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December 5, 2017

DECISION MEMORANDUM

TO: Council members

FROM: John Shurts, General Counsel
Ben Kujala, Power Division Director

SUBJECT: Council Business: Deferral of Review of Section 6(c) Policy

PROPOSED ACTION: Defer review of Bonneville Power Administration's Section 6(c) Policy.

SIGNIFICANCE: Council staff does not anticipate Bonneville will be acquiring a major resource in the foreseeable future (next 5 years). Bonneville and the Council propose to postpone the periodic five-year public review of Bonneville's 6(c) until such time as there is a reasonable likelihood that Bonneville will need to acquire a major resource. At that time, Bonneville will coordinate with the Council to accomplish any needed review of its 6(c) policy.

BUDGETARY/ECONOMIC IMPACTS

None.

BACKGROUND

As you may know, Bonneville has a policy on the implementation of Section 6(c) of the Northwest Power Act. Section 6(c) guides how Bonneville might acquire a major resource. A copy of the policy is attached to this memorandum.

The Section 6(c) policy includes a provision that requires Bonneville periodically review and (if necessary) update the policy, with the help of the Council. The policy was last updated in 1993 following a joint public review process with the Council. Since that time, BPA has not conducted a 6(c) process because it has not had a need to acquire a new major resource. With such acquisition unlikely, and given that neither the Council nor Bonneville nor the region has any more recent experience with 6(c) to draw upon in positing revisions to the existing policy, the Council and Bonneville agreed in 1998, 2005 and 2012 to defer review until such time as it appears more likely Bonneville will propose acquisition of a major resource.

ANALYSIS

Bonneville and the Council currently agree there is little need for Bonneville to conduct a public review-and-update process of its 6(c) policy now where it is highly unlikely that Bonneville would initiate a Section (c) proposal in the near term. Additionally, there is no new related experience or knowledge gained by Bonneville or the Council from recent experience with a 6(c) process to drive a review of the policy at this time. The review itself, would involve the Council, and most likely, the region at large, so would require a not insubstantial amount of both Council and Bonneville resources to accomplish. Thus, staff recommends deferral of policy review until such time as there is a reasonable likelihood that Bonneville will need to acquire a major resource. At that time, Bonneville will coordinate with the Council to accomplish any needed review.

ALTERNATIVES

The Council could choose to review Bonneville's 6(c) policy on its own and provide recommendations to Bonneville for use at the time Bonneville chooses to review its policy; however, a coordinated joint review, as conducted previously, would likely be more efficient and a better use of Council resources.

ATTACHMENTS

Bonneville's 6(c) Policy

NOTICES

DEPARTMENT OF ENERGY

Bonneville Power Administration

Policy for Section 6(c) of the Pacific Northwest Electric Power Planning and Conservation Act

Friday, **July 2, 1993**

***35922** AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Revised Agency Policy.

SUMMARY: Section 6(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act or Act), [16 U.S.C. 839d\(c\)](#), requires the ***35923** Administrator of the Bonneville Power Administration (BPA) to conduct public hearings on any BPA proposal to acquire a major resource, to implement a conservation measure which will conserve an amount of electric power equivalent to a major resource, to pay or reimburse investigation and preconstruction expenses of the sponsors of a major resource, or to grant billing credits or services involving a major resource; and to determine whether the proposed resource is consistent with the Pacific Northwest Electric Power and Conservation Planning Council's (Council) Northwest Conservation and Electric Power Plan (Plan). In addition, the Act also permits the Council to determine subsequently whether the proposal is consistent with the Council's Plan. If either BPA or the Council determines that the proposed resource is inconsistent with the Plan, BPA can implement the proposal only after receiving approval from Congress.

After an extensive public review process, BPA and the Council first promulgated and adopted their respective sections 6(c) Policies (Policy) in November 1986. See [51 Fed. Reg. 42, 903 \(1986\)](#) and [51 Fed. Reg. 42,038 \(1986\)](#). As adopted in November 1986, these Policies were limited in scope to (1) proposals to acquire a major regional or non-regional resource and (2) proposals to implement a conservation measure which would conserve an amount of electric power equivalent to that of a major resource. In addition, the November 1986 section 6(c) Policy requires the Administrator to review and reevaluate this policy after 5-years in light of new information and understanding regarding resource acquisition that might have become available after the policy was adopted.

In accordance with the 5-year review requirement, BPA and the Council reviewed their respective section 6(c) Policies and proposed to amend the policies to address payment or reimbursement of investigation and preconstruction expenses to major resource sponsors, and granting billing credits or providing services involving a major resources. In addition, BPA proposed to incorporate a provision in its section 6(c) Policy that would

allow a section 6(c) review to be conducted under expedited hearing procedures under certain circumstances. Because a section 6(c) review had been implemented only once in the intervening 5-year period, both BPA and the Council proposed to extend, without modification, the provisions adopted in November of 1986, including the 5-year review requirement.

