], including the . . . IP rate[]."[91]

BPA next argues that section 7(b)(2) "does not protect the IP rate from REP costs."[92] BPA is correct. The NWPA does not contemplate the mechanism employed in the Settlement; moreover, the Refund Amounts / Lookback amounts are *not* statutory REP costs. They represent unlawful settlement payments that BPA made to the IOUs at the expense of the preference customers and any party paying rates that included REP costs.[93] While it is true that sections 7(b)(2) and (3) do not protect the DSIs from costs of implementing the REP congress envisioned, those provisions do protect the DSIs from bearing responsibility for repaying unlawful benefits received by the IOUs.

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to recover total REP benefits, which under the Settlement are referred to as REP Recovery Amounts (*i.e.* the sum of the Scheduled Amounts and the Refund Amounts)"); REP-12-E-BPA-04 at 11:24 – 12:1 ("Rates will be set to recover the total REP benefits. In this instance, the total REP benefits will be the combination of the amounts identified in section 3.1 (Scheduled Benefits) and 3.2 (Refund Amounts) of the Settlement.").

[90] REP-12-E-AL-01 at 10:7-14:

> Q. Do the Refund Amounts form part of BPA's revenue requirements for the FY 2012-2013 rate period and future rates set under the proposed settlement?
>
> A. Yes. BPA proposes to recover the Refund Amounts through its rates.
>
> Q. How does the proposed recovery of Refund Amounts impact the FY 2012-2013 IP rate?
>
> A. The IP rate (including the FY 2012-2013 IP rate proposed in the BP-12 proceeding) will contain the portion of the Refund Amounts recovered through the proposed REP Surcharge.

[91] Draft ROD at 206.

[92] Draft ROD at 215.

[93] As Alcoa has observed, the unlawful settlement payments made to the IOUs were also at Alcoa's expense. *See* REP-12-E-AL-01 at 12:13 – 13:6.

BPA next contends that Alcoa has no evidence that Refund Amounts are included as a cost in the IP rate.[94] BPA, however, ignores Alcoa's responses to BPA's own data requests, which track the manner in which Refund Amount costs are allocated to the IP rate. BPA has offered nothing but obfuscation and argument to the contrary.[95]

Alcoa is not, as BPA implies, proposing that the IP rate should receive a rate credit or reduction.[96] BPA's argument misses the point. Alcoa has not requested that its rates should receive a refund or some form of credit as a part of the Lookback / Refund Amount construct. Indeed, Alcoa has previously agreed that it would not challenge rates that applied to the period prior to September

[94] Draft ROD at 206.

[95] *See, e.g,,* Alcoa's response to BPA data requests BP-AL-02 ("Section 3.3.1 of the February 1, 2001 Draft Settlement Agreement establishes the REP Surcharge as equal to the REP Recovery Amounts plus COU REP Benefits times 7.38 divided by 265,846,587. Section 3.3 defines REP Recovery Amounts as the sum of Scheduled Amounts plus Refund Amounts. Therefore, the REP Surcharge contains embedded Refund Amounts (referred to as 'Lookback' amounts in the testimony) according to the terms of the Settlement Agreement. The REP Surcharge is calculated and included on line 40, column Q of table 2.5.7.3 on page 87 of the Power Rates Study Documentation (BP-12-E-BPA-01A). It is shown as the 'Settlement Charge' and included (along with embedded Lookback costs) in the IP rate calculation."); BPA-AL-04 (saying the same); BPA-AL-10 (saying the same); and BPA-AL-09 ("REP Policy testimony (REP-12-E-BPA-04) page 11, line 24, through page 12, line 1 states: 'Rates will be set to recover the total REP benefits. In this instance, the total REP benefits will be the combination of the amounts identified in section 3.1 (Scheduled Benefits) and 3.2 (Refund Amounts) of the Settlement.'. Also, line 38, Column A of table 2.3.1.1 of the Power Rates Documentation study (BP-12-E-BPA-01A) shows a figure of about $258 million for the IOU Exchange Benefits which approximates the Scheduled Benefits plus the Refund Amount shown in the Draft Settlement Agreement for that year."). Copies of these data responses are attached hereto as Exhibit 2.

[96] Draft ROD at 208 ("What would have been inequitable would be to include the Refund Amounts/Lookback Amounts as a general rate reduction to all ratepayers because it would be giving Alcoa and other parties that did not pay the PF-02 rate (and therefore did not incur any overcharges) the full benefit of these future refunds.").

30, 2006.[97] Alcoa's argument is equitable – because Alcoa did not receive any benefits as part of the unlawful 2000 REP settlements, it should not be expected to contribute to the repayment of the unlawful REP benefit amounts. Neither BPA's testimony nor the Draft ROD provide a compelling (indeed, any) justification for saddling Alcoa and the DSIs with responsibility for redressing unlawful settlement payments received by the IOUs.

F. The Draft ROD Incorrectly Concludes that Alcoa Has Waived Objections to the Refund Amount / Lookback Constructs

BPA unpersuasively asserts that Alcoa has waived its right to raise arguments concerning the collection of Lookback amounts / Refund Amounts from the IP rate because it should have raised those concerns in prior rate cases. BPA's position is factually and legally deficient.[98] First, Alcoa was not paying the IP rate during the WP-07S rate period. Beginning in October 2006, BPA did not physically sell Alcoa power at the statutory IP rate (or sell Alcoa physical power at any rate, for that matter).[99] Instead, Alcoa obtained power via a Monetary Benefit contract, which required Alcoa to purchase power at market rates that greatly exceeded the IP rate.[100] BPA, in turn, provided Alcoa with "monetary benefits" designed to partially offset Alcoa's market purchases. Due to BPA's imposition of the "monetary benefit" construct, Alcoa had no direct interest in the development of the WP-07S rates, including the treatment of Lookback amounts, because it was not paying the IP rate developed in that proceeding.

[97] WP-07-E-AL-4 at 6:18-22.

[98] Draft ROD at 211.

[99] REP-12-E-AL-01 at 12:20-22.

[100] REP-12-E-AL-01 at 12:20-22, 13:11-13.

Furthermore, BPA's reference to Mr. Speer's testimony in the WP-07S proceeding is misleading.[101] It is true that Mr. Speer observed that Alcoa agreed not to challenge rates in effect *prior* to September 30, 2006, as part of the Compromise Approach settlement.[102] But at the same time, BPA agreed that it:

> [W]ill not assert in any subsequent BPA power rate case or appeal thereto that either this agreement, or the decisions in § 15.5 of BPA's 2002 Power Rate ROD, create any procedural or substantive precedent or create any agreement to any underlying principle or methodology. This paragraph survives the expiration of this agreement.[103]

Alcoa is not challenging pre-2006 rates consistent with the Compromise Approach settlement. Alcoa assumes that BPA will also act consistently with its commitments and will withdraw its assertion that Alcoa has somehow waived arguments concerning the treatment of Lookback / Refund Amounts premised on the resolution of the 2002-2006 contract settlement.

In his WP-07S testimony, Mr. Speer also noted Alcoa's concern about BPA's response to *PGE* and *Golden Northwest* in future proceedings – "[t]he exercise of developing the IP rate may therefore have future significance and Alcoa does not want to have its silence interpreted as agreeing with the methodology used to develop the proposed, but currently irrelevant, IP rate."[104] Indeed, it was that very concern that compelled Alcoa to include the settlement language quoted above.

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[101] Draft ROD at 211.

[102] WP-07-E-AL-04 at 6:17-21.

[103] *See* June 23, 2000, settlement between BPA and Alcoa at ¶11, which is attached hereto as Exhibit 3. Although the settlement is marked as protected under ER 408, Alcoa is not offering it into evidence for purposes of establishing liability.

[104] WP-07-E-AL-04 at 5:13-15.

Furthermore, Alcoa is currently a participant in the *Avista v. BPA*[105] appeal, which addresses WP-07S rate issues. Alcoa is also a participant in the *Portland Gen. Elec. v. BPA*[106] appeal, which addresses WP-10 rate issues. While WP-07S non-rate issues have been fully briefed in the *Ass'n of Pub. Agency Customers v. BPA*[107] appeal, BPA has stipulated that the non-rate issues in WP-07S do not include BPA's "2007 Supplemental Wholesale Power Rate Case Final Proposal, FY 2002-2008, Lookback Study Volumes I-III."[108] Thus, Alcoa and other parties to the *Avista* and *Portland Gen. Elec.* cases are not precluded from raising issues concerning BPA's treatment of Lookback amounts in the WP-07S and WP-10 rates.

Finally, even if Alcoa waived its ability to address Lookback issues in the WP-07S proceeding (which it has not), it has not waived them as to this proceeding. Section 7(i) of the NWPA grants Alcoa the right to "offer refutation or rebuttal *of any material submitted by any other person or the Administrator*." 16 U.S.C. § 839e(i)(2)(A) (emphasis added). BPA cannot credibly argue that the broad grant of participation rights afforded under section 7(i) somehow precludes Alcoa from challenging the manner in which the Settlement will inequitably impact the rates it pays for power over the next 17 years based on arguments raised (or not raised) in a proceeding that developed rates for a period when Alcoa was not actually purchasing power from BPA.

The fact that Alcoa may not have objected to the treatment of Lookback amounts in the WP-07S administrative proceeding has no bearing here. Parties

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[105] Consolidated Appeal No. 09-73160.

[106] Consolidated Appeal No. 09-73228.

[107] Consolidated Appeal No. 09-74725.

[108] *Ass'n of Pub. Agency Customers v. BPA*, No. 08-74725 Joint Motion to Adopt Stipulated Briefing Schedule, DktEntry 64 (June 1, 2009).

routinely change their positions, sometimes drastically so, in rate proceedings. For example, the IOUs have repeatedly argued (as have the DSIs) that a portion of the section 7(b)(3) surcharge should be recovered from surplus sales. The understanding of the statute was adopted by BPA in WP-07S and WP-10. Now, however, the IOUs have abandoned that position in this proceeding in exchange for a settlement framework that prohibits BPA from making such an adjustment. BPA does not claim that the IOUs have waived the ability to change their position on this issue in exchange for other concessions they receive in the Settlement.

Significantly, BPA itself does not believe it is bound by precedent in rate cases. In the parallel BP-12 proceeding, BPA has stated that it "is not maintaining that it is bound by precedent."[109] BPA goes on to explain that "an agency is empowered to change its policies when it is reasonable to do so" when presented with evidence that "circumstances have changed in a manner that would compel BPA to reverse [its] longstanding policy."[110] Here, Alcoa has presented BPA with such compelling changed circumstances – namely, that Alcoa is now purchasing physical power directly from BPA at the IP rate. Accordingly it should not be bound by arguments raised (or not raised) in rate cases when it *was not* purchasing physical power from BPA.[111]

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[109] Draft ROD at 118.

[110] Draft ROD at 118.

[111] While Alcoa and the preference customers agree on little, they share common ground on BPA's misplaced contention that Alcoa was waived arguments concerning the treatment of Lookback / Refund Amounts:

> BPA further notes that its final decision on that issue "was not taken up on appeal" and so,"[f]or the next 15 years, BPA continued to implement that decision based on the sense of finality that it had assumed should attach to final decisions that have not been challenged on appeal to the Ninth Circuit."

G. The Draft ROD Incorrectly Evaluates the Settlement's Compliance with Section 5(c)

BPA maintains that the treatment of ASCs under the Settlement complies with its 2008 Average System Cost Methodology ("ASCM"), as approved by the Federal Energy Regulatory Commission ("FERC").[112] But the Settlement, however, turns the ASCM (and the use of ASCs) on its head in a manner never contemplated by BPA, FERC, or Congress.

Under BPA's FERC-approved rules, the ASCM is the first step in determining the costs of the REP program. The ASCM is deployed to calculate an individual utility's average cost of power, from which an individual utility's REP benefits (if any) are determined. As FERC has explained, the 2008 ASCM "establishes the methodology that Bonneville Power Administration will apply to

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> Some might take these statements to mean that in order to prevent the "sense of finality" from attaching to a decision, that decision, however small, must be challenged on appeal to the Ninth Circuit. Of course, many considerations go into a party's determination whether or not to appeal a decision to the Ninth Circuit. Parties often forego appeal because of various strategic and practical considerations and not because they agree with the decision and agree to be bound by it in the future. If BPA is now asserting that unless a decision is challenged before the Ninth Circuit, it will assume that stakeholders agree with that decision and bestow on it precedential value, then it should carefully consider the implications of such a policy. The floodgates of litigation will swing wide open as parties nervously line up to challenge BPA on every issue just so BPA does not feel bound by the "sense of finality" of its decision in case the parties wish to raise the issue again in the future.

BP-12-R-JP04 at 7.

[112] *E.g.* Draft ROD at 75 ("The Settlement requires no changes to the ASC Methodology, and no changes have been proposed or are contemplated"); Draft ROD at 105 ("The 2012 REP Settlement properly retains the features of the REP required by section 5(c) and resembles the REP envisioned by Congress in all material respects"); Draft ROD at 326 ("It has been shown that the Settlement implements the ratemaking elements of the REP in the same manner as BPA currently implements the REP.").

determine average system costs, *and thus what Bonneville will pay*" for the REP program. 74 FR 47052, 47059 (2008) (emphasis supplied).

But under the Settlement, the ASCM is the last step where the fixed amount of aggregate benefits is divided based on participating utilities' relative ASCs. REP benefits "are not determined using ASC filings and the PFx rate (although ASC filings may be used to determine how the pre-determined benefits are allocated amongst various customers."[113] BPA's use of the ASCs under the Settlement deviates from its own FERC-approved administrative rules and therefore does not comply with the law.[114]

1. Development and Approval of the 2008 ASCM

The NWPA does not define what costs are included in calculating the ASC of a utility's resources. Rather, the NWPA provides for BPA to develop a methodology for determining a utility's ASC. 16 U.S.C. § 839c(c)(7). This methodology is developed in consultation with the Pacific Northwest Electric Power and Conservation Planning Council[115], BPA's customers, and appropriate state regulatory bodies, and is subject to review and approval by FERC. *Id.* The 2008 ASCM was developed by BPA in consultation with the relevant

[113] REP-12-E-AL-01 at 8:14-18.

[114] An agency is bound by its own regulations and must comply with them while they are in effect. *Mem'l, Inc. v. Harris*, 655 F.2d 905, 910-11 n. 14 (9th Cir. 1980) ("It is by now axiomatic that agencies must comply with their own regulations while they remain in effect"); *Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 610 (9th Cir. 1981) ("It is by now axiomatic that agencies must comply with their own regulations while they remain in effect") *quoting Memorial, Inc. v. Harris*, 655 F.2d 905, 910-11 n. 14 (9th Cir. 1980); *Confederated Tribes & Bands of Yakima Indian Nation v. F.E.R.C.*, 746 F.2d 466, 474 (9th Cir. 1984) ("It is a well-known maxim that agencies must comply with their own regulations"); *Wagner v. U.S.*, 365 F.3d 1358, 1361(Fed. Cir. 2004) (An agency is bound by its own regulations); *A.D. Transport Express, Inc. v. U.S.*, 290 F.3d 761, 766 (6th Cir. 2002) ("When an agency promulgates regulations, it is … bound by those regulations").

[115] Currently known as the "Northwest Power and Conservation Council."

stakeholders, and marked the first revision in the ASCM in over 24 years. 74 Fed. Reg. at 47053. FERC conditionally approved the 2008 ASCM in September 2008 for use in the newly revived REP, and issued its final approval in September 2009. *Id.*

BPA is presently bound to apply the FERC-approved 2008 ASCM, and has not proposed modifications to the 2008 ASCM as part of the REP-12 proceeding.

2. Operation of the 2008 ASCM

The 2008 ASCM applies to any sales of electric power from any utility to BPA under Section 5(c) of the NWPA. 18 C.F.R. § 301.1. Under the 2008 ASCM, a utility's ASC is generally determined by dividing the utility's costs for production and transmission resources (Contract System Cost) by the utility's total regional load (Contract System Load). 18 C.F.R. § 301.1 (defining average system cost). Specifically, a utility's ASC is determined by calculating a utility's Base Period ASC, then escalating certain line items in the Base Period ASC through the subsequent wholesale rate period. 74 Fed. Reg. at 47054-55. The escalation step is designed to reduce BPA's administrative burden "by limiting changes to a utility's average system cost once it is established in an average system cost review process." 74 Fed. Reg. at 47055.

To calculate the Base Period ASC, a utility submits an Appendix 1 form to BPA. 18 C.F.R. § 301.6(a). This is the form on which a utility "reports its Contract System Cost, Contract System Load, and other necessary data for the calculation of ASC." *Id.* The primary source of data for the Appendix 1 is a utility's FERC Form 1 filing. 18 C.F.R. § 301.6(c). The Base Period ASC is calculated by populating schedules in Appendix 1 with cost and revenue data from the annually-developed FERC Form 1 filing and other sources. 74 Fed. Reg. at 47054. Once the Base Period ASC is calculated, BPA then escalates certain

items in the Base Period ASC through the wholesale rate period to arrive at the Exchange Period ASC. 18 C.F.R. § 301.4. The Exchange Period ASC is the ASC that BPA will use to determine the utility's Residential Exchange Program benefits during the subsequent rate period. 74 Fed. Reg. at 47055.

A utility can only change its ASC during a rate period in a limited number of circumstances, such as when it acquires or loses a certain amount of resources, or if it loses or gains territory that results in a specified change to its Base Period ASC. 18 C.F.R. § 301.4. The 2008 ASCM also outlines a process for BPA to make changes to the ASCM. 18 C.F.R. § 301.5. After gaining one year of experience with the current ASCM, BPA may initiate the process on its own or upon request from a certain number of customers, but any changes must be approved by FERC. *Id.*

3. The Settlement Agreement

The 2008 ASCM was designed and implemented solely to support BPA's traditional REP Program. Under its terms, it may only be implemented to develop an ASC amount that correlates to an *actual amount* of REP benefits for individual utilities, not just to allocate percentages of REP benefits among utilities using an externally, third-party negotiated aggregate level of REP benefits.[116] The Settlement does not use the 2008 ASCM to develop an ASC amount that correlates to any actual dollar amount of benefits, but rather establishes a pre-determined level of aggregate benefits and allocates the negotiated settlement amount among participating utilities.[117] Put another way,

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[116] *See* REP-12 Cross Exam Trans. at 89:4-10 ("Q. So you'd agree under the traditional application of the Residential Exchange Program, that Bonneville doesn't start with a fixed amount of benefits for participating utilities, correct? A. (Mr. Bliven) Correct.").

[117] Draft ROD at 98 (discussing Settlement in terms of a utility's ASC relating to its "share" of REP benefits); REP-12-E-AL-01 at 9:6-9 (" While the settlement model uses participating utilities' relative ASCs to determine how the Scheduled

under the traditional implementation of the REP, the REP benefit calculation begins with (and is determined by) a utility's ASC. But under the Settlement, the REP benefit calculation ends with the use of ASCs to allocate shares of the fixed REP benefits negotiated by the parties. The aggregate amount of REP benefits is fixed under the Settlement, and BPA is obligated to pay out the fixed annual amount regardless of any given utility's ASC.[118] Thus, the Settlement's use of the 2008 ASCM is contrary to the ASCM's purpose and intended use.

The ASCM's intended use is evident from its construction and BPA's explanation of the methodology in the FERC approval. FERC endorsed the "traditional" use of ASCs in the REP program when it issued its approval. As it explained:

> Under the Residential Exchange Program, a utility may sell power to Bonneville at the average system cost of that utility's resources. Bonneville then sells the same amount of power back to the utility at Bonneville's priority firm exchange rate. The power exchange is generally viewed as a paper transaction. In almost all instances, *Bonneville makes a payment to the utility for the difference*

Amounts will be allocated between the exchange parties, BPA does not use them to calculate total payments to be distributed pursuant to the REP.")

[118] REP-12-E-BPA-12 at Table 3.1. *See also* REP-12 Cross Exam Trans. at 90:19 – 91:6:

> Q. And so in Section 3.1, there's a table, annual REP benefits, and those are the benefits that will be paid in aggregate to the qualifying utilities, correct?
>
> A. (Mr. Bliven) Well, that's why I was saying the REP settlement benefit payments would be made. The scheduled amounts are used to form those amounts, but there is language in the start of Section 3.1.1 that allows the amounts to be changed pursuant to certain conditions, but the scheduled amounts on the table form the starting point for those calculations.
>
> Q. And those amounts can only be changed pursuant to the express contingencies that you just described in Section 3.1.1, correct?
>
> A. (Mr. Bliven) Yes.

> *between the utility's average system cost and Bonneville's priority firm exchange rate, multiplied by the utility's residential and small farm load.*

74 Fed. Reg. at 47052 (emphasis added, internal citations omitted).[119] BPA and FERC obviously envisioned that BPA would use the 2008 ASCM to determine the *amount* of REP benefits available to an individual utility, as required by the NWPA.

BPA's intent to use the ASCM to determine an *amount* of REP benefits (rather than just as an allocator, as applied under the Settlement) is evident throughout the many changes made to the methodology in the 2008 ASCM. BPA modified the ASCM in 2008, for the first time in 24 years, to account for changes in the energy industry that had occurred over time. 74 Fed. Reg. at 47053. Under the Settlement, an individual utility's ASC is used only as a threshold for determining whether or not that utility receives, and if so its relative percentage of, the pre-determined and fixed REP benefits set forth in the Settlement.[120] The ASCM contemplates individualized determinations of REP benefits, which by their nature will change over time. Disregarding this construct, the Settlement

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[119] In implementing the REP program, BPA usually engages in a "paper transaction" instead of an actual sale of power. 74 FR at 47052. However, BPA has the ability under Section 5(c) to provide power if the cost of the replacement acquisition is less than the applicable ASC. 16 U.S.C. § 839c(c)(5). Under the traditional REP program, BPA would occasionally have the incentive to do this depending on the power market. Under the Settlement, BPA is locking itself into providing lump sum payments to the participating utilities, losing its ability to respond to real time market factors and shackling itself to a program that may interfere with its ability to respond to market conditions consistent with sound business principles.

[120] Draft ROD at 98 (discussing Settlement in terms of a utility's ASC relating to its "share" of REP benefits); REP-12-E-AL-01 at 9:6-9 ("While the settlement model uses participating utilities' relative ASCs to determine how the Scheduled Amounts will be allocated between the exchange parties, BPA does not use them to calculate total payments to be distributed pursuant to the REP."); REP-12-E-AL-01 at 8:14-18 ("[REP benefits] are not determined using ASC filings and the PFx rate (although ASC filings may be used to determine how the pre-determined benefits are allocated amongst various customers").

fixes the aggregate amount of REP benefits for 17 years, and the aggregate amount of REP benefits will not be adjusted to account for changes in the participating utilities' ASCs.[121]

BPA would not have gone to the trouble of modifying its ASCM if it had not intended the ASCM to be used to determine a utility's actual *amount* of REP benefits. BPA's 2008 revisions to the ASCM evince its intention that ASCs will be used to establish the amount of an individual utility's REP benefits. The 2008 modifications include changes to "how the average system costs are calculated as well as the substance of the costs included and excluded from the average system costs calculation." 74 Fed. Reg. at 47053. Among the most important changes, the 2008 ASCM uses FERC Form 1 data instead of state retail rate orders as the source of ASC data, adjusts system costs less frequently, allows utilities to file a single ASC for its regional service territory instead of an ASC for each state in which it operates, and matches the ASC period to the wholesale power rate period. *Id.*

For example, the escalated Exchange Period ASC was adopted to allow BPA to more efficiently *determine the amount of REP benefits* over a rate period. As noted by FERC, the Exchange Period ASC "is the average system cost Bonneville will use *to determine the utility's Residential Exchange Program benefits during* Bonneville's subsequent wholesale rate period." 74 Fed. Reg. at 47055 (emphasis added). BPA adopted this construct to enable it to more efficiently determine a utility's ASC, and thus its *amount* of REP benefits, over a rate period.

[121] REP-12-E-BPA-11 (p. 11) ("Schedule of REP Settlement Benefit Payments to IOUs").

FERC also observed in its approval Order, that the purpose of the ASCM is to develop ASCs that correspond to the *amount* of REP benefits BPA will pay over a rate period. In its approval, FERC stated:

> Given that this final rule establishes the methodology that Bonneville Power Administration will apply to determine average system costs, *and thus what Bonneville will pay*, this final rule meets the exception provisions of 5 U.S.C. 804(3)(A).

74 Fed. Reg. at 47059. FERC could not have made it any more clear that the ASCM is intended to develop the *amount* of REP benefits BPA will pay, and that FERC based its approval on the requirement that the ASCM relate to an individualized *amount* of REP benefits (as opposed to an allocation of fixed REP benefits). The Settlement ignores this construct completely.

BPA's intended use of the ASCM becomes even more apparent upon an examination of BPA's Final Record of Decision for the 2008 ASCM ("ASCM ROD").[122] The ASCM ROD is replete with BPA explanations of the traditional REP program and how the ASCM complies with the program. For example, in its explanation of the methodology, BPA explained:

> Under the methodology, exchanging utilities make proposed ASC filings with BPA. BPA then reviews the filings for conformity with the ASCM and the requirements of section 5(c) of the Northwest Power Act. The BPA Administrator then determines the appropriate ASC for the filing Utility. IOUs file the BPA-determined ASC with FERC for review and approval. *BPA determines a Utility's REP payments by comparing the Utility's ASC with BPA's PF Exchange rate, and then multiplying the difference, if any, by the Utility's exchangeable load. For example, if a Utility had an ASC of $50/MWh and BPA's PF Exchange rate was $30/MWh, then the Utility would receive REP payments equal*

[122] 2008 Average System Cost Methodology, Final Record of Decision, June 2008 ("ASCM ROD"). *Available at*: http://www.bpa.gov/corporate/finance/ascm/Docs/FINAL-ASCM-ROD.pdf.

to the difference ($20/MWh) multiplied by the Utility's residential and small farm load.[123]

BPA's ASCM rule describes the methodology in terms of its traditional REP program, and no where in the ASCM ROD does BPA contemplate, or even speculate, that the ASCM would only be used to allocate an externally-derived and fixed aggregate REP benefit.

In addition to requiring fixed REP benefit amounts contrary to the methodology developed in the 2008 ASCM, the Settlement also does away with the traditional Residential Purchase and Sale Agreements, the use of which is expressly contemplated in the 2008 ASCM.[124] Among the major contemplated changes, the Draft ROD indicates that the new Residential Exchange Program Implementation Agreements will do away with the "deemer mechanism." Under the deemer mechanism, if a utility's ASC falls below BPA's PF Exchange rate, the utility can "deem" its ASC equal to the PF Exchange rate and can pay off the amount it owes BPA in its deemer account by accepting a reduction in future positive REP benefits. 74 Fed. Reg. at 47053 n.14. Under the Settlement, if a utility's ASC fails to exceed BPA's PF Exchange rate, then the utility simply will not receive REP benefits, but BPA does not indicate that it will be forced to pay the difference through a reduction in future benefits.[125]

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[123] ASCM ROD at 3 (emphasis added).

[124] *See* Draft ROD at 74 (discussing the Residential Exchange Program Implementation Agreements, which are the "new form" of BPA's traditional RPSA). The Residential Purchase and Sale Agreements are the contracts that define and implement the power purchase and sale under the REP. 18 C.F.R. § 301.2 (defining Residential Purchase and Sale Agreements).

[125] *See* Draft ROD at 74 (noting that "[i]f an IOU's ASC fails to exceed BPA's PF Exchange rate . . . the IOU receives no REP benefits"); Draft ROD § 4.3 (p. 76)(stating that "[i]f an IOU's ASC is less than the PF exchange rate, then under the Settlement, such IOU receives no REP benefits").

The 2008 ASCM and the NWPA dictate the process BPA must use to modify the 2008 ASCM. Under these rules, BPA is required to consult with a variety of stakeholders, and must seek FERC approval of any changes to its ASCM.[126] BPA cannot initiate this process until one year of experience has been gained under the 2008 ASCM.[127] BPA has not initiated any such process, and does not intend to.[128] The Settlement's provisions are inconsistent with the ASCM implemented at 18 C.F.R. § 301 and discussed in the ASCM ROD. The Settlement deviates from the currently effective FERC-approved rule and accordingly renders the product of the Settlement unlawful.

H. The Draft ROD Misreads the Court's Remand Instructions in *Golden Northwest*

In *Golden Northwest*, the Ninth Circuit remanded BPA's WP-02 rates to the agency in light of its holdings in *PGE* that the 2000 REP settlement was unlawful. The court's remand instructions were unambiguous – "[w]e therefore remand to BPA *to set rates* in accordance with this opinion." 501 F.3d at 1053 (emphasis added). BPA contends that Alcoa's arguments are predicated on questionable evidence – namely BPA staffs' cross examination testimony.[129] This argument would render BPA's statutorily-required hearings meaningless. Moreover, the "evidence" Alcoa is relying on is the Ninth Circuit's unambiguous remand instructions to "set rates" to redress the unlawful REP payments.

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[126] 18 C.F.R.§ 301.5 (governing changes in average system cost methodology); 16 U.S.C. 839c(c)(7) (requiring certain stakeholder input in developing a new methodology, and requiring FERC approval of that methodology).

[127] 18 C.F.R. § 301.5(b).

[128] Draft ROD at 75 ("The Settlement requires no changes to the ASC Methodology, and no changes have been proposed or are contemplated.").

[129] Draft ROD at 218.

BPA, however, will not re-set rates under the Settlement. Instead, BPA will redress the preference customers' overpayments via billing credits as opposed to rate adjustments.[130] By issuing refunds rather than adjusting the PF rate, the Settlement requires BPA to disguise the real PF rate with the result that the IP rate is not "equitable in relation to the retail rates charged by the public body and cooperative customers to their industrial consumers in the region." 16 U.S.C. § 839e(c)(1)(B). The Refund Amounts will reduce the preference customers' net power costs. Alcoa has presented testimony indicating that it is likely that a portion of the Refund Amounts will flow through to the preference customers' industrial customers, thereby reducing their net rates.[131] Neither BPA nor the preference customers have rebutted Mr. Speer's testimony.[132] BPA concedes that it could request from the preference customers information on how the Lookback refunds and Refund Amounts impact the rates of their industrial consumers.[133] But BPA has declined to gather such information.[134] As such, BPA has ignored its obligation to ensure that the IP rate set under the proposed Settlement satisfies the "equitable in relation to" standard set out in 16 U.S.C. § 839e(c)(1)(B).

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[130] REP-12-E-BPA-01 at 41:11-13 ("The Refund Amounts, however, are not paid to the IOUs, but instead are credited back to preference customers in the form of a credit on their power bills.");

[131] Speer Testimony, REP-12-E-AL-01 at 12:1-12.

[132] REP-12-E-BPA-12 at 28:13-15 ("We do not know whether or not the Refund Amounts or Lookback refunds are passed on to the industrial consumers of the COUs.").

[133] REP-12 Cross Exam Trans. at 136:11-15.

[134] REP-12 Cross Exam Trans. at 134:25 – 125:3 (Q. Has Bonneville requested from the COUs information on how the [L]ookback amounts might impact industrial customers' rates? A. (Mr. Bliven) No.").

1. The Refund Amounts Provided under the Settlement Do Not Comply with the Court's Decisions in *Golden Nw.* and *PGE*.

BPA contends that the Settlement complies with the court's instruction in *Golden Nw.* to "set rates" consistent with the court's opinion.[135] In *Golden Nw.*, the Ninth Circuit held that BPA's rates were impermissibly high because of the inclusion of unlawful REP settlement costs. The court elected to "remand to BPA to *set rates* in accordance with [its] opinion." 501 F.3d at (emphasis supplied). As Alcoa noted in its initial brief, "[t]he Ninth Circuit's remand instructions, though short, do two things: (1) remand the decision on over-recovery to BPA (not to some of the parties to the dispute); and (2) mandate that on remand, BPA should set rates consistent with the opinion."[136] Instead of following the court's simple remand instructions, BPA proposes to adopt a Settlement negotiated by most, but not all of, the preference customers and IOUs.[137] The Settlement returns negotiated Lookback sums to specific customers.[138]

Instead of responding to Alcoa's argument about the court's actual instructions, BPA argues that the court's mandate leaves BPA's options open, and resorts to a fallback position, already rebutted by Alcoa, that Alcoa should have raised its issues in earlier proceedings.[139] BPA argues that the Settlement's provisions fall within an area not decided by the court or left open by the mandate of the court.[140] However, BPA cannot escape that fact that its Settlement awards monetary refunds, does not make prospective rate

[135] Draft ROD § 6.4 (pp. 216-218)

[136] REP-12-B-AL-02 at 29.

[137] *See* REP-12-B-AL-02 at 30.

[138] *See* REP-12-B-AL-02 at 30.

[139] Draft ROD at 217; *see also* Section II.F. *supra.*

[140] Draft ROD at 217.

adjustments, and consequently has an adverse impact on the IP rate (which is based on the PF rate). Indeed, BPA refers to its Lookback Amounts as "damages."[141] These damages are negotiated by the IOUs and preference customers, and only compensate some of the parties damaged by BPA's earlier settlements.[142] Damages are not rates, and BPA's attempt to cloak the damages as rates does not comply with the court's remand instructions in *Golden Nw.*

2. BPA's Governing Statutes Do Not Permit BPA to Return Refund Amounts in the Manner Required by the Settlement.

BPA continues to defend the treatment of the Lookback refunds in the Settlement.[143] Specifically, BPA maintains that issuing refunds to specific customers, rather than adjusting prospective rates, is not unusual.[144] In defense of its position, BPA cites a number of cases that, while interesting, are irrelevant to the situation at issue in the REP-12 proceeding. The main case relied on by BPA, *United Gas Imp. Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965), dealt with a rate proceeding before the Federal Power Commission ("FPC") concerning gas producers in south Louisiana. *Id.* at 225. The producers had been operating under certificates that were revisited in the rate proceeding. *Id.* In its decision, the Court stated:

> We also conclude that the Commission's refund order was allowable. We reject, as did the Court of Appeals below, the suggestion that the Commission lacked authority to order any refund. While the Commission 'has no power to make reparation orders,' its power to fix rates under § 5 being prospective only, it is not so restricted where its order, which *never became final,* has been overturned by a reviewing court. Here the original certificate orders were subject to judicial review; and judicial

[141] Draft ROD at 219.

[142] *See* REP-12-B-AL-02 at 31.

[143] *E.g.,* Draft ROD at 221.

[144] Draft ROD at 221.

> review at times results in the return of benefits received under the upset administrative order.

Id. at 229 (internal citations omitted, emphasis added). The rule outlined in *Callery* did not create a blanket rule for all future rate-setting decisions by agencies operating under federal laws. Moreover, a FPC case under the Natural Gas Act, in which the Commission is exercising its independent regulatory authority is irrelevant to a NWPA case where BPA has received specific remand instructions from a Court that invalidated a prior settlement.

Callery does not apply for two additional reasons. First, the WP-02 rate case, at issue in *Golden Nw.* and *PGE*, was a *final* decision under the NWPA, whereas the rates at issue in *Callery* were not. *Id.* at 229 ("While the Commission 'has no power to make reparation orders,' *its power to fix rates under § 5 being prospective only*, it is not so restricted where its order, which *never became final,* has been overturned by a reviewing court") (emphasis added). Second, the NWPA sets forth specific rate setting directives that govern this proceeding and were not at issue in the cases cited by BPA, which did not involve BPA or the NWPA.

Subsequent decisions support interpreting *Callery* to apply only to decisions that are not final. Recently, the District of Columbia Court of Appeals elaborated on the finality standard. *Dist. of Columbia v. Dist. of Columbia Pub. Serv. Comm'n*, 905 A.2d 249 (D.C. 2006). The court noted that "once a regulatory body has authorized a public utility to charge a particular rate, having found that rate to be reasonable, it may not require the utility to pay refunds to its customers based on its subsequent finding that the rate was excessive-even if it concludes that it made an error when it approved the rate in the first place*." Id.* at 257 (citing *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.,* 284 U.S. 370 (1932)). In dismissing an argument

that *Callery* applied, the court stated that "[i]n *Callery*, the Supreme Court merely held that even though a regulatory agency may have no power to make reparation orders, it still may order a refund on remand to effectuate an appellate court reversal of its original rate order, which never became final." *Id.* at 259 (citing *Callery*, 382 U.S. at 229).

In the WP-02 case, the rates were deemed final upon approval by FERC. *Golden Nw.*, 501 F.3d at 1042-43. The court noted that under its precedent, a BPA rate order has not been "deemed final" until FERC denies any petitions for rehearing. *Id.* (citing *Pacificorp v. FERC,* 795 F.2d 816, 820 (9th Cir.1986)). The court notes that in the WP-02 appeal, that happened on October 17, 2003. *Id.* at 1042-43. This is in accordance with the statute, which provides for judicial review of final rate determinations. 16 U.S.C. § 839f(e)(1)(H).

This construct further distinguishes BPA's proceedings from those in the cases cited by BPA. In each of those cases, the FERC order was not subject to review by another agency prior to judicial review. *See Callery*, 382 U.S. at 226; *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1067 (D.C. Cir. 1992); *Pub. Utilities Comm'n of State of Cal. v. FERC*, 988 F.2d 154, 157 (D.C. Cir. 1993). There was no intermediate review upon which the order became final – judicial review *was* the first level of review. *Callery* does not endorse the Settlement's billing credit construct because the order in the WP-02 rate case was final upon FERC approval.

Furthermore, *Callery* and the other cases cited by BPA deal with rates imposed by FERC and not subject to the strict rate-setting provisions of the NWPA. The NWPA requires that BPA set rates prospectively, and sets forth specific rate directives that are not found in any other regulatory construct.

BPA has acknowledged that cases arising under statutes such as the FPA and Natural Gas Act do not apply to it.[145] BPA cannot have it both ways. BPA cannot claim to apply principles from cases arising under other statutes in instances where it helps BPA's position, but claim not to be governed by them in other instances, such as when discussing the prohibition on retroactive ratemaking.[146] The cases cited by BPA do not apply to BPA's rate-setting under the NWPA.

3. The Settlement's Requirement that BPA Provide Targeted Refunds through the Refund Amounts, Rather than Lower Prospective Rates, Also Violates the Rule Against Retroactive Ratemaking.

Next, BPA contends that the Settlement does not violate the rule against retroactive ratemaking.[147] While acknowledging that the rule against retroactive ratemaking is alive and well in rate-setting jurisprudence, BPA contends that the rule does not apply to it because Federal Power Marketing Administrations ("PMAs") like BPA are exempt due to their wide discretion in recovering their costs under the Flood Control Act ("FCA").[148] Again, BPA's arguments are interesting, but irrelevant to the current situation. Alcoa does not dispute BPA's ability to recover its costs (something not in dispute in context). Instead, Alcoa simply contends that BPA must make rate

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[145] WP-07-A-05 at 25-26 ("Indeed, BPA is different in other respects from the 'regulated companies' subject to the filed rate doctrine under the FPA and Natural Gas Act such as those involved in cases cited by APAC, IPUC, and others. First, BPA is not governed by the FPA or the Natural Gas Act, 16 U.S.C. §§ 832-832m"); *id.* at 26 (" Clearly, FERC has no authority to apply standards other than those found in the Northwest Power Act and cannot make determinations based on standards that are applicable only to utilities regulated under the FPA and the NGA.").

[146] *See* WP-07-A-05 (p. 25-26).

[147] Draft ROD at 227) (referring to the WP-07S ROD for its positions).

[148] WP-07-A-05 (p. 24-25)

adjustments through prospective rate-setting. The NWPA's plain language makes clear that Congress intended the agency to set prospective rates:

> The Administrator *shall establish* a rate or rates of general application for electric power sold to meet the general requirements of . . . customers within the Pacific Northwest . . . [s]uch rate or rates *shall recover* the costs of that portion of the Federal base system resources needed to supply such loads until such sales exceed the Federal base system resources. Thereafter, such rate or rates *shall recover* the cost of additional electric power as needed to supply such loads . . . ."

16 U.S.C. § 839e(b)(1) (emphasis added). The NWPA uses prospective language and creates a duty for BPA to set its rates prospectively, and no general language or directives in the FCA change BPA's far more specific duties under the NWPA. There is no dispute that the NWPA was codified after the FCA, and it contains more specific rate directives. It is a well-recognized canon of statutory construction that a "precisely drawn, detailed statute pre-empts more general remedies." *Brown v. Gen. Services Admin.*, 425 U.S. 820, 821 (1976); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (holding that a specific statute of specific intention takes precedence over a general statute, particularly when the specific statute was later enacted).

As for Alcoa's use of state regulatory commission opinions[149], Alcoa was simply illustrating that the court's use of the words "set rates" rather than "pay damages" or "make payments" was used advisedly, because the more common way for overcharges to be returned to customers is through prospective rate adjustments to a customer class, not through retroactive refunds to individual customers.[150] Alcoa does not suggest that BPA is bound

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[149] Discussed at Draft ROD at 227.

[150] REP-12-B-AL-01 (p. 29)

by state PUC procedures, but rather that, in addition to its other infirmities, the Settlement is also at odds with the procedures traditionally employed by state PUCs to return any overcharges to utilities' customers, and that BPA's decision to issue refunds rather than make rate adjustments is at odds with the normal approach taken by utilities throughout the region.

III. CONCLUSION

BPA's criticism of Alcoa is misdirected. The parties negotiating the Settlement had every reason to read the same statutes that Alcoa raises here and to comply with them. But they (not Alcoa) boxed BPA into the corner it now faces – accept a settlement that is contrary to law, or surrender years of effort to reach the settlement of issues that are critical to achieving equitable treatment of Northwest consumers. The REP-12 proceeding is either a formal section 7(i) process where parties may raise their legitimate concerns, or it is not. If not, then the hearings were a meaningless exercise. If so, then Alcoa's concerns should be heeded and not ignored as "too late."

Although various arguments were made during the REP-12 proceeding suggesting that amending the NWPA is not necessary to implement the Settlement, in fact, the statutes (and the Settlement itself) say otherwise. BPA and the parties to the Settlement will necessarily go back to Congress for authority to lawfully implement the Settlement's terms. The Northwest parties and Congress should also address the major inequity that, despite the NWPA's intention to fairly spread the benefits of the Federal Columbia River Power System ("FCRPS") to three customer classes, the DSIs alone have no assured long-term access to BPA's cost-based power derived from that system (despite the fact they have helped pay for the FCRPS for over 70 years).

Alcoa has no desire to be "the spoiler," but it is assuredly fighting for the life of its Intalco Works smelter and the roughly 2,000 jobs that are dependent upon the continued operation of that smelter. So it may not just "go along" with efforts to ignore the NWPA to resolve others' power problems, particularly when the parties to the Settlement sought to muzzle the DSIs as the cost of participating in what is only a partial resolution of the Northwest's serious power disputes.

Respectfully submitted this 24th day of June, 2011

MARTEN LAW

By: */s/ Michael C. Dotten*
Michael C. Dotten, OSB No. 780099
Dustin T. Till, OSB No. 100534

Attorneys for Alcoa Inc.

MARTEN LAW PLLC
1001 SW Fifth Avenue
Portland, OR 97204
Telephone: 503.243.2200
Facsimile: 503.243.2202
E-Mail: mdotten@martenlaw.com
E-Mail: dtill@martenlaw.com

Alcoa Inc.'s Brief on Exceptions
REP-12-R-AL-01

Exhibit 1

Affidavit of Michael C. Dotten

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

BEFORE THE

BONNEVILLE POWER ADMINISTRATION

2012 WHOLESALE POWER	)	BPA Docket BP-12
RATE ADJUSTMENT PROCEEDING	)	

Affidavit of Michael C. Dotten

1. I am an attorney who represents Alcoa Inc. in its dealings with Bonneville Power Administration ("BPA") and in related proceedings before the U.S. Court of Appeals for the Ninth Circuit. I am competent to testify on the matters contained herein, which are based on my personal knowledge.

2. Alcoa was aware of efforts to settle the long-standing dispute between the Consumer Owned Utilities ("COUs") and the Investor-Owned Utilities ("IOUs") over the residential exchange ("REP") program. Alcoa authorized me to participate on its behalf in settlement meetings so that Alcoa could help foster a settlement and not be an obstacle to settlement of the long-standing dispute consistent with Alcoa's interests in maintaining fair rates for DSI customers.

3. During efforts to settle certain Ninth Circuit appeals pertaining to the Residential Purchase and Sale Agreements, I attended two meetings that preceded the mediation referred to in BPA's Draft Record of Decision, REP-12-A-01. I also attended two mediation sessions pertaining to the settlement efforts. The events surrounding Alcoa's participation in the negotiations are accurately portrayed in Alcoa's response to BPA's data request BPA-AL-18, which is attached to this affidavit as **Exhibit A** and incorporated herein by reference. I prepared Alcoa's data request response and attest that it is accurate.

4. The BPA staff characterization found on page 37 of the REP-12 Draft Record of Decision (REP-12-A-BPA-01) that "DSI representatives were at various mediation sessions, but there were certain portions of the mediation that the DSIs were not invited to" is correct, as more specifically reflected in Alcoa's data response and referred to above in paragraph 3. The BPA staff characterization that "Staff agrees that the DSIs were not present when the substance of the framework on which the

Settlement is built was put together" is accurate. Following the mediator's decision not to include the DSIs in the mediation, Alcoa was not invited to any further negotiation sessions leading up to the Agreement in Principle.

5. Mr. Murphy's characterization at BPA's Oral Argument session that "we did exclude Alcoa from certain elements of the discussion leading up to the agreement in principle" is correct, except that "certain elements" included the entire effort to reach the Agreement in Principle. In other respects, Mr. Murphy's characterizations at oral argument (and quoted in the Draft ROD at p. 38) are incorrect.

6. It is true that Mr. Murphy and I spoke on several occasions concerning the settlement. The remainder of Mr. Murphy's characterization is incorrect as reflected below.

7. In early November, 2010, I called Mr. Murphy to ask whether the IOU and COU parties were prepared to release their draft of the definitive settlement agreement that resulted from the Agreement in Principle. Mr. Murphy returned my call and said that he would have to check with the IOU and COU participants to see if Alcoa would be permitted to have a copy of the draft. In response to our conversation, Mr. Murphy sent me the e-mail attached hereto as **Exhibit B** which included a portion of the draft of the definitive REP-12 Settlement Agreement. In conjunction with our exchange of calls in mid-November 2010, I asked Mr. Murphy when it would be appropriate for Alcoa to have input on the settlement. Mr. Murphy replied that DSI participation would be a problem with some of the parties.

8. After BPA's initial proposal in the REP-12 proceeding I received a second call from Mr. Murphy inquiring as to whether Alcoa would likely sign the settlement. I told Mr. Murphy that Alcoa was concerned about several aspects of the settlement, and particularly about the provision that would preclude Alcoa, if it were a signer of the settlement, from seeking redress of its primary concern, the lack of long-term power supply from BPA at the statutory rate.

9. Following the conversation referred to in paragraph 8, I received a call from Mr. Murphy indicating that certain (unspecified) publicly owned utilities might be willing to waive (as to Alcoa) the prohibition in § 8 of the Settlement that precludes signers from seeking resolution of issues not included in the settlement document during the Congressional ratification process. Mr. Murphy also said that Pacific Northwest Generating Cooperative was opposed to any such waiver and that it was critical to the settlement to preserve as much of the COU participation as possible, so it didn't seem too likely that the § 8 would be waived as to Alcoa.

10. I did not receive any invitations to attend any specific meetings regarding the negotiations to finalize the settlement. I understand that meetings concerning the negotiations were scheduled by e-mail. I did not receive any notices of negotiating sessions by e-mail, nor did Mr. Murphy or anyone else invite me to any negotiating session.

11. I did not fail to return any calls by Mr. Murphy extending an invitation to participate in the negotiating sessions that led up to the settlement agreement, nor did I fail to return any calls placed to me by Mr. Murphy. More than once in the exchange of calls referenced above, I did return Mr. Murphy's calls only to reach Mr. Murphy's voicemail.

12. Certainly I did not receive, and to the best of my knowledge, no other representative of Alcoa received, any invitation to participate in any negotiations surrounding the REP settlement other than the limited participation in the mediation sessions, and it appears that Mr. Murphy's characterization on this point during BPA's oral argument is based on a faulty recollection of the relevant events.

13. As a consequence of Mr. Murphy's faulty recollection, BPA's finding that "the settling parties extended opportunities to Alcoa to participate, but Alcoa never returned [their] calls" is also incorrect.

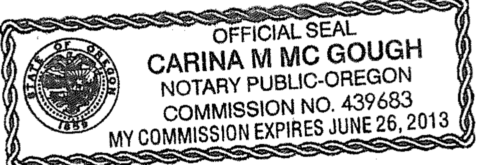
Dated this 24th day of June, 2011.

Michael C. Dotten

Sworn and subscribed to before me this 24th day of June, 2011.

Notary Public for Oregon

My Commission Expires: 6/26/2013



Affidavit of Michael C. Dotten
REP-12-R-AL-01

Exhibit A

Response is past due after seven (7) days.

