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City of Idaho Falls v. Fuhriman Amicus Brief Dckt. 36721

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE THE VALIDITY OF THE POWER SALES
AGREEMENT AND THE CREDITWORTHINESS
AGREEMENT BETWEEN THE CITY OF IDAHO
FALLS AND THE BONNEVILLE POWER
ADMINISTRATION

The CITY OF IDAHO FALLS,

Petitioner - Respondent

v.

The Honorable JARED D. FUHRMAN,
Mayor to the City of Idaho Falls,

Intervenor-Appellant

Docket No. 36721-2009

BRIEF OF AMICI CURIAE

*Appeal from In re the Validity of the Power Sales Agreement and the Creditworthiness
Agreement between the City of Idaho Falls and the Bonneville Power Administration*

in the

Seventh Judicial District of the State of Idaho, in and for the County of Bonneville

Case No. CV 09-1736

Honorable Darren B. Simpson, Presiding District Judge

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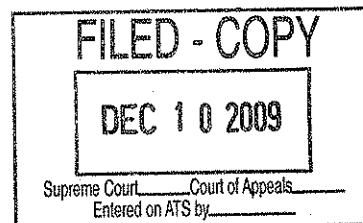
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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE THE VALIDITY OF THE POWER SALES
AGREEMENT AND THE CREDITWORTHINESS
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The Honorable JARED D. FUHRMAN,
Mayor to the City of Idaho Falls,

Intervenor-Appellant

Docket No. 36721-2009

BRIEF OF AMICI CURIAE IN RESPONSE TO
APPEAL OF JUDICIAL CONFIRMATION OF
RENEWAL POWER SALES AGREEMENT

This Brief is filed by the following eight Idaho Cities that operate and maintain electric distribution utilities for the benefit of their citizens; City of Albion, City of Bonners Ferry, City of Heyburn, City of Minidoka, City of Plummer, City of Rupert, City of Soda Springs, and the City of Weiser (the "Power Cities"). It is filed in response to the appeal by the Honorable Jared Fuhrman, Mayor of the City of Idaho Falls, Idaho, (the "Mayor") of the decision of the Seventh Judicial District Court of Bonneville County, State of Idaho (the "District Court") confirming the validity of the Power Sales Agreement, Contract No. 09PB-13056 (the "Renewal Power Sales Agreement") between the City and the United States of America, Department of Energy, acting

by and through the Bonneville Power Administration (“Bonneville”), pursuant to the Judicial Confirmation Law, Title 7, Chapter 13, Idaho Code, as amended.

I. Table of Contents

TABLE OF CASES AND AUTHORITIES2

STATEMENT OF THE CASE3

ADDITIONAL ISSUES PRESENTED ON APPEAL.....4

ARGUMENT4

THE DISTRICT COURT’S HOLDING SHOULD BE AFFIRMED BECAUSE THE PAYMENT OBLIGATION OF THE CITY OF IDAHO FALLS UNDER THE RENEWAL POWER SALES AGREEMENTS AND OF THE POWER CITIES UNDER THE REPLACEMENT POWER SALES AGREEMENTS ARE “ORDINARY AND NECESSARY EXPENSES” WITHIN THE MEANING OF ART. VIII, § 3 OF THE IDAHO CONSTITUTION4

CONCLUSION.....15

II. TABLE OF CASES AND AUTHORITIES

Cases

Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983) 5, 9

Bd. of County Comm’rs of Twin Falls County v. Idaho Heath Facilities Authority, 96 Idaho 498, 531 P2d 588 (1974) 10

City of Boise v. Frazier, 143 Idaho 1, 137 P.3d 388 (2006)..... 9

City of Pocatello v. Peterson, 93 Idaho 774, 473 P.2d 644 (1970) 10

I.W. Hart, Proceedings and Debates of the Constitutional Convention of Idaho 587 (1912)..... 10

In re University Place/Idaho Water Center Project---Idaho---, 199 P.3d 102, 122 (2008) 15

Statutes

Idaho Constitution Art. VIII, § 3 4, 5, 9, 11, 12

Section 50-325, Idaho Code..... 10

Section 50-342, Idaho Code..... 3, 10

III. STATEMENT OF THE CASE

The Power Cities concur in the Mayor's statement of the case. In addition, the Power Cities each affirm that they have for decades and today operate and maintain electric utility systems that distribute electricity throughout the respective cities and to nearby areas. Seven of the eight Power Cities rely exclusively on the federal government, through the Bonneville Power Administration ("Bonneville"), for the wholesale supply of electricity to serve their citizens.¹ The Power Cities are statutory preference customers of Bonneville and most have purchased wholesale electric power from Bonneville since at least 1963. Bonneville provides comparatively inexpensive wholesale electricity to the Power Cities, produced primarily at hydroelectric facilities along the Columbia River System. These generating stations (the "Federal Power System") include 37 hydroelectric facilities on the Columbia River and its tributaries that have been in operation for many years, in some cases since the 1930s, as well as a large nuclear generating station.² All eight Power Cities have existing "Full Service Power Sales Agreements" with Bonneville that expire on September 30, 2011, and all eight have executed or intend to execute new 17-year Power Sales Agreements that will act to replace the current Bonneville Power Sales Agreements on October 1, 2011 ("Replacement PSAs").

As is the case with the City of Idaho Falls, the Replacement PSAs between Bonneville and the Power Cities may be insufficient, over time, to meet the entire wholesale power needs of the Power Cities from the Federal Power System. Under the new power supply regime recently

¹ The City of Bonners Ferry, like the City of Idaho Falls, owns certain hydroelectric generating facilities, the output of which is also sold to Bonneville as authorized by Idaho Code § 50-342.

² In the Renewal Power Sales Agreement, the Federal Power System is defined as the "Tier 1 System Resources" and consist of the specific generating facilities listed in Bonneville's Tiered Rate Methodology. The complete Tiered Rate Methodology is available on BPA's website: http://www.bpa.gov/corporate/ratecase/2008/2008_TRM/Docs/TRM_11-10-08.pdf (last visited March 12, 2009).

established by Bonneville, each Power City is individually responsible for meeting its own customer and demand growth. Under the Replacement PSAs, a Power City can enter into a separate commitment to purchase its supplemental power requirements from Bonneville at market-based rates (referred to in the Replacement PSAs as the “Tier 2” rate) or a Power City can independently contract with alternative suppliers to meet its supplemental power requirements. Consequently, the Power Cities envision a future need to sign additional wholesale power supply agreements that are structured to timely take advantage of wholesale power market opportunities, if and when those opportunities arise, in correlation with a Power City’s customer and electric load growth.

IV. ADDITIONAL ISSUES PRESENTED ON APPEAL

None.

V. ARGUMENT

THE DISTRICT COURT’S HOLDING SHOULD BE AFFIRMED BECAUSE THE PAYMENT OBLIGATION OF THE CITY OF IDAHO FALLS UNDER THE RENEWAL POWER SALES AGREEMENTS AND OF THE POWER CITIES UNDER THE REPLACEMENT POWER SALES AGREEMENTS ARE “ORDINARY AND NECESSARY EXPENSES” WITHIN THE MEANING OF ART. VIII, § 3 OF THE IDAHO CONSTITUTION.

Article VIII, § 3 of the Idaho Constitution provides in pertinent part, as follows:

No city shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof... Any indebtedness or liability incurred contrary to this provision shall be void: *Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state....*(emphasis added).

The Power Cities believe that payment obligations under the Replacement PSAs constitute “ordinary and necessary expenses” within the meaning of the proviso to Art. VIII, § 3. The Mayor, on the other hand, argues that while such contract based power supply expenses are “ordinary” with respect to operating an electric distribution system, they are not “necessary” within the meaning of Art. VIII, § 3. The Power Cities respectfully disagree with the Mayor on this point and are of the belief that the Mayor erroneously interprets *Frazier*³ as establishing a bright line test for the “necessary” prong of Art. VIII, § 3’s proviso clause, when in fact the court’s reference to “urgency” was merely by way of illustration rather than mandating an element of the “necessary” analysis.

A. *ASSON* ANALYSIS OF POWER PURCHASE AGREEMENTS AS “ORDINARY AND NECESSARY”

In *Asson v. City of Burley* the Idaho Supreme Court addressed the validity of the payment obligations of five Idaho cities to the Washington Public Power Supply System (“WPPSS”) under a Participants’ Agreement under Art. VIII, § 3.⁴ The *Asson* case is the only reported decision of the Supreme Court that considers whether payments by an Idaho city under a power sales agreement are “ordinary and necessary expenses” under the proviso clause. The *Asson* court held that the unconditional obligations of the cities to pay their percentage shares of the costs incurred by WPPSS in developing, financing and constructing Projects No. 4 and 5, including debt service costs, regardless of whether Projects No. 4 and 5 were constructed and whether or not the cities received any power, were not “ordinary and necessary expenses.” Regarding Projects No. 4 and 5, the Court stated:

It was a colossal undertaking, fraught with financial risk. It was open-ended: the cities could not have known what their ultimate debt or liability would be. One cannot stretch the meaning of “ordinary” to include an expense for which there could not be,

³ 143 Idaho 1, 137 P.3d 388 (2006)

⁴ 105 Idaho 432, 670 P.2d 839 (1983).

until years later, certainty of limits. The funding agreement left the Idaho cities with extensive indebtedness – yet no ownership, and minimal control, *and only the possibility of electricity*. Further, the agreement was for the construction of nuclear power plants, at an expense unencountered in the history of these cities’ power ventures. One could conceive of a number of words to describe this undertaking, but “ordinary” would not be one of them.⁵

More importantly for this case, the Supreme Court contrasted its holding regarding Projects No. 4 and 5, with the net billing agreements associated with the Washington Public Power Supply System Projects No. 1, 2, and 3, which were not at issue in the *Asson* case. The court stated that because the obligations under the latter agreements were so different from the open-ended financial guarantee embedded in the Participants’ Agreement for Projects No. 4 and 5 (“underwriting another entity’s indebtedness in return for merely the possibility of electricity”), its holding would be inapplicable to Projects No. 1, 2, and 3, had those agreements been before the court:

The cities’ authorization to enter into Project 1, 2 and 3 agreements is not at issue, and as we have pointed out, the two sets of agreements are sufficiently different to make much of our holding *not applicable even by analogy* to the earlier agreements, which we perceive to be in the nature of *power purchase contracts more than long-term debt obligations*.⁶

In essence, the court suggested, though it did not hold, that *bona fide* power purchase arrangements that provide for the delivery of electrical power and payment for services rendered would constitute an “ordinary and necessary” municipal expense. The Replacement PSAs at issue here fall into this latter category established by *Asson* of *bona fide* power purchase agreements.

A discussion of the differences between the two sets of agreements is instructive to understanding the court’s view that the agreements related to Projects No. 1, 2, and 3 would

⁵ *Id.* at 443, 670 P.2d at 850 (emphasis added).

⁶ *Id.* (emphasis added).

qualify under the proviso. The Court observed that prior to entering into the Participants' Agreements for Projects No. 4 and 5, the cities had entered into net billing agreements with WPPSS and Bonneville with respect to Projects No. 1, 2 and 3.⁷ Under the net billing agreements, the cities purchased from WPPSS shares of project capability in Projects No. 1, 2 and 3 and, like the Participants' Agreement from Projects No. 4 and 5, agreed to make payments to WPPSS on an absolute and unconditional basis (*i.e.*, "come Hell or High Water"). However, unlike Participants' Agreement from Projects No. 4 and 5, the net billing agreements contained provisions that mitigated the cities' risk that Projects No. 1, 2 and 3 would not be completed. Under the net billing agreements, the cities assigned their project capability shares to Bonneville, which agreed to incorporate the output available to it from the assigned project capability shares into its existing power supply resources (the Federal Power System) that it used to provide power supply to the cities under the power sales agreements then in effect. Bonneville agreed to credit its regular power bills to the cities in an amount equal to their payments to WPPSS regardless of whether the plants ever became operable.⁸ In effect, Bonneville, not the cities, funded Projects No. 1, 2 and 3 and effectively protected the cities from the direct construction and financing risks associated with these projects.⁹ Because the net billing agreements integrated Projects No. 1, 2 and 3 into Bonneville's existing power supplies and power sales agreements with the cities, the cities were insulated from the direct construction risks associated with the projects, and were thus guaranteed that they would always receive power in exchange for the payments they made to Bonneville and WPPSS, regardless of whether Projects No. 1, 2 and 3 were completed or operable. The cities would never be in the situation of making payments in exchange for "merely the possibility of electricity."¹⁰

⁷ *Id.* at 435, 670 P.2d at 842. The court also noted that the cities had statutory authorization under Section 50-342, Idaho Code, as amended to enter into net billing arrangements.

