

FINAL

BONNEVILLE POWER ADMINISTRATION

**RESIDENTIAL EXCHANGE TERMINATION AGREEMENT
FOR PACIFICORP (dba Pacific Power & Light Company and Utah
Power & Light Company)**

RECORD OF DECISION

May 21, 1997

Record of Decision

Termination of Residential Purchase and Sale Agreements for PacifiCorp dba Pacific Power & Light Company and Utah Power & Light Company

I. Background

Bonneville Power Administration (Bonneville) was established by the Bonneville Project Act of 1937 (Project Act), 16 U.S.C. §§ 832 *et seq.* After enactment of the Project Act, Bonneville marketed the low-cost hydropower generated by Federal dams in the Pacific Northwest. Section 4(a) of the Project Act requires Bonneville to “give preference and priority to public bodies and cooperatives” when selling power. 16 U.S.C. § 832c(a). This preference had little significance in Bonneville’s early years, however, because Bonneville had sufficient power to serve the needs of all customers in the region. These customers included public bodies and cooperatives, known as “preference customers” because of their statutory first right to Federal power under the preference clause noted above. *Id.* These customers also included investor-owned utilities (IOUs) and direct service industrial customers (DSIs). In 1948, the increasing demand for power caused Bonneville to require that contracts with the DSIs must include provisions to allow the interruption of service when necessary to meet the needs of Bonneville’s preference customers. In the 1970’s, forecasts showed that preference customers would soon require all of Bonneville’s power. Therefore, in 1973, Bonneville gave notice that new contracts for firm power for IOUs would not be offered and that as DSI contracts expired between 1981-1991, the contracts were not likely to be renewed.

Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 467 U.S. 380, 383-385 (1984). In 1976, Bonneville advised preference customers that Bonneville would not be able to satisfy preference customer load growth after 1983 and that Bonneville would have to determine how to allocate power among preference customers.

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

The Northwest Power Act expressly reaffirmed the right of Bonneville's preference customers to first call on Federal power before such power could be offered to Bonneville's IOU or DSI customers. 16 U.S.C. §. 839g(c). The Act also established the Residential Exchange Program. 16 U.S.C. §. 839c(c). As noted above, when Bonneville had insufficient Federal power to meet the needs of investor-owned utilities in the 1970s,

such utilities developed their own resources which were generally more costly than Federal hydropower. The Residential Exchange Program provides Pacific Northwest utilities a monetary form of access to low-cost Federal power. *See California Energy Resources Conservation and Dev. Comm'n v. Johnson*, 807 F.2d 1456, 1459-60 (9th Cir. 1986). Under the program, Pacific Northwest utilities may sell power to Bonneville at a rate based on the utility's average system cost (ASC) of its resources. Bonneville is required to purchase that power and sell, in exchange, an equivalent amount of power to the utility at Bonneville's Priority Firm Power (PF) rate. This is the same rate that applies to Bonneville's sales of power to its preference customers, although the Act provides that the PF rate for the Residential Exchange Program may be higher than the PF rate for preference customers due to a rate ceiling for preference customers established in section 7(b)(2) of the Act. 16 U.S.C §. 839e(b)(2); 16 U.S.C §. 839e(b)(3). The Residential Exchange is not "a mechanism . . . for establishing a traditional cost of purchased power." Federal Energy Regulatory Commission Order No. 400-A, 30 F.E.R.C. ¶ 61,108, 61,195-96 (1985); *see Central Elec. Cooperative v. Bonneville Power Admin.*, 835 F.2d 199-1, 200-01 (9th Cir. 1987). No power is actually transferred to or from Bonneville since the "exchange" is simply an accounting transaction: "in practice, only dollars are exchanged, not electric power." *Public Util. Comm'r of Oregon v. Bonneville Power Admin.*, 583 F. Supp. 752, 754 (D. Or. 1984), *aff'd*, 767 F.2d 622 (9th Cir. 1985).

