

American Rivers * Friends of the Earth * Idaho Rivers United * Institute for Fisheries Resources * National Wildlife Federation * Northwest Sportfishing Industry Association * NW Energy Coalition * Pacific Coast Federation of Fishermen's Associations * Save Our Wild Salmon * Trout Unlimited

October 18, 2002

Stephen J. Wright, Administrator
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97298

Frank Cassidy, Jr., Chairman
Northwest Power Planning Council
851 SW 6th Avenue, Suite 100
Portland, OR 97204-1248

RE: Addendum to "*Improving Federal Performance and Accountability for Salmon Recovery under Potential Changes in Allocation of the Federal Columbia River Power System after 2006*"

Dear Mr. Wright and Mr. Cassidy:

On September 12, 2002 the above-signed organizations submitted a proposal regarding potential changes to the way the federal government markets the power and distributes the costs and benefits of the Federal Columbia River Power System (FCRPS) after 2006.¹ Our proposal (SOS Proposal) focused on what we believe to be serious questions about future federal decisions regarding salmon, river management, and energy choices, as well as the related roles of public and investor-owned utilities.

Since submitting those comments, we have participated in six public meetings across the Northwest and we have heard this region's citizens express clear and overwhelming support for the basic principles our proposal outlines, and for correcting a system that in 30 years has yet to produce sustainable and harvestable wild salmon and steelhead. Through these hearings, we have also learned new information about a proposal submitted by public and investor-owned utilities (Joint Customer Proposal) that we would like to take this opportunity to address. In addition, we would like to expand upon and clarify certain components of our own proposal for your consideration.

Addition Legal and Substantive Concerns Raised by the Joint Customer Proposal

- 1) Customers' request for "meaningful and enforceable" participation raises serious policy and legal questions.**

¹ Save Our Wild Salmon Coalition et. al., *Improving Federal Performance and Accountability for Salmon Recovery under Potential Changes in Allocation of the Federal Columbia River Power System after 2006* (September 12, 2002). Incorporated herein by reference.

The Joint Customer Proposal, submitted to BPA and the Council on September 16, 2002, contained an additional request that raises concerns above and beyond those discussed in the SOS proposal. Based on BPA's recent financial shortfall, the Joint Customer Proposal asks for "meaningful and enforceable participation in the process for setting BPA's expenditures, and the rates that these customers will pay under the new contracts."²

SOS is particularly concerned about the lack of clarity surrounding the term "meaningful and enforceable participation." Frankly, public and investor-owned utilities, along with other concerned parties, are currently entitled to "meaningful and enforceable" participation in BPA's budget process through the administrative provisions set forth in the Northwest Power Act (Act). The Act provides for a formal rate-setting process and judicial review of BPA's final rate determination, among other things, in the Ninth Circuit Court of Appeals. We can only assume, however, based on the customers' request, that they are seeking "meaningful and enforceable" participation beyond that granted equally to all interested parties. This request raises serious legal and substantive concerns.

BPA's budgeting process, as you know, is guided not simply by rate determinations, but by the agency's public purpose responsibilities under federal laws and treaties, including the Endangered Species Act and the Northwest Power Act. Public and investor-owned utilities have a keen economic interest in managing BPA's costs, yet unlike BPA, they are not bound by federal laws requiring investments in salmon recovery and clean energy. We can only assume that the customers are not asking to supersede federal law in BPA's budgeting process. However, the lack of clarity surrounding their request leaves this question unanswered. Granting customers "meaningful and enforceable" participation in BPA's budget process beyond that equally granted to all interested parties would be akin to letting the fox guard the hen house.

Another interpretation of the utilities' proposal is that they want their future contracts with Bonneville to provide some sort of "off-ramp" if their budget recommendations are not adopted or adhered to by BPA. For example, if BPA's costs caused rates to go above some trigger level, customers would be allowed to get out of their 20-year commitment and leave BPA service. This ability (though strongly disputed by many at the time) to leave BPA service without paying "stranded costs" was successfully used by the Direct Service Industries (DSIs) a few years ago to essentially force Bonneville into cutting public purpose and other budgets in order to keep the DSI loads and prevent financial hemorrhage. We strongly oppose BPA putting any language into customer contracts that would give customers this type of leverage.

Legal questions aside, granting the utilities any direct or indirect ability to determine BPA's budgets is simply bad public policy. We implore BPA to reject this request.

2) Customers' proposal is based on a fundamental misunderstanding of the laws that govern operation of the FCRPS.

In recent public meetings, presenters of the Joint Customer Proposal stated that their proposal would leave unchanged the laws and structures that govern salmon recovery and operation of the

² See, *Joint Proposal from Investor-Owned and Preference Utilities on the Future Role of BPA* (September 16, 2002), Public Power Council, pg 6 (E1).

FCRPS. However, the Joint Customer Proposal itself states: “Under the new Slice agreements, BPA will continue *to operate the federal system, and will continue to have the unilateral right to establish operating constraints to fulfill its statutory, treaty and multi-use obligations*” (emphasis added).³ The customers go on to state that, “BPA operations will retain the rights it currently enjoys to take *unilateral actions it deems necessary* to respond to emergencies...” (emphasis added). These statements are at-odds with federal law and reveal a serious flaw in the customer’s interpretation of BPA’s role in the federal system.