⁸ "Each participating utility pays WPPSS its share of the costs of developing the projects, and BPA gives the participant a credit in the amount of such payment on the BPA bill for the power purchased by the participant." *Id.*

⁹ *Id.* at 434-35, 670 P.2d at 838-39.

¹⁰ *Id.*

However, it should be noted that the net billing agreements did not completely insulate the cities from all of the risks associated with Projects No. 1, 2 and 3. The cities still bore the risk that if these Projects were not completed, their power supply costs from Bonneville would increase and did increase in fact.¹¹

In contrast to the WPPSS Participants' Agreements, no "dry hole" financing construction risk is present in the Replacement PSAs. They are merely contracts for the purchase of power; they do not fund the construction of new power generation projects. Moreover, even though a Power City is obligated to purchase power for the term of the contract, that City is only obligated to pay for power supplies "made available" for Bonneville. There is no realistic possibility that a Power City will not receive any power from the existing and operating generating resources comprising the Federal Power System. The generating facilities that Bonneville has committed to meet its power supply obligations of the Power Cities are not proposed or planned facilities, but are the same generating resources that it has used to meet its supply obligations to the Power Cities since 1963 and under the existing 2001 PSAs. Bonneville has no statutory authority to construct any generating facilities, and is required to use only the existing and operating facilities that comprise the Federal Power System, to meet its power supply obligations under the Replacement PSA. No new generating facilities will be constructed or financed by Bonneville in order to enable it to provide electric service to the Power Cities. Unlike the WPPSS Participants' Agreement which provided for "merely the possibility of electricity," the Power Cities have every assurance that they will at all times receive a continuous flow of electricity from Bonneville under the Replacement PSAs.

¹¹ Under the net billing agreements, Bonneville was obligated to provide billing credits to the cities regardless of whether Projects No. 1, 2 and 3 were completed, operable or operating. As a result, Bonneville provided (and continues to provide) billing credits in exchange for only the power from completed Project No. 2. This resulted in an increase in Bonneville's net power supply costs and increased billings to all of the cities.

Further, if a Power City is unable to take power from Bonneville due to “Uncontrollable Force” (as defined in the Replacement PSAs), that City’s obligation to pay is suspended. There is no “dry hole” risk associated with the Replacement PSAs. While various factors could affect the cost-based rate to be charged by Bonneville under the Replacement PSAs (referred to as the “Tier 1 Rate”), these factors do not include the risks and costs associated with constructing new generating facilities as discussed above. Thus, the payment obligations of the Power Cities under the Replacement PSAs are even more “ordinary” than under the net billing agreements for Projects No. 1, 2, and 3.

The Power Cities submit that the *Asson* decision makes it clear that a pay-as-you-go contract for power supply services, not involving an unconditional obligation to make payments regardless of whether service is provided, constitutes an “ordinary and necessary expense” of a municipal electric system. Here, the Power Cities have for decades been in the business of buying wholesale power from Bonneville and distributing that power to city residents and businesses. The Power Cities pay Bonneville for services rendered out of the rates paid by their retail customers. Such power supply agreements, in the words of *Asson*, are not “in the nature of . . . long term debt obligations.”¹²

B. *CITY OF BOISE V. FRAZIER* AND THE DEFINITION OF “ORDINARY AND NECESSARY”

In *City of Boise v. Frazier*¹³ the Court found, based on the facts before it, that Boise City’s proposed parking garage was *not* an ordinary and necessary expense because the parking facility did not satisfy the “necessary” prong of the proviso clause. *Frazier* suggested that a “required urgency” must exist for an expense to be “necessary” under Article VIII, § 3.¹⁴ It

¹² *Id.* at 443, 670 P.2d at 850

¹³ 143 Idaho 1, 137 P.3d 388 (2006).

¹⁴ *Id.* at 6, 137 P.3d at 393.

therefore held that “the City must obtain the consent of the voting public before entering into the proposed financing agreement.”¹⁵

The *Frazier* court also specifically stated “[w]hether a proposed expenditure is ordinary and necessary depends on the surrounding circumstances of each case.”¹⁶ This suggests the court’s statement regarding the “urgency” factor was not a bright-line rule applicable to all government expenses, but rather was one factor, among others, that could satisfy the “necessary” prong and that the ultimate determination will depend upon the particular facts of the case. Importantly, *Frazier* did not overrule any of the court’s prior decisions, nor did the court suggest that the *Frazier* rule superseded any of the court’s prior Art. VIII, § 3 precedent.