Request (click to view)	Exhibit	Responded	Requesting Party	Responding Party	Date Filed	Response (click to view)
BPA-AL-18	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	2/25/2011 4:24 PM	Select Request to view Response

You are viewing page 1 of 1

Request Detail

Request ID: BPA-AL-18
Page Number: 6
Line Number: 21-23
Exhibit Filing: REP-12-E-AL-01

Technical Contact Name: Peter Stiffler
Technical Contact Phone: 503.230.5660
Technical Contact Email: pbstiffler@bpa.gov
Legal Contact Name: Richard Greene
Legal Contact Phone: 503.230.4626
Legal Contact Email: ragreene@bpa.gov

Request Text:

Is it your testimony that Alcoa was "excluded from participating" in the mediation sessions BPA conducted in the spring and summer of 2010? Also please provide all documentation and evidence you relied on to support your statement that "Alcoa and other DSI customers were excluded from participating in the negotiations of the REP Settlement Agreement. . ."

Response Detail

Date Response Filed: 3/2/2011 10:13:52 AM
Contact Name:
Contact Phone:
Contact Email:
Response Text:

Yes. In the late Winter and early Spring of 2010, Alcoa's counsel attended at least two meetings at the Airport Sheraton in Portland to discuss the potential means of settling the ongoing disputes pertaining to levels of Average System Cost and lookback payments. The sessions were convened by BPA. Alcoa attended the sessions as Alcoa is an intervenor in the various 9th Circuit proceedings in which the ASC and lookback issues were in dispute. The settlement meetings were designed to settle the 9th Circuit cases. Later, in the Spring of 2010, BPA hired private mediators (Layn Phillips and Bernard Schneider) to assist with settlement of the disputes. On April 15-16, 2010, the mediators held "plenary sessions" and "caucuses" with the parties in Portland. Dustin Till, one of Alcoa's counsel attended the first "plenary session" of the mediation in which preliminary procedural matters were discussed. Immediately following the meeting, Mr. Till was approached by Mark Thompson, then counsel for the Public Power Council. Mr. Thompson told Mr. Till that he had been delegated by COU interests to say that COUs were uncomfortable having Alcoa attend the "customer" caucus sessions. Later Mr. Phillips told Mr. Till that Alcoa would not be included in any of the caucus negotiating sessions. The mediators never consulted with Mr. Till during the period April 15-16 on Alcoa's positions on any substantive issue. On April 17, Layn Phillips sent out an e-mail to representatives of the IOUs, the COUs, APAC, Alcoa and an Expert Panel that advised the mediators announcing the next negotiation session and noting in paragraph 1 "Alcoa will not attend." During Spring 2010, Alcoa was, from time to time, sent copies of e-mails from the mediators summarizing various meetings that had taken place between the parties to the mediations and describing the procedures that the mediators intended to use to reach resolution of the disputes. Based on those e-mails, Alcoa is aware that additional "plenary sessions" were held primarily with the IOUs and COUs on April 22-23 and April 29-30 and on May 13-14, 2010 in Portland. One of the e-mails provided an Expert Panel report dated May 10, 2010 on the progress of negotiations and the parties' various positions. Mike Dotten, Alcoa's counsel attended one mediation session following the issuance of the Expert Report to point out that the average IP rate in one of the Expert Panel's calculations was higher than the then-current IP rate and was assured by the Expert Panel that this was an error and would be corrected. Mike Dotten asked whether he should caucus with the mediators and was told that the mediators planned to meet exclusively with the IOUs and COUs. At no time during the mediations did the mediators caucus with Alcoa, and to be best of Alcoa's information, the mediators did not caucus with the other DSIs, nor were any caucus room facilities established for Alcoa or the other DSIs to meet with the mediators. Apparently the mediation sessions continued during the summer without much success. Alcoa did not receive subsequent communications from the mediators until an e-mail from Bernard Schneider dated August 9, 2010 that stated that "BPA informed the two caucuses [referring to COUs and IOUs] that a settlement must be reached by August 13, 2010." The e-mail asked for a confidential "mediators-eyes-only" response from the "two caucuses" to indicate their intention to participate, or not, on the basis of a broad outline of terms the mediator laid out in the confidential memorandum. Alcoa understands that Mr. Schneider's process lead to private settlement discussions between the COUs and IOUs (with occasional participation by BPA) over the summer and fall of 2010 that lead to the Agreement in Principle and the draft Settlement Proposals at issue in this proceeding. Alcoa was not invited to participate in the private settlement discussions, was provided no notice of the dates or locations of

Files Submitted for this Response:

REP-12-R-AL-01
Exhibit 1: Exhibit A

Affidavit of Michael C. Dotten
REP-12-R-AL-01

Exhibit B

Reply | Reply to all | Forward | Close | Help

You replied on 11/15/2010 6:10 PM.
Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

From: Paul Murphy [pmurphy@mbllp.com] Sent: Mon 11/15/2010 1:58 PM

To: Michael C. Dotten

Cc:

Subject: Rates section of draft REP Settlement Agreement

Attachments: Rate Section of Settlement Agreement.doc(95KB)

View As Web Page

Mike,

Here is the rates section of the draft REP Settlement Agreement. It is still a work in progress, but it should not change in any substantive manner, The unexplained number for the REP Surcharge in section 3.3.1 is the IP § 7(b)(3) surcharge from the WP-10 rates divided by the total REP benefits for IOUs and COUs in the WP-10 case.

Paul M. Murphy
Murphy & Buchal LLP
2000 SW First Ave., Suite 420
Portland OR, 97201
Tel: (503) 227-1011
Fax: (503) 227-1034
E-mail: pmurphy@mbllp.com

This email message may contain information that is privileged and/or confidential. It is intended only for use of the person or persons to whom it is addressed. If you have received this communication in error, please delete it without copying or disseminating and immediately notify us by telephone (503-227-1011). Thank you.

Alcoa Inc.'s Brief on Exceptions
REP-12-R-AL-01

Exhibit 2

BPA-AL MISC

Response is past due after seven (7) days.

Request (click to view)	Exhibit	Responded	Requesting Party	Responding Party	Date Filed	Response (click to view)
BPA-AL-2	**REP-12-E-AL-01**	**Yes**	**Bonneville Power Administration**	**Alcoa**	**2/18/2011 3:49 PM**	**Select Request to view Response**
BPA-AL-20	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	2/25/2011 4:24 PM	Select Request to view Response
BPA-AL-21	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	2/25/2011 4:25 PM	Select Request to view Response
BPA-AL-22	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	2/25/2011 4:25 PM	Select Request to view Response
BPA-AL-23	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	2/25/2011 4:25 PM	Select Request to view Response
BPA-AL-24	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	2/25/2011 4:25 PM	Select Request to view Response
BPA-AL-25	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	3/1/2011 3:30 PM	Select Request to view Response
BPA-AL-26	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	3/1/2011 3:31 PM	Select Request to view Response
BPA-AL-27	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	3/1/2011 3:32 PM	Select Request to view Response

You are viewing page 1 of 1

Request Detail

Request ID: BPA-AL-2
Page Number: 5
Line Number: 5-6
Exhibit Filing: REP-12-E-AL-01

Technical Contact Name: Raymond Bliven
Technical Contact Phone: 503.230.3685
Technical Contact Email: rdbliven@bpa.gov
Legal Contact Name:
Legal Contact Phone:
Legal Contact Email:

Request Text:

Please provide all evidence that supports your statement that "BPA proposes to impose IOU 'Lookback' costs on the IP rate through the application of the REP Surcharge." In your response, please provide specific cites to BPA's Initial Proposal studies and/or documentation (including table numbers with rows and columns) that demonstrates that Lookback costs are included in the REP Surcharge.

Response Detail

Date Response Filed: 2/28/2011 11:25:55 AM
Contact Name: Jack Speer
Contact Phone: 509.699.8131
Contact Email: jackspeer1@mac.com
Response Text:

Section 3.3.1 of the February 1, 2001 Draft Settlement Agreement establishes the REP Surcharge as equal to the REP Recovery Amounts plus COU REP Benefits times 7.38 divided by 265,846,587. Section 3.3 defines REP Recovery Amounts as the sum of Scheduled Amounts plus Refund Amounts. Therefore, the REP Surcharge contains embedded Refund Amounts (referred to as "Lookback" amounts in the testimony) according to the terms of the Settlement Agreement. The REP Surcharge is calculated and included on line 40, column Q of table 2.5.7.3 on page 87 of the Power Rates Study Documentation (BP-12-E-BPA-01A). It is shown as the "Settlement Charge" and included (along with embedded Lookback costs) in the IP rate calculation.

Files Submitted for this Response:

REP-12-R-AL-01
Exhibit 2

Response is past due after seven (7) days.

Request (click to view)	Exhibit	Responded	Requesting Party	Responding Party	Date Filed	Response (click to view)
BPA-AL-4	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	2/18/2011 3:49 PM	Select Request to view Response

You are viewing page 1 of 1

Request Detail

Request ID: BPA-AL-4
Page Number: 6
Line Number: 15-16
Exhibit Filing: REP-12-E-AL-01

Technical Contact Name: Raymond Bliven
Technical Contact Phone: 503.230.3685
Technical Contact Email: rdbliven@bpa.gov
Legal Contact Name:
Legal Contact Phone:
Legal Contact Email:

Request Text:

Please provide all evidence that supports your statement that "The REP surcharge is designed to collect a portion of Scheduled Amounts paid to IOUs, Refund Amounts paid to COUs and COU REP benefits..." In your response, please provide specific cites to BPA's Initial Proposal studies and/or documentation (including table numbers with rows and columns) that demonstrates that the REP Surcharge is designed to collect the items listed in your testimony.

Response Detail

Date Response Filed: 2/28/2011 11:33:36 AM
Contact Name: Jack Speer
Contact Phone: 509.699.8131
Contact Email: jackspeer1@mac.com
Response Text:

Alcoa objects to this data request because providing all evidence that supports this statement has not been done and would be overly burdensome and no party is required to perform any new study or run any analysis. BPA Rules of Procedure Governing Rate Hearings. Section 1010.8(b). Nevertheless, Alcoa offers the following evidence: Section 3.3.1 of the February 1, 2001 Draft Settlement Agreement establishes the REP Surcharge as equal to the REP Recovery Amounts plus COU REP Benefits times 7.38 divided by 265,846,587. Section 3.3 defines REP Recovery Amounts as the sum of Scheduled Amounts plus Refund Amounts. The resulting Settlement charge is included in the IP rate formula on line 40, column Q of table 2.5.7.3 on page 87 of the Power Rates Study Documentation (BP-12-E-BPA-01A).