Congress created BPA to sell power from the federal dams on the Columbia and Snake rivers. See 16 U.S.C. § 832a (Bonneville Project Act). Though it may appear otherwise at times, BPA does not “operate” the federal system, BPA has no unilateral right to establish the operating constraints for the FCRPS, and it cannot unilaterally take actions in response to emergencies. The Flood Control Act of 1944, as amended, states:

“Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of Energy who shall transmit and dispose of such power and energy...” See 16 U.S.C. § 825s.

Thus, BPA’s role in the operation of the system is strictly limited to marketing excess power that the Army Corps of Engineers and Bureau of Reclamation deem appropriate according to the competing uses of federal projects. This glaring misunderstanding of BPA’s authority and duty under federal law reinforces the concerns behind the SOS Proposal’s call for fundamentally changing FCRPS decision making processes in order to give salmon conservation truly equal weight.

After the drought and energy crunch of 2001, we strongly believe that despite the law, BPA *did* operate the federal system to manage its finances during the drought, invoking the “emergency clause” provision of the 2000 FCRPS Biological Opinion to the detriment of migrating juvenile salmon. The events of 2001 are one in a series of events showing that BPA and other agencies have failed to meet their responsibilities under federal law. That the customers apparently believe the system is unilaterally operated by BPA is clear evidence of the need for change.

We urge BPA to take this opportunity to clarify its role in the operation of the FCRPS for the benefit of all parties involved in the regional dialogue.

Clarifications to the Save Our Wild Salmon Proposal

In our September 12 submittal, we approached the outstanding issue of Direct Service Industry (DSI) allocation by arguing for interruptibility rights under drought conditions in order to meet salmon requirements, should contracts ultimately be negotiated. At this point the SOS Proposal does not take a position on whether the DSIs should have access to federal power. However, in addition to our recommendation above, if contracts are ultimately negotiated with DSIs we recommend that reviews be conducted every 6 months during curtailment periods to assess curtailment status. In these circumstances, we support full compensation (100 percent of salary and benefits) and advance notice to the workforce for the duration of any curtailments. We

³ Id, at pg. 9

believe that aluminum workers, their families, and their communities should be protected from the adverse effects of such changes.

Clarifying the distinctions between the Public Interest Proposal and the Joint Customer Proposal

During the course of the public meetings on changes to BPA's power supply role post-2006, it became evident that there may be confusion surrounding the differences between the details of the Joint Customer Proposal and the SOS Proposal. This section is meant to clarify those differences related to salmon recovery. Differences between the Joint Customer Proposal and the Public Interest Clean Energy Proposal will be discussed in separate comments.

- 1) **Allocating River Operations:** The SOS Proposal would allocate only the energy output of the FCRPS without *any* control over river operations, making utilities passive recipients of power. The Joint Customer Proposal asks that BPA allocate the output of the "Defined Federal Base System" (FBS), which includes control of storage and flexibility rights over river operations.
- 2) **Hydro Emergencies:** The SOS Proposal would prohibit BPA or other federal agencies from declaring "hydro emergencies" except for short-term incidents that threaten public health or safety. As mentioned above, the Joint Customer Proposal would allow BPA to make unilateral decisions to interrupt salmon recovery actions in response to self-declared "emergencies."
- 3) **Structural Salmon Recovery Changes:** The SOS Proposal seeks to correct a broken salmon recovery system by granting equal consideration to salmon needs in all river operations decisions. For example, we propose that Columbia River tribes have a vote equal to that of the federal agencies in all river operating decisions. This change will help ensure that salmon recovery requirements are truly hard constraints. The Joint Customer Proposal at best would solidify the failed status quo salmon policies for the next 20 years and would more likely cause further harm to dwindling salmon populations impacted by the federal hydrosystem.
- 4) **Length of Contracts:** The Joint Customer Proposal seeks 20-year contracts with BPA to implement its proposal. With regards to salmon recovery, the SOS Proposal argues that given the dynamic nature of actions to recover salmon, 20-year contracts are simply too long to ensure that the power system can accommodate future salmon recovery policies. We recommend that contracts not extend beyond five years except under specific circumstances.
- 5) **Independent Contract Enforcement:** Any contracts between BPA and its customers to implement changes to BPA's power supply role post-2006 will affect the broader public interest, especially with regard to salmon recovery and clean energy investments. Our proposal recommends independent, third party contract enforcement to protect the public interest implications of the contracts. The Joint Customer Proposal has no equivalent provisions.

Conclusion

We appreciate the opportunity to provide clarifications to the SOS Proposal and comment on concerns surrounding the Joint Customer Proposal. We look forward to further discussion with you on this important topic.

Sincerely,

Pat Ford, Executive Director, Save Our *Wild* Salmon

Sara Patton, Director, NW Energy Coalition

Jeff Curtis, Western Conservation Director, Trout Unlimited

Liz Hamilton, Executive Director, Northwest Sportfishing Industry Association

Shawn Cantrell, Northwest Regional Director, Friends of the Earth

Rob Masonis, Northwest Regional Director, American Rivers

Paula Del Giudice, Director, Northwestern Natural Resources Center, National Wildlife Federation

Bill Sedivy, Executive Director, Idaho Rivers United

Glen Spain, Northwest Regional Director, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations