Bonneville Power Administration

Final Policy on Standards For Service
Administrator's Record of Decision

I. Introduction

The Bonneville Power Administration (BPA) is formally adopting standards for service an entity must meet prior to being offered a contract for the purchase of firm power marketed by BPA under section 5(b) of the Northwest Power Act. 16 U.S.C. § 839(c)(b). Section 5(b)(4) of the Act requires that entities purchasing Federal power under section 5(b) must comply with BPA's standards for service. BPA has traditionally made its determination regarding compliance with BPA's standards for service on a case-by-case basis and communicated its standards and assessment of a party's qualifications in correspondence to parties seeking to purchase Federal power under section 5(b). Formal adoption of these standards as policy is being made in response to BPA's proposed modification to the standard that requires prospective public body or cooperative utility customers and privately owned companies selling to the general public to own their own distribution facilities. BPA proposed that it modify this standard to permit that a customer either (1) own a distribution system; or (2) have an ownership-type lease arrangement for a distribution system.

A. Summary of BPA's Draft Policy Proposal

As described in BPA's proposal to change its standards for service, 64 Fed Reg. 24382 (May 6, 1999), the planned offering of new power sales contracts under the Federal Power Subscription Strategy, plus the advent of electricity deregulation in the wholesale market and in the retail markets of some western states, prompted BPA to assess whether or not a change in BPA's existing standards for service was needed. Interest by various entities, including several tribes, in forming and operating electric utilities also added to BPA's decision to issue its draft policy proposal. As stated above, the proposal focused on whether to broaden the distribution ownership standard by permitting prospective customers the ability to enter ownership-type lease arrangements to acquire distribution facilities.

As discussed in its proposal BPA has long interpreted sections 4(c) and (d) of the Bonneville Project Act, 16 U.S.C. §832c(c) and (d), as requiring prospective public customers to own the distribution facilities necessary for such customers to be in the business of selling and distributing the power purchased from BPA. Section 4(c) states that prospective purchasers are to be in the "public business of selling and distributing the electric energy proposed to be purchased." Section 4(d) speaks to the opportunity and time necessary for prospective purchasers "to construct or acquire necessary and desirable electric distribution facilities . . . ." When read together BPA has interpreted the language of these sections to require ownership of the physical distribution facilities necessary to facilitate the delivery of Federal power to retail consumers.

BPA proposed the ownership-type lease arrangement, which is consistent with this interpretation. Such a proposed standard is also consistent with Department of Energy (DOE) policy that allows the use of a lease by a prospective public agency customer to obtain a distribution system. See DOE General Counsel Opinion, "Request of City of Needles for Reinstatement of Sales of Federal Power for Benefit of its Citizens" (Nov. 21, 1978). This policy was affirmed in Salt Lake City, et al. v. Western Area Power Administration, 926 F.2d 974 (10th Cir. 1991). Without defining any of the necessary criteria to establish such an ownership-like lease, BPA merely outlined its proposed ownership-type lease as: (1) a long-term arrangement for the life of the facilities or for the duration equal to the term of the BPA power supply obligation; (2) giving the prospective customer the right to operate, maintain and have repairs performed on the system; and (3) having complete decision authority over costs of the distribution system.

B. The Administrator's Decision

This Record of Decision (ROD) formalizes the Administrator's final decision to adopt the standards for service as published in 64 Fed Reg. 24382 (May 6, 1999). BPA will retain its present standards for service including ownership of distribution facilities and will not adopt the proposed modification to permit ownership-type lease arrangements of distribution facilities. This decision is made under section 5(b)(4) of the Northwest Power Act, 16 U.S.C. §839c(b)(4), which directs the Administrator to require all potential customers requesting a contract for firm power under section 5(b) of the Act to comply with the Administrator's standards for service in effect on December 5, 1980, or as subsequently revised.

It is within the Administrator's discretion under section 5(b)(4) to leave unchanged the present standard requiring that an entity own its distribution system in order to purchase Federal power from BPA. The Administrator has determined that there is no need to broaden the current distribution ownership standard. In the exercise of discretion under section 5(b)(4), however, the Administrator will consider, on a case-by-case basis, future issues related to the ownership standard regarding difficulties that tribes may face in pursuing the acquisition of all the distribution facilities on tribal reservations.

Under certain circumstances the Administrator may determine it is appropriate to provide an exception to the requirement to own all distribution facilities located on tribal reservations. This need to potentially make exceptions arises because of the potentially unique circumstances that may confront tribes seeking to form and operate a utility on a tribal reservation. Tribal reservations are frequently located in sparsely populated rural areas that are more likely to be served in part by electrical facilities that are radial in nature without multiple interconnections to the local distribution facilities. Such facilities can merely pass through a reservation and be used to serve retail consumers both on and off the reservation. Requiring multiple ownership of such facilities could result in the fragmentation of such facilities which could affect system reliability and may present additional operating and coordination difficulties for the involved utilities. Therefore, the

Administrator finds it reasonable to determine for tribes on a case-by-case basis whether a prospective tribal utility facing challenging service territory and distribution facility configurations will be given an exception to owning all the distribution facilities needed to serve a tribal utility's retail consumers.

The Administrator's decision not to modify the ownership standard is grounded on several factors. Primarily, fee ownership of distribution facilities, unlike an ownership-type lease, does not create any ambiguity over meeting the standard for eligibility. It serves as a standard that helps ensure that the benefits of Federal power are directly reaching retail consumers. This standard has been interpreted and used by BPA for over 60 years in a uniform manner without administrative burden and is consistent with the intent of Congress as expressed in sections 4(c) and (d) of the Bonneville Project Act that utilities (public body and cooperative) construct or acquire electric distribution facilities.

An ownership-type lease standard would create confusion and uncertainty for both BPA and prospective purchasers. Such confusion and uncertainty would serve neither prospective nor present customers. It could add legal challenges to individual applications and increase the agency's administrative burden under the ownership-type lease standard. The standard for eligibility could become subject to varying interpretations dependant on the specific factual situation presented. BPA would become a regulator reviewing the terms and conditions of every distribution lease transaction entered into by and between the prospective customer and others. This would create new administrative costs for BPA at a time when BPA is looking at ways to reduce its costs.

BPA is also concerned that the ownership-type lease standard could result in the creation of entities that do not perform any actual utility function. Through lease arrangements, an entity leasing a distribution system would be able to contract out all physical utility services back to the lessor/owner of the system. In this situation, the lessor/owner continues as the actual operator of the system and the distributor of Federal power. The leasing entity could constitute a paper entity only, and would therefore not be actually in the business of distributing Federal power purchased from BPA as required by section 4(c) of the Bonneville Project Act. 16 U.S.C. § 832c(c). Selling to such an entity could become a circumvention of the prohibition on the resale of Federal power to investor-owned utilities as provided in section 5(a) of the Act.

Finally, a significant number of parties opposed BPA's proposed policy change. Assessing BPA's proposed policy in light of the old adage "if it ain't broke, don't fix it" these parties expressed support for BPA's existing ownership standard. Comments in opposition to BPA's proposed policy expressed the view that even with the changes that are occurring in both wholesale and retail electricity markets utilities will continue to own their distribution systems. Continuation of such ownership allows BPA to fulfill its statutory purposes of marketing Federal power without becoming unnecessarily involved with the changing regulatory environment.

Environmental Compliance

The Final Policy on Standards for Service is consistent with BPA's Business Plan Final Environmental Impact Statement (DOE/EIS-0183, June 1995), the Business Plan Record of Decision (ROD), signed August 15, 1995, and the subsequent Power Subscription Strategy ROD, signed December 21, 1998.

Public Process

This ROD addresses the issues raised by commenters who responded to BPA's proposed policy on standards for service, published in Federal Register at 24382 (May 6, 1999). On June 3, 1999, the thirty (30) day comment period was extended by BPA through June 30, 1999. In addition to the comment period BPA held two public meetings. The first meeting was held on May 27, 1999, in Spokane, Washington. The second meeting was held on June 2, 1999, in Portland, Oregon.

BPA received over seventy-five written comments from various interested parties. See appendix for commenter abbreviation/acronym. This ROD will separate the comments into three (3) categories: (1) comments opposed to adopting the proposed modification; (2) comments in support of the proposed modification; and (3) comments in support of modifying BPA's standards for service beyond the proposed modification to accommodate changes in states that have restructured their retail electric industries.

Responses to Comment

II. Parties Opposed to Modifying Ownership Standard to Include Ownership-type Lease

A. "If it ain't broke, don't fix it"

Comment: We do not approve of the proposed standard and are opposed to it. *Benton PUD; Benton REA; Blachly-Lane; CPU; Consumers Power, Inc.; Coos-Curry Electric Coop.; Flathead Electric Coop.; ICOUA; IPC; Lost River Electric Coop.*; *Montana Electric Coop. Assn.; NRU; OTEC; PacifiCorp; PSE; The Companies; Seattle City Light; SUB; WPAG; WRECA.* Maintain BPA's current interpretation of §§ 4(c) and (d). *Fergus Electric Coop.; Park Electric Coop.* There is no compelling reason to justify a change from BPA's current interpretation of the law. *PNGC; PPC; WPAG.* It is not an opportune time to change BPA's historic standard. *WDCTED.* Proposal to lease distribution facilities is a major departure from the current long-standing requirement that a utility must own and operate a distribution system. Administrative action by BPA cannot abrogate the statutory language nor the intent of the underlying statutory requirement. *Mid-West Electric Consumers Assn., Inc.*

BPA Response: The Administrator has decided not to adopt the proposed ownership-type lease modification to the standards for service. The Administrator has latitude in

administering the provisions of statutes under which BPA operates. While an ownership-type lease standard is viewed as consistent with these statutes, the Administrator has decided to retain BPA's long-standing ownership standard.

B. Comments on Distribution

Comment: The proposal should clarify the distinction between the utility's distribution function and transmission function as the term "distribution" is used in the criteria. *Whatcom PUD*. It is important to continue requiring preference customers to own and operate a distribution system; leasing a distribution system should be limited to a small fraction of a total distribution system. *Whatcom PUD*. If direct ownership of distribution facilities is the standard, what happens to existing customers that take service through contracted distribution facilities? *WIC.*

BPA's proposal ignores long-standing interpretations of law that cooperatives qualifying for preference be financed by the Rural Electrification Administration (REA) and own, or be in the process of acquiring, a distribution system. *Seattle City Light*.

BPA Response: BPA acknowledges that there is some confusion over the distinction between "transmission" and "distribution." While there may be no single voltage criteria for readily distinguishing transmission from distribution, BPA considers the lower voltage system that is needed to directly deliver power to, as well as interconnect with, retail consumers as distribution. Under BPA's standards for service, a prospective utility customer is required to own its distribution system as provided under sections 4(c) and (d) of the Bonneville Project Act. The retail load that is physically served from the distribution system owned by the utility forms its regional firm power load for which that utility has the right to request a contract for Federal power from BPA to serve such load under section 5(b)(1) of the Northwest Power Act. As defined in the BPA Definitions book, "distribution" is "the transport of electricity to ultimate use points, such as homes and businesses, from a source of generation or from one or more substations." DOE/BP-2279 (1994).

In determining what constitutes an interconnected distribution system BPA looks to typical industry practice. Interconnected distribution systems are typically made up of various components, such as primary and secondary distribution lines, distribution transformers, service drops and meters. BPA also recognizes that in certain situations it is necessary and prudent for one utility to wheel electrical power over the distribution facilities of another utility in order to have power delivered to its own distribution system. Such customers required to obtain wheeling over another utility's distribution system will continue to be eligible to purchase from BPA.

In response to the comment that a cooperative qualifying for preference must be financed by the REA, BPA's statutes are silent on this matter. While it is true that cooperatives have historically had financing available through the REA (now the Rural Utility Service, or RUS), BPA's statutes do not limit cooperatives to only RUS financing.

C. Comments on the Potential for Increasing the Administrator's Load Obligation

Comment: BPA's strategy of limiting benefits of the Federal Columbia River Power System enjoyed by the residential and small farm customers of the IOUs encourages those same customers to leave IOUs and form small public utilities to obtain full preference benefits. *IPC; EEI; PSE.* The OPUC does not support increasing the regional acrimony by inventing new classes of public agencies and cooperatives as proposed. *OPUC.* The proposal, by encouraging the formation of new publics, will result in greater load responsibility for BPA and thus result in growth in the system itself, thus diluting the benefits of the Federal system. *IPC; OPUC; PacifiCorp; PNGC; The Companies.*

If implemented there will likely be a proliferation of sham utilities. *Central Electric Coop.; Congressman DeFazio; Flathead Electric Coop.; Idaho Consumer-Owned Utilities Assn.; PNGC; PPC; The Companies; Seattle City Light; SUB; WRECA.* The ability of private for-profit utilities to obtain (under this proposed rule change) increased access to Federal preference power for their customers encourages the sale of low-cost private power resources in the Northwest to customers outside the region. *Montana Electric Coop. Assn.* Permitting entities that only lease distribution facilities to qualify for the purchase of Federal power creates a potential opportunity for IOUs to circumvent the compromises struck in the Subscription Strategy regarding availability of Federal power. *Seattle City Light; WPAG.*

BPA Response: These comments express concern over the possibility that adoption of the ownership-type lease standard is unnecessary and, if adopted, could lead to increasing the amount of regional load BPA is obligated to meet. Their concern is that such a standard could increase the number of preference customers BPA would be obligated to serve. Many of the comments express doubt over the legitimacy of such new preference customers.

BPA's proposed modification was not intended to make it easier for entities to form new preference customers; rather, BPA sought to review the ownership standard and proposed a modification to it, in part, in light of the ongoing efforts to deregulate the electric utility industry. Having made this review BPA has decided to retain its ownership standard. The ownership standard provides BPA a clear standard that is easy to administer and which does not create the burdens and uncertainties associated with the proposed ownership-type lease standard. BPA also agrees with comments that the proposed ownership-type lease standard could lead to the formation of paper utilities that would otherwise not qualify to purchase Federal power directly from BPA. In contrast, the standard of ownership does not lend itself to the easy formation of paper utilities.

D. Comments on the Existing Ownership Standard

Comment: The requirement to own has served as a bright line standard. It is simple, easy to administer, and is not subject to varying interpretations. *CPU; Umatilla Electric*

Coop.; WPAG. It should not be abandoned in this period of rapid change and uncertainty. *Umatilla Electric Coop.; CPU; WPAG.* A shift to an ownership-like lease standard would result in administrative confusion and uncertainty. What constitutes an ownership-lease would be the subject of varying interpretations. *CPU; PacifiCorp; SUB.* Permit lease/purchases for annexations or mergers between existing customers served with PF power. *United Electric Coop., Inc*.

Lessening the requirements for a public body or rural electric cooperative for purposes of eligibility for preference raises concern that it will nullify the purposes of the Bonneville Project Act. *Central Montana Electric Power Coop.; Mid-West Electric Consumers Assn., Inc.* BPA should incorporate all the characteristics of a preference customer stated by the Second Circuit in Allegheny Elec. Coop., Inc. V. FERC, 922 F.2d 73 (2d Cir. 1990), and the FERC in Opinion No. 329, 48 FERC ¶ 61,124 (1989). *Central Montana Electric Power Coop.; Mid-West Electric Consumers Assn., Inc.*

BPA should not create eligibility standards that would provide a "one-size fits all" under any type of permanent lease arrangement. *NRECA.* It is not certain that allowing leases would put BPA in closer conformance with DOE policy. *PNGC.* The proposal is inconsistent with the purpose and long standing interpretation of the Bonneville Project Act. *Seattle City Light*. BPA has properly interpreted the Bonneville Project Act requiring outright ownership of distribution facilities. *NRECA.* The question of eligibility to purchase power from BPA on a preference and priority basis is fundamentally important and should be answered in the context of whether the entity is a public body under the Bonneville Project Act. Eligibility standards should preserve the qualities of public power that make it unique. *PPC.* Do not change the existing six standards for service for eligibility. *NRU; PPC.* Ownership of the distribution system is essential and when combined with the five other criteria allows for a meaningful distinction between new preference entities as envisioned by statute and other utility formations whose purpose may simply be to reallocate competitively priced preference power to other entities. *NRU*. The proposed change raises serious policy and administrative risks because there is no clear definition of what constitutes a life of facilities lease, nor what would be appropriate maintenance requirements during the term of such lease. *WPAG.*

BPA Response: BPA agrees with many of the views and concerns expressed in these comments. While it is likely that an ownership-type lease standard would create ambiguities and be subject to varying interpretations, a strict ownership standard does not suffer from these difficulties. BPA is cognizant of the congressional intent for the preference and priority given to public body and cooperative utilities. BPA will continue to market Federal power consistent with preference as directed in the Bonneville Project Act.

As discussed in the proposal, an ownership-type lease would conform to DOE policy. It has become clear though that broadening the ownership standard is unnecessary. In cases where one preference customer is "acquiring" by annexation or merger another preference

customer, BPA will consider the means by which such acquisition will be made. At this time BPA is meeting all of its statutory purposes under the existing standards for service and does not need to revise the clear standard now applicable, ownership. The Administrator has latitude in administering the provisions of statutes under which BPA operates. Congress committed the standards for service to the Administrator's discretion under section 5(b)(4). While an ownership-type lease standard is viewed as consistent with these statutes, the Administrator does not want additional administrative regulation, confusion, or uncertainty associated with adopting such a standard.

E. Comments on Tribal Utility Acquisition of Distribution

Comment: In states without statutory deregulation there should be no relaxation of the standards for service. BPA must continue to adhere to standards of service which require that a new public or tribal utility seeking access to Federal power as a preference customer actually own a distribution system. By allowing ownership-type lease in its eligibility standards, BPA would be opening the door to condemnation disputes. Avista strongly opposes initiatives which would permit its distribution system to be acquired for purposes of gaining access to Federal power under any circumstances that involved less than full adherence to condemnation procedures required for obtaining full ownership of public utility facilities. *Avista*. BPA should adopt distribution ownership standards that reflect full operation and control of customer distribution services. *OPUC.* The benefit of forming tribal utilities in cases where the utility currently providing service is publicly owned utility [preference customer] will be minimal. *WPAG.* The proposed change to lease will not help tribes; in the absence of condemnation authority the incumbent utility will be under no compulsion to lease distribution facilities to a tribal utility. *WPAG*.

BPA Response: BPA will continue with the existing standard requiring a prospective purchaser to own all its distribution facilities. However, the Administrator may in certain limited circumstances find it appropriate to allow an exception for prospective tribal utilities on reservations. BPA understands that tribes, in evaluating the benefits of forming and operating a tribal utility, may include factors other than those related to the costs of wholesale electric power. Tribes may choose to form a tribal utility even where the current utility providing service on the reservation is already purchasing from BPA on a preference basis.

F. Comments on State Electricity Industry Restructuring

Comment: BPA should not be in the business of facilitating electricity deregulation and the break-up of the current regulated utility structure. BPA's proposal to loosen the requirements that a new public agency must meet in order to qualify for preference under Bonneville's organic statutes runs afoul of this principle. BPA's current standard requiring a new preference agency to own the distribution system is well grounded both in law and common sense. Actual ownership of the wires serves to distinguish a utility committed to providing quality electric service from a sham cover organization committed primarily to facilitating deregulation of the utility industry. *Congressman*

DeFazio. To give preference to "wireless" cooperatives could effectively force deregulation on utilities located in states that have not adopted deregulation legislation. *City of Cheney*. The proposal prejudges the outcome of retail deregulation in the Northwest. *PacifiCorp; PNGC; SUB; The Companies.* If BPA adopts this proposed change, an administrative decision will have been made that the preference right belongs to the end-use consumer. This should be a legislative decision, not an administrative one. *ICOUA.* Resist calls to fundamentally shift interpretation of eligibility standards in order to avoid conflicting or interfering with state restructuring efforts. *CUB.*

BPA should not feel an obligation to step in and add further benefits to Montana. BPA should not, and need not, change the rules to accommodate certain interests in Montana. *Kootenai Electric Coop.; CUB.* Do not change BPA policy (standards for service) or definition of preference customers or give Montana any greater benefit than would have been received through the residential exchange. *Umatilla Electric Coop*. Although the residential and small farm customers of Montana Power Company (MPC) should receive the allotment of BPA power and money they would have received as residential exchange customers, BPA should not fix the Montana legislation by substantially altering eligibility standards. *CUB.* With relaxed standards, utilities like MPC would be allowed to walk out on its [retail] customers with impunity. *CUB.*

The degree to which restructuring should impact regional decisions on eligibility standards allowing Federal power purchases should be approached with caution. Modification of standards should be consistent with the purpose of public power. The decision to modify eligibility standards warrants further review. *Lewis County PUD*.

It is difficult to imagine how a utility can have an obligation to serve without owning the distribution system. *City of Cheney.* The description of the utility obligation to serve is insufficient. Total displacement of the incumbent provider and ultimate responsibility for the distribution function and the delivery of service must be maintained by the preference customer. *Central Montana Electric Power Coop.* Under Montana's restructuring law existing public power entities face a specific and unavoidable obligation to serve. It is arguable that an entity under a lease-type arrangement faces a similar statutory responsibility for service. *Montana Electric Coop. Assn.*

BPA Response: These comments express the view that BPA should not get involved with decisions by states to restructure their electricity industries. BPA agrees. BPA does not intend to cause the initiation of electricity deregulation by states. BPA's proposal was based, in part, on a perceived need by BPA to review its standards for service in light of retail access and electricity restructuring developing in some states. BPA does not find, however, that it is necessary to change BPA's existing standards for service to accommodate the changes in state law regarding the retail electricity industry in Montana or other states. BPA will retain the existing ownership standard.

In response to comments on the obligation to serve, BPA's proposal discussed the relationship between the obligation to serve and the requirement to own distribution.

BPA highlighted this relationship and sought input from commenters on the effect state deregulation might have on that relationship. BPA's interest in seeking input relates to the direction given to the Administrator by Congress that the Federal power distributed by BPA's customers to the general public be resold in a fair and nondiscriminatory manner. Because the Administrator is not adopting the proposed modification it is neither necessary nor required at this time to consider making a change to the standard on a utility's obligation to serve the general public.

III. Parties in Support of an Ownership-type Lease Standard

The following section describes comments made in support of the proposed modification to allow an ownership-type lease of distribution facilities and BPA's response to such comments. While some comments provide general support, many comments discuss support for the proposal only in specific situations.

Comment: Adopt a strict distribution-related interpretation of eligibility; require that the customer own the distribution system or lease the system with full operation and cost control rights, including rights over costs, improvements and additions, and responsibilities over operation, maintenance, billing and metering, and outage restoration. *CUB.* An ownership-type lease could suffice if properly structured and does not diminish preference. *EPUD; PGP.* Selection of vendors for system operations and maintenance services should be done on an open and competitive basis, and should not be bundled together with the lease of the distribution system. *EPUD.*

Ownership-type lease standard should require (1) "arms length" transaction; (2) lessee be financially independent of lessor; (3) lessee controls cost of operating and maintaining the distribution system; (4) lessee controls capital decisions (i.e., replacement and additions); (5) lessee has clear obligations to serve at retail; (6) lease is long-term; (7) lease payments yield a reasonable rate of return to the asset owner—avoid above market payments; and (8) BPA has right to review leases to ensure these conditions are met. *PGP.*

We support both BPA's proposal to permit ownership-type lease arrangement and contractual capacity rights for delivery of Bonneville power. *ATNI; Coquille Indian Tribe; Spokane Tribe of Indians; Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes and Bands of the Yakama Indian Nation; Shoshone-Bannock Tribes; Warm Springs Tribes.* These approaches provide flexibility that tribes may need to deal with varying situations. Requiring tribes to acquire and own all distribution facilities is unduly burdensome and a large up-front capital expense. Leasing or obtaining contractual capacity rights to distribution facilities encourages cooperation and promotes maximum facility usage. Ownership-type lease allows tribes time to develop a working relationship with existing service providers. *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes and Bands of the Yakama Indian Nation.*

Existing distribution systems do not always conform to reservation boundaries. A non-tribal utility could seek to acquire an intact distribution system that might define such a new preference utility. A tribal utility does not have this option because reservation boundaries are defined by Treaty. *Confederated Tribes and Bands of the Yakama Indian Nation.*

Tribes should not be required to have ownership-like responsibilities over the distribution system; BPA should change its standards for the benefit of tribal utilities regardless of what the agency determines its policy should be for other utilities. *NWEC.* The distinctiveness of the legal status of tribes creates risks to all other governmental units if generic standards are modified to suit the tribes. It appears to be far better to use the distinctive legal status of tribes to fashion an approach tailored to their specific needs without changing the rules for everyone else. *WDCTED.*

BPA response: BPA is not modifying the standard requiring ownership of distribution to one of ownership or ownership-type lease. As expressed in these comments, adopting the ownership-type lease standard would require BPA to develop, define, and establish additional criteria in order to administer the standard. Beyond the need to develop and define such criteria is the burden it would create for BPA in having to administer it. The PGP proposed lease type does not result in the public utility owning the distribution system over time and is thus more like a "use" form of lease. Ownership of distribution provides the clearest standard to apply and is not subject to varying interpretations.

BPA understands that tribes face distinct legal issues when providing utility service to reservations. Under certain circumstances the Administrator may find it appropriate to allow an exception for prospective tribal utilities on reservations due to potentially unique circumstances that may confront tribes seeking to form and operate a utility. Such circumstances may arise because tribal reservations are frequently located in sparsely populated rural areas that are more likely to be served by electrical facilities that are radial in nature without multiple interconnections to the local distribution facilities. These types of facilities can merely pass through a reservation and be used to serve retail consumers both on and off the reservation. Requiring multiple ownership of such facilities could result in the fragmentation of such facilities. This could affect system reliability and may present additional operating and coordination difficulties for the involved utilities served by multiple distribution systems. Therefore, the Administrator finds it reasonable to determine on a case-by-case basis whether prospective tribal utilities facing difficult distribution facility acquisitions will be given an exception to the standard requiring ownership of all distribution facilities for serving their reservations. It is assumed that in these cases the owner of the distribution system will be willing to enter into an ownership-type lease arrangement with the prospective tribal utility so that the terms of the lease agreement will provide ownership-type control of certain reservation facilities to the tribal utility.

Comment: Ownership of distribution facilities should not be made a prerequisite for continuing to receive Federal power allocation when Federal customers are establishing policies to reduce their operating costs. *FEMP*.

BPA response: BPA is cognizant of efforts by agencies of the Federal government to reduce costs. However, the economic decisions Federal agencies must make about whether to remain eligible to take a disposition of Federal power at wholesale from BPA or to become a retail consumer served by a local utility are independent of BPA's decision to maintain the standard requiring ownership of distribution facilities. BPA's policies regarding service to Federal agencies are not changed by this decision.

IV. Parties in Support of Loosening BPA's Standards for Service Beyond the Ownership-type Lease Standard

A. Comments on State Electricity Industry Restructuring

Comment: BPA's efforts to modify the standards have not gone far enough to accommodate major industry changes. It is recommended that BPA modify the proposal to acknowledge unique circumstances faced by consumers in states that have adopted utility restructuring legislation. *Joint Montana Commenters; Avista; ICNU; Montana Governor's Office; NWEC; PSE*. Nothing in the Project Act precludes BPA from allowing ownership-type leases as a mechanism for satisfying the eligibility requirements. *ICNU.*

Amend the eligibility standards to allow Federal power to be sold to any entity that can demonstrate that it is obligated to distribute the power to the intended users at cost and will not resell the power on the market for its own or another's financial benefit. *PGE.* Specific standards are not required by statute; agencies must have latitude to adopt standards that may evolve over time as long as those standards are consistent with the statute's purpose and not contrary to law. Allegheny Elec. Coop., Inc. v. FERC, 922 F2d 73, 81 (1st Cir. 1990). *PGE.* The primary mandate of the Bonneville Project Act is to encourage the "widest possible use of Bonneville Power." BPA's eligibility standards should not defeat them [the mandate] by failing to transition to modern industry structures and trends. *PGE.*

Preference must ultimately be fundamentally redefined if electricity deregulation becomes a reality in the region. *NWEC; WDCTED; CUB.*

BPA response: BPA's proposal was not intended solely to accommodate those states in the Northwest that deregulate their electricity markets. It was not intended to create opportunities for utilities to develop creative power supply alternatives while eliminating or restructuring portions of their utility operations. Changes in state law cannot rewrite the language and meaning expressed by Congress in the Bonneville Project Act.

In administering the Act, the Administrator is to read each section consistent with one another. BPA has interpreted the language of section 4(c) that states "such prospective purchaser to enter into the public business of selling and distributing the electric energy proposed to be purchased," when read together with the language in section 4(d) which speaks to the opportunity and time necessary for prospective purchasers "to construct or acquire necessary and desirable electric distribution facilities . . ." to mean ownership of the physical distribution facilities necessary to facilitate the delivery of Federal power to retail consumers. While it may be possible to use an ownership-type lease to effectuate the purposes of the statute, it is an inconsistent construction of such language to allow entities that are only authorized to "sell" Federal power to purchase power from BPA. Preference entities, and privately held utilities selling to the general public, purchasing Federal power from BPA must also be the distributors of such power. For over 60 years, BPA has consistently interpreted this language to mean that ownership of distribution facilities is required. And, during all of this time, the Administrator has carried out the purpose of encouraging the widest possible use and nonmonopolization of Federal power. Changes in state law do not, and are not expected to, impair the Administrator's ability to continue to meet this purpose by requiring a change.

Some commenters expressed a desire that BPA redefine the statutory preference granted to public bodies and cooperatives. Congress specifically identified such utility customers as having "preference and priority" at all times in the disposition and sale of Federal power by the Administrator. The Administrator cannot administratively change Congress' intent that preference and priority be given to public bodies and cooperatives as explicitly directed in section 4(a) of the Bonneville Project Act.

B. Comments on Ownership and Lease

Comment: BPA misinterprets the statutory language of § 4(d) of the Bonneville Project Act. Such misinterpretation may have been of little consequence prior to the national and state actions establishing wholesale and retail open access. *City of Missoula.* BPA's ownership-type lease is based on an overly restrictive or inaccurate reading of § 4(d). *Montana Governor's Office*. The artificial requirement/constraint for ownership or long-term lease of distribution facilities is antiquated and is not consistent with national and state policy for wholesale and retail open access. *City of Missoula*. In Montana it is "neither necessary or desirable" to require ownership or long-term lease of distribution facilities to assure that customers, served by otherwise bona fide public bodies, gain non-discriminatory access to Federal preference power at the lowest cost based rates. *City of Missoula*. Permit delivery through open access tariffs; BPA's failure to evolve its standard to the changing energy business will thwart rather than promote its mandate to distribute its power widely. *PGE.*

BPA's proposed service standards would encroach on state authority to determine whether a particular entity may sell power to retail customers. *WIC.* Two questions are relevant in determining whether an entity is entitled to service from BPA: (1) is the entity a public agency or cooperative? (2) is that entity permitted or affirmatively authorized to

sell power to customers under state law? *WIC.* The proposed policy is inconsistent with the efficient use of existing facilities and will encourage construction of duplicate facilities, nor is it consistent with the requirement that BPA "encourage the widest possible use" of Federal power. *WIC.*

The proposed policy on PF eligibility is another instance in which BPA attempts to discriminate among customers based on a historical distinction that is not required by law and is not relevant to current and emerging industry practices. *Alcoa/Vanalco; WIC.* The DOE opinion, Request of City of Needles for Reinstatement of Sales of Federal Power for Benefit of its Citizens (1978) is not on point. The implication is that any means available under state law to obtain distribution services is sufficient. *Alcoa/Vanalco.* Ownership of distribution may have been necessary in the 1930's when distribution services were not available on an unbundled basis. But ownership is not necessary today if distribution access is mandated by the state or voluntarily made available by distribution owners. Contrary to BPA's assertion, in the current state regulatory environment, § 4(d) requires BPA to afford a public utility reasonable time to secure a means of delivering power, including a distribution service contract. *Alcoa/Vanalco; WIC.* There are no standards for service established in the Act beyond becoming a legally constituted public body or cooperative under the laws of the respective states. *WIC.*

BPA should expand its proposal because: (1) the Bonneville Project Act does not require ownership of distribution assets as a condition of purchasing preference power; (2) it does not comport with the Clinton Administration's recent electricity industry restructuring proposal; (3) the Montana Public Service commission continues to regulate distribution of electricity; (4) BPA relies on a 1978 DOE General Counsel advisory opinion to justify an ownership-type lease requirement, which does not mention the additional requirements associated with an ownership-type lease that BPA is proposing; and (5) WAPA's recent proposal to sell power to Native American tribes, ownership of wires and poles is not a necessary condition for receiving preference power (BPA should adopt a similar policy for open access jurisdictions). *Joint Montana Commenters; Montana Governor's Office; WMG&T.*

BPA response: These comments express the view that changes in state law that grant entities access to distribution facilities owned, controlled, and operated by another compel the Administrator to permit such entities to purchase Federal power from BPA. BPA does not agree with this view. They also express disagreement with BPA's view of sections 4(c) and (d) of the Bonneville Project, section 5(b)(4) of the Northwest Power Act, the 1978 DOE opinion, and they cite recent proposals by WAPA to sell power to Native American tribes.

The Bonneville Project Act explicitly provides in subsections 4(c) and (d) that the Administrator sell Federal power to those public bodies and cooperatives which are in the public business of selling and distributing electric power. The Act further provides that public bodies and cooperatives acquire and/or construct the distribution facilities needed to become legally qualified sellers and distributors of power. The terms "acquire" and

"construct" when read together express the congressional intent of ownership. When the Act was drafted Congress considered ownership as the only means to control and operate distribution facilities. See Report of the National Power Policy Committee, 75th Cong., 1st Sess., at 3 (1937). This intent is reinforced by the specific direction that the Administrator afford people reasonable time and opportunity to finance, through bond measures and other means, the acquisition and/or construction of the necessary distribution facilities.

Of course, Congress did not contemplate, and has not yet addressed, states deregulating their electricity industries. And while states may do so, it is axiomatic that the states do not govern Federal actions. The Administrator may or may not change the standard for service requirement to own the distribution facilities consistent with Federal law. While some states have changed their retail utility laws, even now public bodies and cooperatives can still form and own their distribution facilities. Neither Congress' intent nor the Administrator's ability to market Federal power consistent with the purposes of the Bonneville Project Act and the Northwest Power Act are frustrated by changes in state law.

For many years BPA has responded to inquiries by prospective public utility customers by stating they must acquire a distribution system to serve their retail loads, among other actions, to meet BPA's standards for service for becoming a customer. WIC and Alcoa/Vanalco are simply wrong in stating that meeting state law or forming a public body or cooperative is sufficient.

BPA's reference to the DOE City of Needles opinion in the draft proposal points out that such a proposal is consistent with DOE policy which allows use of a lease to acquire distribution. Parties are correct that WAPA markets power under different statutes; however, the City of Needles Opinion reflects a determination of criteria for standards for service that a prospective customer must meet under the preference clause in section 9(c) of the Reclamation Act of 1939. Such criteria are contained within the principle standard of being "ready, willing, and able" to take service. Recognizing the distinction between sections 4(c) and (d) of the Bonneville Project Act and section 9(c) of the Reclamation Act, BPA relies on DOE policy as guidance in making the draft proposal because the policy was general and BPA's own standards for service accommodate the "ready, willing, and able" principle.

In response to questions why BPA is not proposing something similar to WAPA's efforts to deliver the benefits of Federal power to Indian tribes, BPA markets Federal power under separate and different marketing statutes. In brief, WAPA has established a bill crediting program to more directly provide the benefit of low-cost Federal power to Indian tribes without actual power deliveries. For further information regarding WAPA's final power allocations of the post-2001 resources pool, see 62 Fed. Reg. 11174 (March 11, 1997); 10 C.F.R. part 905.

C. Comments on Obligation to Serve

Comment: Allow more flexibility in how BPA interprets the general utility responsibility standard when a state restructures. *CUB; NWEC.* BPA should change this standard to be one of a showing that the applicant will sell BPA power in a non-discriminatory manner for the benefit of the general public and particularly of domestic and rural customers. *PGE.* It is necessary and reasonable that BPA establish a public policy that recognizes and approves otherwise qualifying public bodies subject to comprehensive state electric restructuring retail open access and regulatory control, including "default supplier" or "obligation to serve" provisions. *City of Missoula.*

Montana has passed laws that allow municipal governments to become "default supplier" for residential and commercial customers, and allow the opportunity for buying cooperatives to become a default provider, both subject to approval by the Montana PSC. *City of Missoula*. The responsibilities or obligations for providing default electric supply services to all customers are equivalent whether provided by the distribution services provider or licensed default supplier. *City of Missoula*. The default supplier is limited by law to serving only residential and small commercial customers with average monthly demands of 100 kW or less. Default electric supply service is equivalent to a franchise type restriction. This restriction assures that the benefits of public preference power are focused on the residential and small commercial customers, which surely meets the language in § 4(a) of the Bonneville Project Act. *City of Missoula; Joint Montana Commenters; Montana Governor's Office; WMG&T.* Montana small customer size limitation imposed on default electric suppliers is not inconsistent with general utility responsibility. Domestic and rural customers are those customers the default supplier is obligated to serve which implements the provisions of the Act. *Joint Montana Commenters.*

BPA Response: BPA's proposed modification to its standards for service policy discussed the relationship between the standard of the obligation to serve and the requirement to own distribution. BPA highlighted this relationship and sought input from commenters on the affect state deregulation might have on that relationship. BPA raised this issue in light of Congress's direction that the Federal power marketed by BPA and distributed by BPA's customers to the general public be resold in a fair and nondiscriminatory manner.

Part of BPA's requirements to buy Federal power has been that the purchaser be authorized to sell and distribute electric power to the general public and not limit, or discriminate, its sales to the public. A utility responsibility to serve all those public consumers who request service has been the common phrase used. Generally, a company, a public body, or a cooperative cannot refuse to provide services to members of the public except on very limited grounds, like nonpayment of bills. BPA views this requirement as necessary to accomplish the purposes of the Bonneville Project Act--nonmonopolization of Federal power and widespread use--as well as other statutory purposes.

The comments suggest that BPA must accept the limitations imposed by state law upon some electric service providers. BPA disagrees. BPA does not find a state law that prevents service to certain consumers by certain electric service providers to be like a "franchise type" right which is geographical in nature. Nor does this state law substitute for a general utility responsibility to serve the public with Federal power purchased from BPA. Many comments expressed by these parties go beyond the scope of BPA's proposed modification. Because the Administrator is not adopting the proposed modification it is neither necessary nor reasonable at this time to consider making a change to the standard requiring the obligation to serve.

D. Comments on Operations and Structure

Comment: There are no legal, practical or economic reasons to require a particular "operations and structure" for distributing BPA preference power to otherwise bona fide public entities capable of selling such power to residential and commercial customers and contracting with and paying for BPA power. *City of Missoula; Joint Montana Commenters*. BPA's proposal should be clarified to distinguish that the agency is really only interested in whether the purchasing utility can fulfill its contractual obligations. *WMG&T*. Montana's comprehensive electric restructuring and retail open access laws fully satisfy the legal and practical requirements that a public body (1) sell preference power on a non-discriminatory basis to all customers in its service area; and (2) fulfill its contract and payment responsibilities to BPA. In the case of the City of Missoula, Montana Power Company is the distribution provider whose regulated services include facilities ownership and control; metering, billing, operation and maintenance are provided pursuant to regulated tariffs under conditions of retail open access. *City of Missoula*.

BPA Response: These comments go beyond the scope of BPA's proposed modification. The view expressed above suggests that what is only necessary is the ability to make monetary payment to BPA for Federal power sold. Although ability to make payment in conformance with the underlying contract is an important criterion, it is not the only standard. BPA needs the assurance provided by formation, operations, and function that the benefits of Federal power flow to retail consumers. In contrast, acceptance of the views expressed in these comments would lead to a result in which the actual utility function of providing distribution (and the metering, billing, and actual operation and control of the system) would remain in the control of an investor owned utility. Such a dual arrangement is not consistent with section 4(c) of the Bonneville Project Act that requires a prospective purchaser to be both a seller and distributor of the power purchased from BPA. The formation of mere paper "utilities" to specifically receive the benefits of preference and priority on behalf of any investor-owned utility would become problematic. As noted in preceding responses, BPA cannot ignore statutory direction that its Federal power purchasers be distributors of the power, as well as sellers. Furthermore, selling to a private entity could also result in circumventing the prohibition on the resale of Federal power to investor-owned utilities as provided in section 5(a) of the Act.

Comment: BPA should set this standard in a way that does not inhibit the changes now occurring in the energy business. The decision to outsource any function, including the entire distribution function, is an economic decision made by the entity purchasing Federal power. BPA should not require the purchaser to retain functions, and lose economic efficiencies, just to remain eligible to purchase Federal power. *PGE.*

BPA Response: BPA is open to considering on a case-by-case basis the economic efficiencies, opportunities, and concomitant decisions that utilities make regarding the outsourcing of utility functions for assets they own. However, a utility owner of distribution facilities must control the cost, operation, and maintenance of its facilities (plus metering, billing, and associated costs). If a utility, in carrying out these functions, outsources certain services for its assets, it is reasonable that BPA would consider any such efficiencies from outsourcing, assuming utility control is retained over its distribution facilities and distribution services.

E. Comments on Tribal Utilities

Comment: BPA's policies should be as flexible as possible to allow tribal governments, tribal-owned enterprises, and tribal members to receive low-cost electricity from BPA. *Confederated Tribes and Bands of the Yakama Indian Nation.* Tribes should be able to form either cooperatives or public bodies depending on which structure best meets the needs and goals of the tribe. *Spokane Tribe of Indians; Confederated Tribes and Bands of the Yakama Indian Nation.* Clearly, a sovereign nation is also a public body. *Confederated Tribes and Bands of the Yakama Indian Nation.* BPA should explore the option of direct purchase of power by tribes under § 5 of the Bonneville Project Act. Tribal governments and/or tribal enterprises could use such purchases to reduce their costs. *Confederated Tribes and Bands of the Yakama Indian Nation.*

There are good policy reasons why sovereign tribes should be able to take Federal preference power; BPA has trust responsibilities, beyond its obligations to other customers, for working with tribes to enable them to receive preference power for their reservations. *NWEC.* We recommend a new preference category specifically for tribal lands. *Shoshone-Bannock Tribes.*

Tribal utilities formed under tribal laws for service within reservation lands should be determined by the Administrator to be "public bodies" under Section 3 of the Bonneville Project Act. Decisions that limit tribal utilities to the status of "cooperatives" is an unnecessary barrier to their ability to use tribal tax exempt bonds and other financing stemming from government status. Failure to recognize a tribal utility as a public or governmental body does not recognize the Government-to-Government status between tribes and BPA. *Coquille Indian Tribe; Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes and Bands of the Yakama Indian Nation; Warm Springs Tribes*.

BPA Response: These comments express the view that tribes are domestic dependent nations and sovereign self-governing bodies on their reservations which are "public bodies" with the authority to form their own utility to provide electricity service on their reservations. Federal policy has been to recognize the inherent sovereign power of tribes over their members and territories. See Executive Order 13084 (May 14, 1998). BPA already recognizes the authority of tribes, pursuant to tribal constitution and bylaws, to form electric utility cooperatives that meet the term "cooperative" as defined in section 3 of the Bonneville Project Act. BPA recognizes the inherent sovereignty of Indian tribes and the government-to-government relationship between tribes and BPA. Therefore, the Administrator finds it reasonable and in accord with the meaning and purpose of "public body" as defined in section 3 to consider tribes as "public bodies" for purposes of qualifying for preference and priority. Recognition of "public body" status is limited to the formation of tribal utilities providing service to retail consumers only within reservation boundaries.

Comment: Afford tribes a "reasonable time and opportunity" in which to create the necessary utility entity and to secure financing for acquisition and operation of the utility system so they may become eligible preference customers. *Spokane Tribe of Indians; Warm Springs Tribes.* We support an approach that provides the opportunity for tribal utilities to subscribe to lower cost BPA power through the next 20 years. This should be done under flexible rules to allow a reasonable time to determine engineering, economic and managerial feasibility for utility establishment. An extension of time is requested. *Coquille Indian Tribe; Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; Confederated Tribes of the Umatilla Indian Reservation; Makah Tribal Council.* Provide some timing flexibility so a tribal utility could sign a contingent contract approximately four months after the conclusion of the rate case. *Confederated Tribes and Bands of the Yakama Indian Nation; NWEC.* BPA should accept a Letter of Intent to establish an electrical utility by the contract deadline to be sufficient. *Shoshone-Bannock Tribes.*

BPA Response: Indian tribes and any other people desiring to form a new utility have as much time as needed to do so. The Administrator is not limiting the "reasonable time and opportunity" for people to form new utilities. Whenever a new utility is formed and qualifies for service as a customer from BPA, then at that time the Administrator shall offer a contract at the applicable wholesale power rate if requested. Comments regarding aspects of BPA's Power Subscription Strategy are beyond the scope of this Record of Decision.

V. Conclusion

After having considered fully the comments made by parties in response to BPA's draft proposal I conclude that there is no need to revise BPA's historical standards for service. It is within the Administrator's discretion under section 5(b)(4) of the Northwest Power Act to leave unchanged the standard requiring that an entity own its distribution system in order to purchase Federal power from BPA. I have determined that this standard need not

be broadened. Furthermore, a new standard would create additional risks and burdens to the agency. The standard requiring distribution facility ownership has been administered for over 60 years in a uniform and easy manner. It is a clear standard and has not been subject to varying interpretations. This standard will continue to fulfill the agency's needs and meet its statutory directives. Therefore, BPA will retain its historical standards for service as set forth in the Federal Register Notice.

Issued in Portland, Oregon, on December 22, 1999.

/s/ J. A. Johansen
Administrator and
Chief Executive Officer

Appendix

Commenter Abbreviations and Acronyms

ATNI	Affiliated Tribes of Northwest Indians
Avista	Avista Corp.
Blachly-Lane	Blachly-Lane Rural Electric Cooperative
CUB	Citizens Utility Board
CPU	Clark Public Utilities
EEI	Edison Electric Institute
EPUD	Emerald PUD
EWEB	Eugene Water & Electric Board
FEMP	Federal Energy Management Programs
ICNU	Industrial Customers of Northwest Utilities
ICOUA	Idaho Consumer Owned Utility Association
IPC	Idaho Power Company
Joint Montana Commenters	Montana Public Service Commission, Montana Consumer Counsel, Montana Power Company, Natural Resources Defense Council, Montana Environmental Information Center, and the City of Missoula
NWEC	Northwest Energy Coalition
NRECA	Northwest Rural Electric Cooperative Association
NRU	Northwest Requirements Utilities
OPUC	Oregon Public Utilities Commission
PGE	Portland General Electric
PGP	Public Generating Pool
PNGC	Pacific Northwest Generating Cooperative
PPC	Public Power Council
PSE	Puget Sound Energy, Inc.
SUB	Springfield Utility Board
The Companies	Reynolds Metals Company, Northwest Aluminum Company, and Goldendale Aluminum Company
WDCTED	Washington Department of Community, Trade and Economic Development
WIC	Washington Industrial Cooperative
WMG&T	Western Montana Generation & Transmission Cooperative
WPAG	Washington Public Agency Group
WRECA	Washington Rural Electric Cooperative Association