Files Submitted for this Response:

REP-12-R-AL-01
Exhibit 2

Response is past due after seven (7) days.

Request (click to view)	Exhibit	Responded	Requesting Party	Responding Party	Date Filed	Response (click to view)
BPA-AL-9	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	2/18/2011 3:51 PM	Select Request to view Response

You are viewing page 1 of 1

Request Detail

Request ID: BPA-AL-9
Page Number: 11
Line Number: 7-9
Exhibit Filing: REP-12-E-AL-01

Technical Contact Name: Raymond Bliven
Technical Contact Phone: 503.230.3685
Technical Contact Email: rdbliven@bpa.gov
Legal Contact Name:
Legal Contact Phone:
Legal Contact Email:

Request Text:

Please provide all evidence that supports your statement that "the Refund Amounts form part of BPA's revenue requirements for the FY 2012-2013 rate period." In your response, please provide specific cites to BPA's Initial Proposal studies and/or documentation (including table numbers with rows and columns) that demonstrates that BPA Refund Amounts are a part of BPA's revenue requirement.

Response Detail

Date Response Filed: 2/28/2011 11:35:19 AM
Contact Name: Jack Speer
Contact Phone: 509.699.8131
Contact Email: jackspeer1@mac.com
Response Text:

REP Policy testimony (REP-12-E-BPA-04) page 11, line 24, through page 12, line 1 states: "Rates will be set to recover the total REP benefits. In this instance, the total REP benefits will be the combination of the amounts identified in section 3.1 (Scheduled Benefits) and 3.2 (Refund Amounts) of the Settlement.". Also, line 38, Column A of table 2.3.1.1 of the Power Rates Documentation study (BP-12-E-BPA-01A) shows a figure of about $258 million for the IOU Exchange Benefits which approximates the Scheduled Benefits plus the Refund Amount shown in the Draft Settlement Agreement for that year.

Files Submitted for this Response:

REP-12-R-AL-01
Exhibit 2

Response is past due after seven (7) days.

Request (click to view)	Exhibit	Responded	Requesting Party	Responding Party	Date Filed	Response (click to view)
BPA-AL-10	REP-12-E-AL-01	Yes	Bonneville Power Administration	Alcoa	2/18/2011 3:51 PM	Select Request to view Response

You are viewing page 1 of 1

Request Detail

Request ID: BPA-AL-10
Page Number: 11
Line Number: 12-14
Exhibit Filing: REP-12-E-AL-01

Technical Contact Name: Raymond Bliven
Technical Contact Phone: 503.230.3685
Technical Contact Email: rdbliven@bpa.gov
Legal Contact Name:
Legal Contact Phone:
Legal Contact Email:

Request Text:

Please provide all evidence that supports your statement that "The IP rate ... will contain the portion of the Refund Amounts recovered through the proposed REP Surcharge." In your response, please provide specific cites to BPA's Initial Proposal studies and/or documentation (including table numbers with rows and columns) that demonstrates that BPA Refund Amounts are a part of the IP rate revenue requirement.

Response Detail

Date Response Filed: 2/28/2011 11:37:02 AM
Contact Name: Jack Speer
Contact Phone: 509.699.8131
Contact Email: jackspeer1@mac.com
Response Text:

Section 3.3.1 of the February 1, 2001 Draft Settlement Agreement establishes the REP Surcharge as equal to the REP Recovery Amounts plus COU REP Benefits times 7.38 divided by 265,846,587. Section 3.3 defines REP Recovery Amounts as the sum of Scheduled Amounts plus Refund Amounts. Therefore, the REP Surcharge contains embedded Refund Amounts (referred to as "Lookback" amounts in the testimony) according to the terms of the Settlement Agreement. The REP Surcharge is calculated and included on line 40, column Q of table 2.5.7.3 on page 87 of the Power Rates Study Documentation (BP-12-E-BPA-01A). It is shown as the "Settlement Charge" and included (along with embedded Lookback costs) in the IP rate calculation.

Files Submitted for this Response:

REP-12-R-AL-01
Exhibit 2

Alcoa Inc.'s Brief on Exceptions
REP-12-R-AL-01

Exhibit 3

Letter Dated June 23, 2000 from Alcoa to BPA
Re: Settlement Agreement

6-27-2000 6:43AM FROM BPA/HQ PSB-5 503 230 3681 P. 1

JUN-23-2000 FRI 07:17 PM ALUMINUM CO. OF AMERICA FAX NO. 1 423 594 4754 P. 02

Alcoa Primary Metals

1200 Riverview Tower
900 South Gay Street
Alcoa Energy Division
Knoxville, TN 37902-1848 USA
Tel: 1 423 594 4833
Fax: 1 423 594 4754
randy.overbey@alcoa.com

Randall M Overbey
President
Energy Division

Protected in Accordance with Rule 408 of the Federal Rules of Evidence

00PB-10697

June 23, 2000

Mr. Stephen Oliver, Vice President
Bonneville Power Administration – PT
P.O. Box 3261
Portland, OR 97208

Re: Settlement Agreement

Dear Mr. Oliver:

Thank you for the opportunity for representatives of Alcoa to meet with Administrator Johansen, you and your staff on June 8, 2000. As we discussed, Alcoa desires to remain competitive in the Northwest, and is very interested in pursuing a cooperative approach with the Bonneville Power Administration (BPA). I feel our meeting was a very productive step in forging this positive and mutually beneficial relationship.

As employers in the region, we are committed to the economy and workers of the region. We recognize the need to obtain regional support for increasing FCRPS benefits to the Direct Service Industries, and we are committed to a process involving other regional stakeholders to achieve that end.

The purpose of this letter is to memorialize an agreement between Alcoa and BPA for the period through September 30, 2006.

1. Attached is the Letter Agreement dated June 18, 1999 referred to as the "Compromise Approach (CA)." This CA agreement is countersigned by Alcoa and its terms are incorporated herein. To the extent that terms of the CA have expired with the passage of time, such terms will have no force or effect. To the extent that terms of the CA are inconsistent with terms of this letter, the terms of this letter agreement shall govern.

Post-it® Fax Note 7671	Date 6-27-00 # of pages ▶ 7
To Jack A. Speer	From Mark Miller
Co./Dept. Alcoa	Co. BPA PT-5
Phone # 5096639331	Phone # 5032307635
Fax # 5096639394	Fax # 5032303681

REP-12-R-AL-01
Exhibit 3

2. Alcoa supports BPA's Final 2002 Wholesale Power Rate Case and Power Subscription Strategy Records of Decision.

3. Alcoa will not legally challenge in any forum, including before the Federal Energy Regulatory Commission (FERC), decisions contained in BPA's 2002 Final Rate Case Record Of Decision, including but not limited to BPA's final rate case decisions regarding the sale of power to serve the residential and small farm loads of the investor-owned utilities, or the rates for such sales, for the FY 2002-2006 period; provided, however, that Alcoa may intervene in any legal challenge to BPA's final rate case decisions regarding power sales or rates for service for Alcoa for the sole purpose of opposing such challenge to power sales or rates for Alcoa.

4. Alcoa will immediately withdraw from pending litigation *Alcoa Inc., et al. v. BPA*, U.S. Supreme Court No. 99-1556.

5. Alcoa believes that existing Federal statutes require BPA to sell its firm requirements power (i.e. IP and PF service) in the region at cost-based rates. Because we believe electricity prices should be as low as possible in the PNW, we will oppose efforts to require BPA to sell firm requirements power in the PNW at market-based rates.

6. Alcoa reserves its right to pursue litigation on any other matter and its right to talk to governmental officials, consistent with this agreement. However, Alcoa agrees to use litigation only as a last resort, and will refrain from litigation while good-faith efforts are being pursued by BPA to address Alcoa's concerns administratively.

7. BPA consents to the immediate assignment, in whole or in part, of Reynolds Metals' Block Sale Contract (Contract No. 95MS-94865) to Alcoa and will deliver such assigned power for use, as designated by Alcoa, at any Northwest facility currently served or contracted with by the BPA PBL and owned or operated by Alcoa or any Alcoa subsidiary.

8. BPA will extend the 1981 Power Sales Contract (Contract No. DE-MS79-81BP90343) to September 30, 2001 for the sole purpose of continuing to allow Reynolds Metals to assign Block Sale Contract excess power to Alcoa and deliver such power for use at Northwest Alloys.

9. BPA and Alcoa agree to negotiate in good faith to extend the 1981 Power Sales Contract to September 30, 2001 at the IP-96 rate for service to the Wenatchee plant, in exchange for Alcoa providing BPA with load modulation or other economic operational flexibility.

10. BPA will offer Alcoa a single subscription contract in the amount of 721 aMW (with extension of the '81 contract at Wenatchee) or 718 aMW (without extension of '81 contract at Wenatchee) at the rates established by the IP-02 rate schedule (as approved on a final basis by FERC and not subject to further appeals) for DSIs that agreed to the Compromise Approach. This contract will allow consumption

of such power at any Northwest facilities currently served or contracted with directly by BPA PBL and owned or operated by Alcoa or any Alcoa subsidiary.

11. BPA will not assert in any subsequent BPA power rate case or appeal thereto that either this agreement, or the decisions in § 15.5 of BPA's 2002 Power Rate ROD, create any procedural or substantive precedent or create any agreement to any underlying principle or methodology. This paragraph survives expiration of the agreement.

I would be happy to discuss Alcoa's operating strategies in some depth with you, but let me assure you that we are aggressively pursuing improvements in inventory levels, raw material costs, productivity, and in a host of other areas, in order to remain competitive and retain jobs in the Northwest. These strategies are defined and driven by the Alcoa Production System, which is being deployed worldwide in Alcoa.

This agreement represents a meaningful step toward a strong, beneficial relationship between Alcoa and BPA. I am very hopeful we can build upon this in the near future. Alcoa believes it will need additional creative solutions that provide benefits for BPA, Alcoa, and the region to maintain the economic viability of the Alcoa facilities in the Northwest. Alcoa and BPA are committed to working with regional stakeholders to identify mutually beneficial solutions and to bring these ideas to fruition. However, Alcoa agrees such solutions should be consistent with BPA's 2002 Final Rate Case Record Of Decision. We agree that BPA, the DSIs, and other regional stakeholders should complete a study to examine the survivability of DSI plants and the impact of DSI plant closures on jobs and the economy as a first step in this process.

Please acknowledge your acceptance of this Agreement by signing below and returning a copy to me.

Sincerely,

Randall M. Overbey
President, Energy Division

Accepted:

By ____________

Date 6/26/00

Department of Energy

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

POWER BUSINESS LINE

June 18, 1999

In reply refer to: P-6

«Name»
«JobTitle»
«Company»
«Address1»
«City», «State» «PostalCode»

Dear «Salutation»:

On June 2, 1999, Bonneville Power Administration (BPA) met with representatives of its Direct Service Industrial (DSI) customers and described a Compromise Approach (see the enclosure) to post-2001 service to the DSIs that BPA would propose in the Initial Proposal to the upcoming rate case, if BPA had support for it from the DSIs. BPA appreciates the effort of «Company» and the other DSIs to try to resolve this issue in good faith. However, the recent letters BPA received from the DSIs in support of BPA making this proposal varied greatly in their contents. The letters did not address, in a clear and consistent manner, issues that are important to BPA in making this important decision.

This letter is intended to create the clarity necessary for BPA to decide that BPA has the support necessary to move forward with the Compromise Approach proposal in the Rate Case Initial Proposal. Without concurrence by the DSIs on the following issues, BPA will not be able to move forward with that proposal. Instead, the Initial Proposal will have to reflect an earlier proposal (the so-called Targeted Augmentation Approach) BPA placed before the DSIs on April 26, 1999.

BPA needs «Company» to agree to the following:

1. BPA will propose the Compromise Approach in the Initial Proposal for the rate case, and «Company» will support the Compromise Approach throughout the rate case so long as BPA continues to do so. The intent of the average rate and the variable rate in this proposal is to collect $23.50 per megawatthour on average over the rate period, as adjusted pursuant to the Compromise Approach. «Company» may submit evidence on the record during the rate proceeding addressing the reasonableness of the aluminum price forecast, and argue for adjustments as provided for in the Compromise Approach.

2. For as long as BPA is proposing the Compromise Approach in the rate case, «Company» will support the Compromise Approach in the rate case, and will so indicate in discussions outside the rate case venue. «Company» may describe publicly the positions it is taking in the rate case.

3. For as long as BPA is proposing the Compromise Approach in the rate case, «Company» will not oppose in the rate case those elements of the Initial Proposal that relate to the establishment of rates for

firm power service to the Investor-Owned Utilities for FY 2002-2006 as provided in BPA's Subscription Strategy. BPA will propose in the rate case a procedural method by which «Company» may preserve its ability to litigate within the limitations of this letter.

4. At the end of the rate case, if the Compromise Approach is substantially sustained in BPA's Rate Case Final Record of Decision, «Company» will not legally challenge the Compromise Approach, but «Company» may challenge BPA's decisions regarding adjustments as provided for in the Compromise Approach pursuant to Paragraph 1 above.

5. If the Compromise Approach is substantially sustained in the Rate Case Final Record of Decision, and «Company» desires to purchase power from BPA at the resulting rate, a condition of such sale is that «Company» will not file a lawsuit challenging the sale of power under the Subscription Strategy to serve the residential and small farm loads of the Investor-Owned Utilities, or the rates for such sales, for the FY 2002-2006 period, unless a party representing the interests of the residential and small farm customers of the investor-owned utilities files a lawsuit challenging the power sales or rates for service to the DSIs.

6. With regard to the legal challenge to the Subscription Strategy «Company» has filed in the Ninth Circuit, for as long as BPA is proposing the Compromise Approach in the rate case, «Company» will argue for holding the suit in abeyance. If the Compromise Approach is substantially sustained in the Rate Case Final Record of Decision, including a reasonable aluminum price forecast, «Company» will withdraw the lawsuit challenging the Subscription Strategy, unless a party representing the interests of the residential and small farm customers of the investor-owned utilities continues a lawsuit challenging the Subscription Strategy's provisions regarding service to the DSIs.

7. «Company» need not relinquish its rights to intervene in lawsuits filed by others challenging its benefits.

Please indicate your agreement by signing the concurrence line below and returning the letter to BPA by 5 p.m., PDT on June 18, 1999. You may fax the letter to 503-230-7333.

Sincerely,

Paul E. Norman
Senior Vice President
Power Business Line

Enclosure

Concur: [signature] 6/23/2000

Name: RANDALL M. OVERBEY
(Print or type)

Company ALCOA INC.

WP-02-E-BPA-09
Attachment 1
Witnesses: Sydney Berwager, Stephen Oliver, and Harry Clark

June 17, 1999

COMPROMISE APPROACH

This is the approach that BPA would propose as part of the Initial Proposal for the upcoming rate case if the DSIs are willing to support it.

Product: Firm Power Block (without load following), take-or-pay

Amount: 1,500 aMW, approximately 75 percent of FY 1997-2001

Allocation: Based on the relative amounts of IP purchases in the FY 1997-2001 time period

Price: $23.50 per MWh (for undelivered, 100 percent annual load factor power)
$23.00 per MWh with Conservation and Renewables discount (C&R discount)

C&R Discount:

The Company will be eligible for discount ($0.50/MWh), subject to the same standards and procedures as utilities participating in the C&R discount program.

Flexible IP Index (Variable) Rate Design:

The following Variable Rate design, applicable to aluminum smelter operations, will be used in the Initial Proposal for the upcoming rate case.

Floor Rate:	$19.00 ($18.50 w/C&R discount)
Lower Pivot Point	$0.06 below aluminum price forecast developed in the rate case
Average Rate:	$23.50 ($23.00) at aluminum price forecast developed in the rate case for the FY 2002-2006 rate period.
Upper Pivot Point:	$0.06 above aluminum price forecast developed in the rate case
Ceiling Rate:	$28.50 ($28.00)

The variable rate design will use this basic rate design. It will be adjusted (shifted higher or lower along the aluminum price axis) to reflect the aluminum price forecast developed in the rate case. The basis for the rate case aluminum price forecast will be forward price curves and aluminum price forecasts provided to BPA by independent consultants. Forecasted revenues under the Flexible IP Index Rate must be equivalent to or greater than $23.50 ($23.00) over the FY 2002-2006 period.

For the Initial Proposal, BPA will use an aluminum price forecast of $0.68 per pound for the FY 2002-2006 rate period (LME three-month).

At the time a DSI signs its new Power Sales contract, it will have to choose whether to take service under the Variable Rate design or under the standard rate. Each aluminum company's choice will apply to all of its smelting operations.

Take-or-Pay/Mitigation:

These contracts will be take-or-pay arrangements. If the Company reduces load to the extent that it cannot accept deliveries of the amount of power it is obligated to purchase, BPA will remarket the power for the Company. The Company will continue to pay for the contracted amount of power, but BPA will provide a credit to the Company for the amount of energy remarketed. The amount of this credit will be capped at the rate paid under this contract minus any remarketing fee.

The only exception to this take-or-pay obligation is available to DSI's who, at the time they sign a contract, elect to take service under the Variable Rate, and simultaneously elect the Floor Rate Curtailment Take-or-Pay Waiver

option. For any company making this dual election, if the company reduces load at the time aluminum prices are such that the electric price is at the Floor Rate, the Company will reduce its take-or-pay obligation on BPA. The amount of the take-or-pay reduction will be equal to the pro-rata share of plant load that had been served by BPA just prior to the reduction in plant load. Once having reduced load under this approach, the Company will have given up its contract right to restore service to the curtailed load under the Compromise Approach agreement. The amount of power subject to stranded cost recovery charges (see Stranded Cost, below) will not be reduced by the amount of this take-or-pay reduction.

Stranded Cost:

Sales under this arrangement would be subject to the power Cost Recovery Adjustment Clause (CRAC). The CRAC will be added to the Variable Rate and the Average Rate. With regard to other stranded cost mechanisms, the power sales contract will be explicit that, for as long as the Company continues to purchase cost-based power from BPA, the new contract supercedes existing contracts and the Company will be subject to same exposure as BPA's utility customers purchasing subscription power.

Dividend:

Sales under this Compromise Approach arrangement would be eligible for a share of the potential "dividend" in the same way that Subscription sales to other customers would make those customers eligible for a share of the dividend.

Amount and Cost Basis:

(a) Under this Compromise Approach, 1,500 aMW will be available to the DSI's. 1,500 aMW was selected set because it represents a large portion (approximately three-fourths) of the load placed on BPA during the previous five years at a cost-based.

(b) Of that 1,500 aMW amount, 1,000 aMW(?) will be served using a cost-basis approach consistent with the IP-PF relationship of 7(c)(2) of the Pacific Northwest Power Act. BPA expects to serve 200 aMW out of its critical inventory. An additional 800 aMW (an amount equal to approximately 40 percent of the amount of secondary energy BPA expects to have in an average year during this period) will also be made available. (BPA is not committing to serve DSI loads with secondary energy; instead, BPA intends to augment its firm inventory as appropriate to serve this load without decreasing the amount of secondary energy available for sale at market prices.) The cost basis for this component of DSI service will change, up or down, as BPA's overall costs change, but it will not change as a result of rate design changes.

(c) The price for the 1500 aMW of service will be established by combining the 1,000 aMW(?) described [illegible] of the DSI's with the costs of these purchases, as [illegible] directly through to the DSI's. This calculated price will be the basis of all Subscription offers to the DSI's. The amounts shown with a [illegible] Proposal so that the price for the 1,500 aMW is $23.50 per MWh.

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