BPA's revised 6(c) [Policy supersedes and replaces the section 6\(c\) procedures found at 51 Fed. Reg. 42,903 \(1986\)](#). These procedures shall apply to all 6(c) hearings initiated on or after March 26, 1993. This Policy addresses the types of resource acquisition proposals subject to section 6(c) review, the procedures for section 6(c) hearings, and the criterion for a BPA finding of consistency with the Plan.

Responsible Official: Charles E. Meyer, Director, Division of Resource Planning, Office of Energy Resources, is the official responsible for this Policy.

FOR FURTHER INFORMATION CONTACT: Julie Pipher, Public Involvement Office, P.O. Box 12999, Portland, Oregon 97212, 503-230-3478.

Information may also be obtained from:

Mr. Terence G. Esvelt, Puget Sound Area Manager, Suite 400, 201 Queen Anne Avenue North, Seattle, Washington 98109-1030, 206-553-4130.

Mr. George Bell, Lower Columbia Area Manager, 1500 NE. Irving Street, Room 243, Portland, Oregon 97208, 503-230-4551.

Mr. Robert Laffel, Eugene District Manager, Room 206, 211 East Seventh Street, Eugene, Oregon 97401, 503-687-6952.

Mr. Wayne R. Lee, Upper Columbia Area Manager, Room 561, West 920 Riverside Avenue, Spokane, Washington 99201, 509-353-2518.

Ms. Carol S. Fleischman, Spokane District Manager, Room 112, West 920 Riverside Avenue, Spokane, Washington 99201, 509-353-3279.

Mr. Ronald K. Rodewald, Wenatchee District Manager, 301 Yakima Street, Room 307, Wenatchee, Washington 98801, 509-662-4379.

Mr. George E. Eskridge, Montana District Manager, 800 Kensington, Missoula, Montana 59801, 406-329-3060.

Mr. Thomas Wagenhoffer, Snake River Area Manager, 101 West Poplar, Walla Walla, Washington 99362, 509-522-6226.

Ms. C. Clark Leone, Idaho Falls District Manager, 1527 Hollipark Drive, Idaho Falls, Idaho 83401, 208-523-2706.

Mr. Jim Normandeau, Boise District Manager, 304 North 8th Street, Room 450, Boise, Idaho 83702, 208-334-9137.

SUPPLEMENTARY INFORMATION:

I. Background

A. Relevant Statutory Provision

Section 6(c) of the Pacific Northwest Electric Power Planning and Conservation Act, [16 USC 839d\(c\)](#), requires the Administrator to conduct public hearings on any BPA

proposal to acquire a major resource, to implement a conservation measure which will conserve an amount of electric power equivalent to a major resource, to pay or reimburse investigation and preconstruction expenses of the sponsors of a major resource, or to grant billing credits or services involving a major resource; and to determine whether the proposal is consistent with the Council's Plan. In addition, the Act also permits the Council to determine subsequently whether the proposal is consistent with the Council's Plan. If either the Administrator or the Council determine that the proposal is inconsistent with the Plan, BPA can acquire the major resource or implement the proposal only after receiving expenditure authorization from Congress. Section 6(c) provides:

6.(c)(1) For each proposal under subsection (a), (b), (f), (h), or (l) of this section to acquire a major resource, to implement a conservation measure which will conserve an amount of electric power equivalent to that of a major resource, to pay or reimburse investigation and preconstruction expenses of the sponsors of a major resource, or to grant billing credits or services involving a major resource, the Administrator shall--

6.(c)(1)(A) publish notice of the proposed action in the Federal Register and provide a copy of such notice to the Council, the Governor of each State conservation measure implemented, and the Administrator's customers;

6.(c)(1)(C) develop a record to assist in evaluating the proposal which shall include the transcript of the public hearings, together with exhibits, and such other materials and information as may have been submitted to, or developed by, the Administrator; and

6.(c)(1)(D) following completion of such hearings, promptly provide to the Council and make public a written decision that includes, in addition to a determination respecting the requirements of subsection (a), (b), (f), (h), (l), or (m) of this section, as appropriate--

6.(c)(1)(D)(i) if a plan is in effect, a finding that the proposal is either consistent or inconsistent with the plan or, notwithstanding its inconsistency with the plan, a finding that it is needed to meet the Administrator's obligations under this Act, or

6.(c)(1)(D)(ii) if no plan is in effect, a finding that the proposal is either consistent or inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) of this Act or notwithstanding its ***35924** inconsistency, a finding that it is needed to meet the Administrator's obligations under this Act.

6.(c)(1)(D) In the case of subsection (f) of this section, such decision shall be treated as satisfying the applicable requirements of this subsection and of subsection (f) of this section, if it includes a finding of probable consistency, based upon the Administrator's evaluation of information available at the time of completion of the hearing under this paragraph. Such decision shall include the reasons for such finding.

6.(c)(2) Within sixty days of the receipt of the Administrator's decision pursuant to paragraph (1)(D) of this subsection, the Council may determine by a majority vote of all members of the Council, and notify the Administrator--

6.(c)(2)(A) that the proposal is either consistent or inconsistent with the plan, or

6.(c)(2)(B) if no plan is in effect, that the proposal is either consistent or inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

6.(c)(3) The Administrator may not implement any proposal referred to in paragraph (1) that is determined pursuant to paragraph (1) or (2) by either the Administrator or the Council to be inconsistent with the plan or, if no plan is in effect, with the criteria of section 4(e)(1) and the considerations of section 4(e)(2)--

6.(c)(3)(A) unless the Administrator finds that, notwithstanding such inconsistency, such resource is needed to meet the Administrator's obligations under this Act, and

6.(c)(3)(B) until the expenditure of funds for that purpose has been specifically authorized by Act of Congress enacted after the date of the enactment of this Act.

6.(c)(4) Before the Administrator implements any proposal referred to in paragraph (1) of this subsection, the Administrator shall--

6.(c)(4)(A) submit to the appropriate committees of the Congress the administrative record of the decision (including any determination by the Council under paragraph (2)) and a statement of the procedures followed or to be followed for compliance with the National Environmental Policy Act of 1969.

6.(c)(4)(B) publish notice of the decision in the Federal Register, and

6.(c)(4)(C) note the proposal in the Administrator's annual or supplementary budget submittal made pursuant to the Federal Columbia River Transmission System Act ([16 U.S.C. 838](#) and following).

6.(c)(4) The Administrator may not implement any such proposal until ninety days after the date on which such proposal has been noted in such budget or after the date on which such decision has been published in the Federal Register, whichever is later.

6.(c)(5) The authority of the Council to make a determination under paragraph (2)(B) if no plan is in effect shall expire on the date two years after the establishment of the Council.

B. Public Involvement

After an extensive public review process, BPA and the Council first promulgated and adopted their respective section 6(c) Policies in November, 1986. See [51 Fed. Reg. 42,903 \(1986\)](#) and [51 Fed. Reg. 42,028 \(1986\)](#). As adopted, these Policies were limited in scope to: (1) proposals to acquire a major regional or non-regional resource, and (2) proposals to implement a conservation measure which would conserve an amount of electric power equivalent to that of a major resource. These policies did not address: (1) proposals to pay or reimburse investigation and preconstruction expenses of the sponsor of a major resource, or (2) proposals to grant billing credits or services involving a major resource.

In response to comments received through the public process, the November 1986 section 6(c) Policy requires the Administrator review and reevaluate this policy after 5-years, in light of new information and understanding regarding resource acquisition that might have become available after the time the policy was adopted. BPA continues to believe that its knowledge and experience in conducting section 6(c) reviews of major resource will increase over time.

In October of 1991, BPA and the Council began the required 5-year review of their respective 6(c) Policies. The agencies met to discuss the issues and procedures for a joint review of their respective Policies. Because a section 6(c) review had been implemented only once in the intervening 5-year period, both BPA and the Council proposed to extend without modification the provisions adopted in November of 1986, including the 5-year review requirement. BPA and the Council, however, proposed to expand the scope of their Policies to include previously unaddressed proposals. These proposals include payment or reimbursement of investigation and preconstruction expenses to the sponsor of a major resource and granting billing credits or services involving a major resource. In addition, BPA proposed to incorporate a provision in its Policy that would allow section 6(c) review to be conducted under expedited hearing procedures under certain circumstances.

On August 20, 1992, BPA published in the Federal Register a notice of [Review of and Amendment to Policy for Section 6\(c\) of the Pacific Northwest Electric Power Planning and Conservation Act. 57 Fed.Reg. 37,792 \(1992\)](#). BPA and the Council then mailed copies of BPA's Federal Register Notice and the Council's staff issue paper, dated August 21, 1992, on the Council's Proposed Amendment and Extension of Time for Review of Council Statement of Policy Implementing Section 6(c), to over 3,200 groups and individuals (including BPA customers, State energy offices, fish and wildlife representatives, Governors, public interest groups, public utility regulatory bodies, state legislative bodies and others) for public comment. As part of the public review process, BPA and the Council agreed to exchange all comments received to assist in finalizing their respective policies. On September 11, 1992, BPA extended the public comment period to October 16, 1992, to coordinate with the Council's public process. [57 Fed. Reg. 41,740 \(1992\)](#). In response to the notice, BPA received, in total, 5 written comments. These commentors represented State agencies, organizations representing public utilities, and interested individuals. Written comments were submitted by W. Bishop, Washington Energy Facility Site Evaluation Council, W. Drummond, Public Power Council, and B. Dutro and C. Browne, private citizens. These comments were considered in developing BPA's final amendments to its section 6(c) Policy. Copies of the written comments and BPA's Decision Document, which addresses these comments, are available from the BPA's Public Involvement Office. Although the Council provided an opportunity for oral comments at their October 14-15, 1992, meeting in Olympia, WA, none were given.

C. Scope of Policy

This section 6(c) Policy addresses proposals under subsections (a), (b), (f), (h), and (l), of section 6 to acquire a major resource, to implement a conservation measure which will conserve an amount of electric power equivalent to that of a major resource, to pay or reimburse investigation and preconstruction expenses of the sponsors of a major resource, or to grant billing credits or services involving a major resource.

***35925** II. Policy

A. Definitions

This section contains definitions of terms used in the Policy and is a part of the Policy. Terms defined in the Northwest Power Act have the same meaning in this Policy, unless further defined.

1. Acquire or Acquisition. To "acquire" means to incur, and an "acquisition" is, a contractual obligation to make payment for:
 - a. Specified rights to the output or capability of a generating resource; or
 - b. The installation of specified conservation measures, or for conservation savings.
2. Binding Contract Offer. A "binding contract offer" exists when the Administrator presents a unilaterally executed contract for signature by the other contracting party.
3. Conservation Resource. A "conservation resource" is actual or planned reduction of electric power consumption resulting from increases in the efficiency of energy use, production or distribution, by either:
 - a. The direct application of renewable resources by a consumer; or

- b. The implementation of conservation measures.
- 4. Generating Resource. A "generating resource" is actual or planned electric power capability of the following type of generating facility:
 - a. Renewable resources, such as solar, wind, hydro, geothermal, biomass, or similar sources of energy; or
 - b. Resources using waste heat or having high fuel conversion efficiency; or
 - c. Thermal resources, such as nuclear and coal; or
 - d. Combustion turbines.
- 5. Option. An "option" is the purchase of a unilateral right to acquire an existing or proposed generating or conservation resource within a particular time period on specified terms. No commitment to acquire a resource is made at the time an option is purchased. Options will be used as low-cost means to increase BPA's flexibility in meeting the range of future resource needs.
- 6. Billing Credits. Billing credits are an adjustment to a customer's power bill or equivalent cash payment intended to compensate the customer for electric power resources which are developed or acquired and used to reduce the customer's net requirements for electric power or reserves purchased from BPA.
- 7. Investigation and Preconstruction Expenses. These expenses are costs incurred by or on behalf of sponsors of resources in obtaining required regulatory approval, including but not limited to licenses and permits; environmental analysis/impact statements; land options; easements and right-of-way acquisition; siting and licensing; geotechnical surveys; and architectural and engineering fees. These costs do not include the procurement of capital equipment or construction material or the costs associated with development of the resource proposal.

B. Threshold

1. Proposals

- a. The existence of a proposal, and when to initiate a section 6(c) hearing process on the proposal, will be determined by the Administrator. This determination will take into account, among other criteria, the existence of sufficient information concerning a proposed future resource action such that the proposal's compliance with statutory requirements and its consistency with the Council's Plan can be adequately assessed.
- b. BPA shall consult with the Council and with representatives from the region prior to the time a section 6(c) review is initiated. Such consultation will address the advisability of modifying BPA's proposal and/or amending the Council's Plan. In addition, BPA shall consult periodically with the Council and representatives of the region with a view to discussing potential proposals to acquire resources within the context of section 6(c).
- c. Given the necessarily preliminary current level of understanding of the types of resource acquisitions that may require review pursuant to section 6(c), the Administrator will initiate, at least once every 5 years, a public policy making concerning the Section 6(c) Policy, including threshold, procedures, and consistency criterion, in order to evaluate evolving understandings of resource acquisitions and to assess the need for changes in this Policy. The result of such public policymaking will be a final action for purposes of judicial review under section 9(e)(5) of the Northwest Power Act, or other applicable laws.

2. Generating Resources

- a. A proposal to acquire or to grant billing credits for a generating resource shall be subject to section 6(c) review if the aggregate megawatts proposed to be acquired or granted billing credits at any one generating resource project constitute more than 50 average megawatts and are acquired or granted billing credits for a period of more than 5 years.
- b. A proposal to acquire or to grant billing credits for a generating resource through a utility system sale shall be subject to section 6(c) review if the aggregate megawatts proposed to be acquired or granted billing credits from the utility for that sale constitute more than 50 average megawatts and are acquired or granted billing credits for a period of more than 5 years.
- c. The aggregate megawatts proposed to be acquired or granted billing credits shall be measured by the Administrator upon consideration of factors including, but not limited to, planned capability measured with generally accepted planning criteria, and the term of the contract for acquisition or for application of billing credits.

3. Generation Programs

- a. A generation program shall be subject to section 6(c) review if the Administrator proposes to one or more entities binding contract offers to acquire or to grant billing credits for more than 50 average megawatts of electric power for a period of more than 5 years:
 - (1) From a single generating resource technology, and
 - (2) At a fixed price or a fixed price formula.
- b. The electric power proposed to be acquired or granted billing credits shall be measured by the Administrator upon consideration of factors including, but not limited to, planned capability measured with generally accepted planning criteria, and the term of the contract for acquisition or application of billing credits.
- c. An individual contract resulting from a generation program which has been reviewed under section 6(c), for purposes other than that provided for in section 9 of this Policy, shall not be subject to further review under section 6(c).

4. Conservation Resources

- a. A proposal to acquire or to grant billing credits for a conservation resource shall be subject to section 6(c) review if the aggregate megawatts proposed to be acquired or granted billing credits under a single contract constitute more than 50 average megawatts and are acquired or granted billing credits for a period of more than 5 years.
- b. The aggregate megawatts proposed to be acquired or granted billing credits shall be measured by the Administrator upon consideration of factors including, but not limited to, the planned savings based upon a reasonably expected penetration of the activities, and the *35926 term of the contract for acquisition or for application of billing credits.

5. Conservation Programs

- a. A conservation program shall be subject to section 6(c) review if the Administrator proposes to one or more entities generic contracts which consist of a set of logically

related activities proposed by the Administrator to capture more than 50 average megawatts of energy savings in a recognized planning sector or subsector for a period of more than 5 years, and which either:

(1) Do not specify particular measures to be installed or implemented, but require an actual delivery of savings for payment; or

(2) Are provided by a single mode of program delivery and consist of a well-defined set of measures, but do not require actual delivery of savings for payment.

b. The energy savings proposed to be acquired or granted billing credits shall be measured by the Administrator upon consideration of factors including, but not limited to, the planned savings based upon a reasonably expected penetration of the activities, and the term of the contract for acquisition or for application of billing credits.

c. An individual contract resulting from a conservation program which has been reviewed under section 6(c), for purposes other than that provided for in section 9 of this Policy, shall not be subject to further review under section 6(c).

6. Requests for Proposals

a. A request for proposals (RFP) issued by the Administrator, which the Administrator has determined does not constitute a binding contract offer, shall not be subject to section 6(c) review.

b. In response to an RFP, the Administrator retains the discretion to acquire or to grant billing credits for the electric power or the energy savings through an acquisition or application of billing credits under sections 2-5, above. In the event of an acquisition or the grant of billing credits under section 3 or 5, the Administrator may choose to expand the program to entities which did not participate in or respond to the RFP.

7. Options to Acquire Major Resources

a. A proposal to purchase an option shall not be subject to section 6(c) review.

b. A proposal to exercise a major resource option shall be subject to section 6(c) review.

8. Section 6(1) Resources

a. A proposal to acquire a major extraregional renewable resource shall be subject to section 6(c) review.

b. Interregional exchanges are not subject to section 6(c) review.

9. Payment or Reimbursement of Investigation and Preconstruction Expenses

a. A proposal to authorize payment of investigation and preconstruction expenses for major resources, for which an agreement or a letter of intent will be signed, identified in the Resource Program is subject to section 6(c) review.

b. A proposal to reimburse investigation and preconstruction expenses of a sponsor, such sponsor having consumers who are end-users of electricity, of a major resource that may be eligible for acquisition but where the project fails prior to completion of the section 6(c) review because of one of the following reasons, is subject to section 6(c) review:

(1) The resource is denied State siting approval or other necessary Federal or State

permits or approvals; or

(2) The investigation demonstrates, as determined by the Administrator, that the resource does not meet the criteria of section 4(e)(1) and the considerations of section 4(e)(2) of the Act or is not acceptable because of environmental impacts; or

(3) After the investigation the Administrator determines not to acquire the resource and the sponsor determines not to construct the resource.

c. A proposal to authorize payment of investigation and preconstruction expenses for the sponsor of any major resource other than those addressed above will be reviewed under section 6(c) on a case-by-case or programmatic basis, as appropriate.

C. Section 6(c) Hearings Procedures

The appendix, incorporated by reference into this Policy, specifies the procedures for the section 6(c) hearings.

D. Consistency

A BPA proposal pursuant to section 6(c)(1) of the Northwest Power Act shall be found consistent with the Northwest Conservation and Electric Power Plan if it is judged to be so structured that it will achieve substantially the goals and objectives of the Plan in effect at the time the proposal is made.

Issued in Portland, Oregon on March 9, 1993.

Randall W. Hardy,

Administrator.

Revised Appendix to **Policy** for **Section 6(c)** of the **Pacific Northwest** Electric Power Planning and Conservation Act

Section 6(c) Hearings Procedures

1. Applicability and Scope

(a) General Procedures. These procedures apply to all proceedings conducted under the procedural requirements contained in Section 6(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), [16 U.S.C. 839d\(c\)](#).

(b) Scope. The scope of all proceedings conducted under these procedures shall be limited to an inquiry into whether the action proposed by the Administrator will achieve substantially the goals and objectives of the Council's Plan.

(c) Waiver. To the extent permitted by law, the Administrator may waive any section of these procedures or prescribe any alternative procedures he determines to be appropriate.

2. Definitions

(a) "Administrator" means the BPA Administrator or the Acting Administrator.

(b) "Agent" means counsel, consultants, witnesses, employees and other

representatives of a person.

(c) "Council" means the members appointed to the Pacific Northwest Electric Power and Conservation Planning Council.

(d) "Hearing Officer" means the official designated by the Administrator to conduct a hearing pursuant to Northwest Power Act Section 6(c).

(e) "Legal Issue" includes any issue rounded on any contractual right or obligation, any of BPA's organic statutes, the Administrative Procedure Act, [5 U.S.C. 551](#), et seq., or the Trade Secrets Act, [18 U.S.C. 1905](#), which has a bearing on the propriety of the action proposed by the Administrator.

(f) "Participant" means any person submitting for the record oral or written comments pursuant to section 6. of these procedures on a major resource action proposed by the Administrator.

(g) "Party" means any person whose intervention is effective under section 5.

(h) "Person" means an individual, partnership, corporation, association, an organized group of persons, a municipality, including a city, county, or any other political subdivision of a state, a state, any agency, department, or instrumentality of a state, a state compact agency or interstate body, a province, or the United States, or any officer, or agent of any of the foregoing acting in the course of his or her employment or agency.

(i) "Record" means the testimony, exhibits, transcripts, notices, comments, briefs, pleadings, and such other materials and information as submitted or developed by the Administrator. The record shall be certified by the hearing officer.

(j) "Record of Decision" means the document, issued by BPA which identifies and resolves each relevant, major issue in the 6(c) hearing; summarizes the factual, legal ***35927** and policy arguments presented by BPA, the parties, and the participants on such issue; and sets forth the Administrator's decision on such issue.

3. Notice of Proposed Action

(a) The Administrator shall publish notice of any proposed action pursuant to section 6(c) in the Federal Register and provide a copy of the notice to:

- (1) The members of the Council and its executive staff;
- (2) The Governor of each State in the Pacific Northwest Region;
- (3) The Administrator's customers; and
- (4) Others the Administrator deems appropriate.

(b) The Administrator may initiate the Section 6(c) process with this notice by indicating a date, not less than 60 days following publication of this notice, on which a public hearing or hearings will be held pursuant to section 6(c). This notice must comply with the requirements of section 4.

4. Initiation of Section 6(c) Process

(a) A Section 6(c) process on the Administrator's proposed major resource action may be initiated by a hearing notice published in the Federal Register. The hearing notice shall:

- (1) specify the proposed major resource action;
- (2) establish a deadline for filing petitions to intervene;
- (3) specify the date on which the Administrator will issue the Record of Decision, which

date shall be used by the hearing officer in establishing the procedural schedule for the hearing;

(4) establish the dates on which the hearing officer will conduct the prehearing conference and commence the 6(c) hearing;

(5) set forth a statement and short explanation of each of the issues to be addressed in the hearing;

(6) state whether the hearing will be conducted pursuant to the provision for expedited hearings procedures, §16; and

(7) provide other information which the Administrator determines to be pertinent to the hearing.

(b) The Administrator shall provide a copy of the notice to the persons identified in section 3(a).

5. Intervention

(a) Filing. A person seeking to become a party in a 6(c) hearing must file a petition to intervene with the hearing officer. A copy of the petition shall be served on BPA's Office of General Counsel/APP.

(b) Contents. The petition shall state the name and address of the person and the person's interests in the outcome of the hearing. Petitioners may designate no more than two persons on whom service will be made. The major resource sponsor, contracting entities, or the Council shall be granted intervention, based on a petition filed in conformity with this section. Other petitioners must explain their interests in sufficient detail to permit the hearing officer to determine whether they have a relevant interest in the hearing.

(c) Time.

(1) Petitions must be filed within the time specified in the section 4. notice for the hearing in question.

(2) Granting an untimely petition to intervene must not be a basis for delaying or deferring any procedural schedule. A late intervenor must accept the record developed prior to its intervention. In acting on an untimely petition, the hearing officer shall consider whether:

(i) the petitioner has a good reason for filing out of time;

(ii) any disruption of the proceeding might result from allowing a late intervention;

(iii) the petitioner's interest is adequately represented by existing parties; and

(iv) any prejudice to, or extra burdens on, existing parties might result from permitting the intervention.

(d) Opposition. Any opposition to an intervention petition shall be filed and served at least 24 hours before the prehearing conference. Opposition to a late intervention petition shall be filed and served within 2 business days after service of the petition.

(e) Application of hearing procedures. Procedures specified in sections 8-14 are available only to parties, and are not available to participants.

6. Participation

Any person who is not a party may become a participant by submitting oral or written recommendations for the record or by testifying in legislative-style hearings when conducted by the Administrator for the purpose of receiving public comment. Oral or

written comments must be submitted to the BPA Public Involvement Office.

7. Prehearing Conference

A prehearing conference shall be held on the date specified in the Administrator's section 4. Federal Register notice. During the conference, the hearing officer shall:

- (a) act on all intervention petitions;
- (b) establish any special procedures the hearing officer considers appropriate, provided that such special procedures conform to BPA's procedures governing proposed major resource actions;
- (c) establish a service list;
- (d) establish a procedural schedule for the entire hearing which may include the scheduling of prefiled testimony; and
- (e) consolidate parties with similar interests into groups for purposes of filing jointly sponsored testimony and briefs and for expediting cross-examination.

8. Discovery

The hearing officer may allow BPA and the parties to any 6(c) hearing to engage in discovery, and be subject to discovery requests, subject to the time available for the hearing and according to the following rules:

- (a) Data requests. Data requests shall be made in writing at the times designated in the procedural schedule. Any relevant information may be requested that is not privileged or unduly burdensome to produce. Requests shall be addressed to counsel for the party to whom the requests are sent (or directly to a party not represented by counsel), and shall be served on all parties to the service list compiled by the hearing officer. Responses to data requests are required to be served on the requesting party or counsel for the requesting party.
- (b) Clarification sessions. The hearing officer may schedule one or more transcribed sessions for the purpose of allowing parties to question witnesses about the contents of their prepared testimony and the derivation of their recommendations and conclusions. The procedural schedule shall require the BPA and the parties wishing to participate in clarification of a witness' testimony serve all data requests pertaining to that testimony at least 3 business days prior to the session. Witnesses shall have the option of providing answers to data requests during the clarification session. If a witness is unable to answer a given question during the clarifying session, the answer to that question shall be provided in accordance with paragraph (a) of this section.
- (c) Objections to discovery. Objections to data requests or to questions asked during clarification sessions shall be submitted within the time specified in the procedural schedule. Objections must explain the grounds on which response is being withheld.
- (d) Motions to compel. Anyone whose data request or clarifying question is not answered may file a motion with the hearing officer to compel an answer. The movant must certify that it first attempted to resolve the objection informally with the objecting party. Motions to compel must be made within the time specified in the procedural schedule.
- (e) Privileged Information. The hearing officer may issue protective orders or make in camera inspection of documents as necessary to protect copyrighted, proprietary, or otherwise privileged information. The hearing officer may not order release of

documents in BPA's possession withheld on the basis of exemptions to the Freedom of Information Act, [5 U.S.C. 552](#), or the trade Secrets Act, [18 U.S.C. 1905](#).

(f) Sanctions. The hearing officer may remedy any refusal to comply with an order compelling answer to a data request or clarification question by:

(1) striking the testimony or exhibits to which the question or request relates; or
(2) limiting discovery or cross-examination by the party refusing to answer or respond.

(g) Copies. Any party wishing copies of data responses should request them from the party submitting the response.

9. 6(c) Hearing Schedule

(a) General Rule. Consistent with fairness to the parties and participants, the hearing officer may establish procedures and conduct hearings as necessary to develop a full and complete record and to receive public comment and argument related to the proposed major resource action. The Record of Decision in 6(c) hearings shall be issued on the date set forth in the notice issued under section 4., except as provided in paragraph (b) of this section.

(b) Extensions. Only the hearing officer may request the Administrator to extend the hearing limit, on a showing of good cause by a party. Upon a determination of the hearing officer that a party's showing has merit and is not dilatory, the hearing officer may request in writing an extension of time from ***35928** the Administrator. Submission of a request shall not have the effect of staying the proceedings. The Administrator shall notify the hearing officer and the parties of this determination within 4 days thereafter.

10. Testimony and Exhibits

(a) General Rule.

(1) The opportunity for refutation or rebuttal on any material submitted by any other party or by BPA shall be provided to the parties as the hearing officer deems appropriate. Except as provided in paragraph (b), witnesses shall submit all testimony and exhibits at the times specified in the procedural schedule. Oral testimony will be permitted only by level of the hearing officer.

(2) Any rebuttal to BPA's direct case must be contained in a party's direct testimony, which shall also contain any affirmative case that party wishes to present. Any subsequent rebuttal testimony permitted by the hearing officer shall be limited to rebuttal of the parties' direct cases. In lieu of cross-examination, the hearing officer is encouraged to allow the filing of surrebuttal testimony on an issue.

(3) Written testimony must have line numbers inserted in the left-hand margin of each page. It is the responsibility of each party to obtain from the hearing officer's clerk exhibit numbers for display on prefiled testimony and exhibits.

(4) The hearing officer shall reject exhibits and other documentation of excessive length. Parties may only introduce into evidence excerpts or summaries of documentation, which exclude irrelevant or redundant material.

(b) Items by Reference. Other testimony, exhibits, or studies may be designated as items by reference in any proceeding. Items by reference should not be physically included in the record, unless the hearing officer so orders.

(c) Official Notice. The hearing officer may take official notice of any matter that may be judicially noticed by federal courts, or any matter about which BPA is expert.

(d) Motions to Strike. Motions to strike prefiled testimony and exhibits shall be filed within 7 days after service. Answers to the motion may be made; however, the movant may not reply to the answer.

(e) Record of Participants. Testimony and comments received pursuant to section 6. shall be compiled in a separate section of the record.

(f) Sanctions. The hearing officer may reject or exclude all or part of any evidentiary material or pleading not submitted in accordance with this section.

11. Hearing

(a) Panels. The hearing officer may permit a party's witnesses to testify in a panel, provided that each panel member (1) has submitted a statement of qualifications, and (2) is under oath. Any panel member may respond to a cross-examination question.

(b) Cross-Examinations.

(1) Cross-examination shall be provided as the hearing officer deems appropriate and shall be limited to issues which the hearing officer determines there are material disputes of fact or to issues identified in statement of issues adopted by the hearing officer. The hearing officer may impose reasonable time limitations on the cross-examination of any witness.

(2) Only counsel for a witness may object to questions asked during cross-examination, except in instances of friendly cross-examination or where the objector can demonstrate that answers would unduly prejudice its interests.

(3) Where parties have substantially similar positions, the hearing officer may appoint lead counsel to conduct cross-examination.

(4) The hearing officer shall not permit cross-examination on issues where it is clear that the questioner's position is not adverse to that of the witness, viz., friendly cross-examination.

(c) Cross-Examination Exhibits.

(1) Documents used during cross-examination of any witness must be submitted to the hearing officer and to the witness' counsel 3 business days prior to the date set for cross-examination.

(2) If a document used as a cross-examination exhibit contains material not offered as evidence, the party utilizing the exhibit must:

(i) Plainly designate the matter offered as evidence; and

(ii) Segregate and exclude the material not offered in evidence, to the extent practicable.

(d) Stipulations. The hearing officer may receive into evidence stipulations on any issue of fact.

(e) All other matters relating to conduct of hearings are left to the discretion of the hearing officer.

12. Briefs

(a) General Rule.

(1) At the conclusion of the evidentiary portion of a hearing, the hearing officer may allow each party to submit a brief. The purpose of a brief is to identify separately each legal, factual, and policy issue to be resolved by the Administrator and present all arguments in support of a party's position on each of these issues. The brief should also

rebut contentions made by adverse witnesses in their prepared testimony.

(2) All evidentiary arguments in briefs must be based on cited material contained in the record. Materials not admitted into evidence shall not be attached to any brief. Incorporation by reference shall not be permitted. The hearing officer may impose page limitations on any brief.

(b) Sanctions. The hearing officer shall not admit into the record any brief that does not conform to this section.

13. Oral Argument

Any opportunity for parties to present oral argument may be provided at the discretion of the Administrator.

14. Service of Documents

BPA and each party shall provide a copy of all motions, briefs, pleadings and prefiled materials to all persons listed in the service list compiled by the hearing officer. Until a service list is adopted by the hearing officer under section 6., service on parties may be made by service on BPA General Counsel/APP. Parties may designate no more than two persons on whom service shall be made. The Administrator may designate additional persons on whom service will be made. Participants shall not be included on the service list. Service of requests for data and responses to such requests is governed by section 8(b) and (h).

15. Record of Decision

(a) Determinations. The Administrator shall make public a written decision which contains the following two determinations;

(1) the proposed action satisfies the requirements of subsection (a), (b), (f), (h), and (l), or (m) of Section 6 of the Northwest Power Act, as appropriate; and

(2) either:

(A) the proposed action is consistent with the Council's Plan, or in the case of subsection (f), the proposed action is probably consistent with the Council's Plan; or
(B) the proposed action is inconsistent with the Council's Plan; or in the case of subsection (f), the proposed action is probably inconsistent with the Council's Plan; or
(C) notwithstanding the proposed action's inconsistency with the Council's Plan a finding that the proposed action is needed to meet the Administrator's obligations under the Northwest Power Act.

(b) Submission of Record. The Administrator shall promptly provide a copy of the Record of Decision to the Council.

(c) Service of Record. The Administrator shall promptly serve copies of the Record of Decision on all parties to the proceeding. Copies of the Record of Decision shall be made available to participants and the public upon request to BPA's Public Involvement Manager.

16. Expedited Hearings Procedures

(a) General Rule. The record of decision in a section 6(c) hearing, conducted under this

section, shall be issued within 90 days after the date of the prehearing conference, except as provided in paragraph (b) of this section. Consistent with fairness to the parties, the hearing officer shall establish the procedures or special rules necessary to satisfy the Administrator's expedited schedule.

(b) Extensions. Any party to the 6(c) hearing may request that the hearing officer petition the Administrator for an extension of the 90-day hearing limit. The party must show that the request is for good cause and is not dilatory. Upon such a showing, the hearing officer shall submit a written request to the Administrator. Submission of a request shall not have the effect of staying the proceedings. The Administrator shall notify the hearing officer and the parties of his determination within four days after receipt of the hearing officer's request.

(c) Special Procedure. Oral argument will not be heard in expedited 6(c) proceedings, unless all parties agree to substitute oral argument for a brief on exceptions.

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