Where a utility's ASC is higher than Bonneville's PF rate, the difference between the rates is multiplied by the utility's jurisdictional residential load to determine an

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

16 U.S.C. § 839e(b)(2).

The Residential Exchange Program is implemented through contracts called Residential Purchase and Sale Agreements (RPSAs). RPSAs have been executed with Pacific Northwest utilities interested in participating in the Residential Exchange Program. Bonneville previously executed RPSAs with Pacific Power & Light Company and Utah Power & Light Company, Contract Nos. DE-MS79-81BP90602 and DE-MS79-BP90607, respectively. Pacific Power & Light Company and Utah Power & Light Company executed a merger in 1989. Pacific Power & Light Company and Utah Power & Light Company, now comprising divisions of PacifiCorp, have participated in the Residential Exchange Program since the execution of their respective RPSAs.

II. Procedural History

In the early summer of 1996, PacifiCorp, Puget Sound Power & Light Company and Portland General Electric Company expressed interest to Bonneville regarding the

possible buyout of their RPSAs. As noted above, these agreements establish the terms governing a utility's participation in the Residential Exchange Program. The agreements were intended to run through June 30, 2001. Joint discussions were mutually suspended in July 1996, pending the acquisition of further data. Discussions with PacifiCorp resumed in late January 1997.

As a result of recent negotiations, Bonneville and PacifiCorp developed a proposed agreement to terminate PacifiCorp's participation in the Residential Exchange Program by terminating PacifiCorp's RPSAs and providing for the payment to PacifiCorp of liquidated amounts from Bonneville. In addition, Bonneville and PacifiCorp would terminate all pending, and commence no new litigation, contract disputes, or regulatory or administrative disputes, including ASC determinations, load determinations, billing disputes, or other issues regarding the Residential Exchange Program, with respect to Residential Exchange Benefits (including challenges to Bonneville's 1996 rates for issues related to the Section 7(b)(2) rate test) for the period prior to July 1, 2001.

On April 14, 1997, Bonneville sent a notice to all interested parties announcing a comment period regarding a proposal by Bonneville and PacifiCorp to terminate PacifiCorp's participation in the Residential Exchange Program through June 30, 2001. Interested parties were encouraged to express their views. Bonneville's notice also described the proposed Agreement. The specific proposed provisions of the buyout Agreement and the reasons for those provisions are summarized below.

III. Summary of Agreement

The Conference Report to the Energy and Water Development Appropriations Act of 1995 (P.L. 104-46) states in part, “[c]onsistent with the regional review, Bonneville and its customers should work together to gradually phase out the residential exchange program by October 1, 2001.” Bonneville and PacifiCorp desire to terminate Pacific Power & Light Company’s and Utah Power & Light Company’s RPSAs, replacing the RPSAs with the payment of liquidated amounts by Bonneville as specified in the Agreement. The Agreement would settle any disputes between the parties regarding their rights and obligations for the period from and including October 1, 1996, through and including June 30, 2001. In addition, the Agreement reflects Bonneville and PacifiCorp’s desire to mitigate retail rate shock to PacifiCorp’s residential and small farm customers and to provide predictability and stability to the Parties’ residential exchange payments and benefits while not adversely affecting Bonneville’s ability to make its payments to the United States Department of Treasury. PacifiCorp intends, for its Idaho jurisdiction, to continue working with members of the Idaho legislature and with the Idaho Public Utilities Commission (IPUC) with respect to developing means to mitigate the impacts on residential and small farm customers of the phase out of residential exchange payments. BPA’s expectation is that the gradually declining stream of annual payments to PacifiCorp and the terms of the agreement will enable PacifiCorp, working with the IPUC and the Idaho legislature, to mitigate any impacts on residential and small farm customers for the period through 2001. The payments provided under the Agreement constitute BPA’s complete contribution toward mitigating retail rate shock to

PacifiCorp's residential and small farm customers through June 2001 and all remaining activities to secure such mitigation are the responsibility of PacifiCorp.

On April 24, 1997, the Idaho Public Utilities Commission issued Interlocutory Order No. 26904 to implement on May 1, 1997, "a temporary surcredit" proposed by PacifiCorp for its Utah Power & Light Company irrigation customers. Rates would be reduced by 8 percent, about one-half of full rate increase mitigation. The order notes that the surcredit "will reduce the period of time over which benefits will be available for irrigators." Bonneville anticipates that PacifiCorp will undertake additional actions to mitigate any rate impacts through 2001.

A. Section 1. Termination of Prior Agreements. This section provides that PacifiCorp's RPSAs and all amendments thereto would be terminated effective at 2400 hours on May 23, 1997.

B. Section 2. Payment by Bonneville. This section provides that Bonneville would, in full and complete satisfaction of all of its obligations for payments to PacifiCorp for the Residential Exchange Program under section 5(c) of P.L. 96-501 for the period from and including October 1, 1996, through and including June 30, 2001, pay to PacifiCorp the sum of \$61,758,578. Payment for the settlement periods would be:

<u>Settlement Periods</u>	<u>Settlement Amounts (\$)</u>	
	<u>UPL</u>	<u>PPL</u>
FY 1997	10/01/1996-09/30/1997	14,083,863
FY 1998:	10/01/1997-09/30/1998	11,610,000
FY 1999:	10/01/1998-09/30/1999	10,500,000
FY 2000:	10/01/1999-09/30/2000	8,500,000
	10/01/2000-06/30/2001	3,000,000
Total	47,693,863	14,064,715

Residential exchange benefit payments for Fiscal Year 1997 will occur as directed in Bonneville's *Interpretative Rulemaking: FY 1997 Residential Exchange Benefit Allocation Record of Decision*. Payments for Fiscal Years 1998 through 2000 will be in 12 equal monthly payments for each such Fiscal Year on or before the last business day of each month beginning in December of such Fiscal Year. Payments for the period October 1, 2000, through June 30, 2001, will be in nine equal monthly payments on or before the last business day of each month beginning in December 2000.

C. Section 3. Bonneville's Contribution to Rate Mitigation. In this section the Parties acknowledge that the payments provided in the Agreement constitute Bonneville's complete contribution toward mitigating retail rate shock to PacifiCorp's residential and small farm customers, and toward providing predictability and stability to the Parties' residential exchange payments and benefits, and that any remaining activities to secure such mitigation, stability and predictability shall be the responsibility of PacifiCorp.

D. Section 4. Adjustments to Bonneville's Payment Obligations. This section specifies that Bonneville's payment to PacifiCorp dba Utah Power & Light Company could be reduced if the eligible residential and small farm loads served by PacifiCorp dba Utah Power & Light Company are reduced from the levels shown in Exhibit A due to the transfer from PacifiCorp of all or a portion of the distribution service

territory containing such eligible residential and small farm loads. BPA's payment reduction would be calculated as the percentage of eligible retail load lost for that fiscal year, or portion of a fiscal year, in relation to total eligible load identified in Exhibit A of the Agreement.

E. Section 5. Advocacy of Legislative Action. In this section, the Parties recognize that the payments provided by Bonneville to PacifiCorp under the Agreement would be for the purpose of buying out PacifiCorp's participation in the Residential Exchange Program through June 30, 2001. The Parties also recognize that Bonneville's financial flexibility is significantly constrained by, among other things, the fact that it has established 5-year rates which cannot be revisited for many customers during the period prior to October 1, 2001. The Parties intend that the payments under the Agreement would constitute a full and complete settlement of all amounts to be paid by Bonneville under the Residential Exchange Program and any appropriations or other legislation that may (as did the Energy and Water Development Appropriations Act, Public Law 104-46) provide for an allocation, increase, or decrease of Residential Exchange Benefits through June 30, 2001. The payments by Bonneville would be in full satisfaction of amounts to be paid to PacifiCorp under the RPSAs and for the Residential Exchange Program under section 5(c) of P.L. 96-501 for the period October 1, 1996, through June 30, 2001. Because the Agreement establishes total exchange benefits for the period October 1, 1996, through June 30, 2001, Bonneville and PacifiCorp agree not to challenge issues within any final actions taken by Bonneville which are rendered moot as to PacifiCorp by

the Agreement. Nothing in the Agreement precludes any party from pursuing remedies for breaches of the Agreement.

The Parties would agree not to request or advocate, directly or indirectly, any legislative action, including appropriations legislation, to provide greater or lesser monetary payments (or comparable in benefits) under the Residential Exchange Program than are provided for under the Agreement for the period through June 30, 2001.

F. Section 6. Residential Exchange Program After June 30, 2001. Except as otherwise provided in the Agreement, neither the Agreement nor any action taken or not taken by any Party in accordance with matters covered by the Agreement would serve to create any procedural or substantive precedent with respect to implementation of Section 5(c) or any other statutory directive of P.L. 96-501 for the period after June 30, 2001.

The Agreement also does not preclude the establishment of residential exchange loads for PP&L for the period from 1997 through 2001 for purposes of any future subscription process.

G. Section 7. Termination of Filings. This section provides that by terminating its RPSA and participation in the Residential Exchange Program through June 30, 2001, PacifiCorp would not be required (a) to file, calculate or track ASC or (b) to submit invoices or perform other duties formerly required by the RPSA, except for reporting for limited purposes expressly described in sections 4 and 8 of the Agreement. Bonneville's corresponding rights and obligations would be similarly satisfied through the implementation of the Agreement.

H. Section 8. Passthrough of Benefits. This section provides that amounts received by PacifiCorp from Bonneville under the Agreement would be passed through directly (under procedures overseen by the appropriate regulatory commission) to PacifiCorp's Residential Loads (as defined in Pacific Power & Light Company's and Utah Power & Light Company's RPSAs). Such amounts would be identified on PacifiCorp's books of account and paid by PacifiCorp exclusively to, or credited exclusively against the retail rates of, Pacific Power & Light Company's Residential Load and Utah Power & Light Company's Residential Load by October 1, 2002. Any amounts not passed through to eligible loads by October 1, 2002, would be refunded to Bonneville within ninety days of such date, except for such sums as PacifiCorp might be required to pass through as a result of the audits conducted under the Agreement, which sums would be passed through to eligible customers. In other words, any amounts not passed through to eligible loads by October 1, 2002, simply because the payments did not occur by the deadline would be refunded to Bonneville within ninety (90) days of such date. Any amounts not passed through to eligible loads because such amounts were passed through to ineligible loads, as determined in accordance with the standards for BPA's compliance reviews, must be passed through to eligible loads only.

Notwithstanding the termination of PacifiCorp's RPSAs, Bonneville would retain the right to audit PacifiCorp at Bonneville's expense to determine whether the Residential Exchange Benefits paid to PacifiCorp under the Agreement were provided only to PacifiCorp's eligible residential and small farm customers as required by section 5(c)(3) of the Northwest Power Act. The first audit would occur at the time prescribed by the

current review cycle. A second audit may occur after the last disbursement of monies under the Agreement. Bonneville may conduct additional audits after the second audit if PacifiCorp has not demonstrated the passthrough of such benefits as specified. Bonneville would retain the right to take action consistent with the results of such audits to require the passthrough of such benefits to eligible customers. Bonneville's right to conduct such audits of PacifiCorp would expire on October 1, 2003 (except for Bonneville's continuing right to assure compliance with such audits). As long as Bonneville has the right to audit PacifiCorp pursuant to the Agreement, PacifiCorp would agree to maintain records and documents dating back to the Effective Date of the Agreement showing all transactions and other activities pertaining to the terms of the Agreement and PacifiCorp's payments of Residential Exchange Benefits to residential and small farm customers. The interest paid to PacifiCorp's Residential Loads on any amounts to be credited against retail rates would be calculated by PacifiCorp in the manner specified by the applicable retail regulatory authority.

I. Section 9. Settlement of Disputes. This section provides that the Parties would agree to terminate all pending, and to commence no new, litigation, contract disputes, and regulatory or administrative disputes, including ASC determinations, load determinations, billing disputes, and other issues regarding the Residential Exchange Program, with respect to Residential Exchange Benefits (including challenges to Bonneville's 1996 rates for issues related to the section 7(b)(2) rate test) for the period prior to July 1, 2001, except for claims of breach of the Agreement.

J. Section 10. Survival of Obligations. This section provides that the Agreement sets forth the entire agreement of the Parties with respect to the subject matter of the Agreement and may be amended only by writing signed by each Party. The Agreement would inure to the benefit of, and be binding upon, the respective successors and assigns of the Parties. The Agreement would not be intended to confer any right or remedy upon any person or entity other than the Parties and their respective successors and assigns.

K. Section 11. Final Action. This section provides that Bonneville and PacifiCorp would agree that the Agreement implements the Residential Exchange Program pursuant to section 5(c) of the Northwest Power Act and that the Agreement constitutes a final action pursuant to section 9(e)(1)(B) of that Act. Bonneville and PacifiCorp further would agree that any action challenging the Agreement must be filed within 90 days of the final action, pursuant to section 9(e)(5) of the Northwest Power Act.

L. Section 12. Enforceability. This section provides that Bonneville and PacifiCorp would warrant and certify that the Agreement is binding and enforceable on the Parties and within the Parties' legal authority. Further, Bonneville and PacifiCorp would agree to defend any and all challenges to the validity and enforceability of the Agreement or to the rights and duties contained therein. Bonneville and PacifiCorp would agree to cooperate in defending any and all challenges to the Agreement.

M. Section 13. Invalidity. This section provides that in the event it were determined by a court of competent jurisdiction that any Party's duties or obligations under the Agreement were invalid, illegal or unenforceable, and in the further event that

such determination were not reversed on appeal, then the Party to whom such duty or obligation is owed would have the right, if exercised within 60 days of the final determination on appeal, to rescind the Agreement, which then would be invalid and void ab initio, and of no force or effect.

N. Section 14. Counterpart Signature. This section provides that the Agreement may be executed by counterparts. Upon execution by PacifiCorp and Bonneville, each executed counterpart would have the same force and effect as an original instrument and as if Bonneville and PacifiCorp had signed the same instrument.

IV. Review of Comments

Bonneville's April 14, 1997, notice requested written comments by May 1, 1997. Bonneville received three written comments as discussed below.

Rep. Golden C. Linford and Sen. Robert R. Lee of the Idaho Legislature expressed support for the proposed Agreement. They noted that as members of the Idaho Legislative Committee on Electrical Deregulation they have met with representatives from PacifiCorp on several occasions to discuss ways to mitigate the price increases faced by the eastern Idaho customers of Utah Power & Light due to recent impending reductions in the residential exchange credit. They noted that the settlement between BPA and PacifiCorp will provide a tool with which that mitigation can be achieved.

The Direct Service Industries, Inc., also expressed their support of the buyout agreement.

BPA also received a comment from the Oregon Public Utilities Commission (OPUC). The OPUC noted that the Agreement is silent on identifying the years between 1997 and 2001 under which exchange load is taking place for Pacific Power & Light's (PP&L's) Oregon service territory. The OPUC believes this is a significant omission because under a subscription process proposed by the Comprehensive Review, the annual level of each year's qualifying exchange loads is a key consideration in determining rights to purchase BPA power. Under the proposed process, each investor-owned utility is limited in its subscription, under the second phase of the subscription process, to subscribe to no more than the average of the two highest consecutive years, during the 1997-2001 time period, of actual exchange load. The OPUC suggests that the Agreement should contain a provision that acknowledges for purposes of the subscription process that the residential and small farm customers of PP&L's Oregon service territory are deemed to be an exchanging load for the entire 5-year period. The OPUC also argues that this is a reasonable provision for having PP&L agree to drop all litigation regarding average system costs and section 7(b)(2) decisions.

While BPA understands the OPUC's concern, this issue is beyond the scope of the Agreement and therefore is inappropriate to address as part of that Agreement. The Agreement is limited solely to the termination of PacifiCorp's participation in the Residential Exchange Program through June 2001. It is important to note, however, that the Agreement does not preclude the establishment of residential exchange loads for Pacific Power & Light Company for the period from 1997 through 2001 for purposes of any future subscription process. In other words, the Agreement does not establish or

preclude the establishment of exchange loads for purposes of determining PP&L's eligible loads for a future subscription process. The determination of such loads must be made at the time of the implementation of the subscription process. BPA can only represent that this Agreement is not intended to have any effect, one way or the other, on such determination. The Agreement, therefore, will not address the issue of exchange loads that may be used for a future subscription process. Future discussions of this issue with the OPUC will be addressed in correspondence that occurs outside of the instant process.

CONCLUSION

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

Issued at Portland, Oregon, on this 21day of May, 1997.

UNITED STATES OF AMERICA
Department of Energy
Bonneville Power Administration

By Randall W. Hardy

Name Randall W. Hardy

Title Administrator and Chief Executive Officer