The *Frazier* court specifically acknowledged that earlier Art. VIII, § 3 cases were correctly decided even where “urgency” was not a factor. For example, the *Frazier* court acknowledged that “expenses incurred in the repair and improvement of existing facilities can qualify as ordinary and necessary expenses.”¹⁷ Both of the cases on which the *Frazier* court relied for that proposition, *City of Pocatello v. Peterson* and *Bd. of County Comm’rs of Twin Falls County v. Idaho Health Facilities Authority*, discuss the role public safety plays in the analysis. However, neither case discussed any sort of “urgency” or “emergency” requiring that the expense be made in the designated year.¹⁸ This led to the *Frazier* court’s acknowledgement that the “urgency” which it had associated with the necessary prong was a malleable concept and that various factors – some of which have nothing to do with “immediacy” or “emergency” – may satisfy the “necessary” prong of the proviso’s test. “The required urgency can result from a *number of possible causes, such as* threats to public safety, the need for repairs, maintenance, or preservation of existing property, or a legal obligation to make the expenditure without delay.”¹⁹

¹⁵ *Id.*

¹⁶ *Id.* at 7, 137 P.3d at 394.

¹⁷ *Id.* at 6, 137 P.3d at 393 (citing *Bd. of County Comm’rs of Twin Falls County*, 96 Idaho 498, 531 P.2d 588 and *Peterson*, 93 Idaho 774, 473 P.2d 644).

¹⁸ See 93 Idaho 774, 473 P.2d 644 and 96 Idaho 498, 531 P.2d 588.

¹⁹ *Frazier*, 143 Idaho at 6-7, 137 P.3d at 393-94 (emphasis added) (citations omitted).

It is important to note that the list of factors which the *Frazier* court stated could stand in the place of “urgency” was illustrative, *not* exclusive.

The Power Cities submit that the specific holding of *Frazier* is limited to bonds, financing leases and other arrangements that finance large, capital projects or “special indebtedness: as contemplated by the Framers of the Idaho Constitution.”²⁰ In contrast, the Power Cities submit that *Frazier*’s holding is inapplicable to service contracts for wholesale power supplies that are essential to enable the Power Cities to continue to deliver reliable and economic utility services under the Replacement PSAs. The electric utility services provided by each of the Power Cities is necessary for our modern way of life and promotes and protects the health, safety and welfare of each City’s citizens and commerce. Idaho statutes authorize the Power Cities to provide, own, and operate power distribution systems.²¹ Providing electrical power to a City’s residents, like providing water, sewer and sanitation services, is a core governmental function. Execution of the Replacement PSAs are essential to the a Power City’s ability to fulfill that core governmental function, without which it would be unable to provide a stable, reliable and economical source of electricity for its citizens.

C. *THE POWER CITIES’ NEED TO SIGN FUTURE SUPPLEMENTAL PSAs.*

Equally important will be the ability of the Power Cities to execute supplemental power supply agreements (“Supplemental PSAs”) that extend beyond a single year when load conditions dictate and favorable market opportunities exist. In order to understand the importance of this need for Power Cities to periodically execute Supplemental PSAs, it is worthwhile briefly examining the legislative facts concerning the operation of Bonneville as the historical wholesale power supplier of the Power Cities, and how the future is about to change.²²

²⁰ I.W. Hart, *Proceedings and Debates of the Constitutional Convention of Idaho 587* (1912) [comments of Delegate Claggett].

²¹ Sections 50-325, 50-342, Idaho Code, as amended.

²² See *McCormick on Evidence*, § 331 (2nd ed. 1972) for a discussion on the ability of an appellant court to take judicial notice of and consider legislative facts when deciding upon the constitutionality of a statute, statutory interpretation or extension or restriction of a common law rule upon grounds of public policy. The author opines

As noted earlier, Bonneville provides power supply to the Power Cities and its other preference customers from thirty-one existing federal hydroelectric projects operated by the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers, supplemented by several existing non-federal hydroelectric and thermal projects in the Pacific Northwest.²³ This Federal Power System, as augmented by a relatively small amount of wholesale market purchases, is the “Tier 1” generating pool or “system capacity” of resources available for Bonneville’s existing preference customers – including the Power Cities – at cost.²⁴

Bonneville will in 2010 establish a High Water Mark (“HWM”) of electrical load for each of its preference customers, including the Power Cities. The HWM defines the amount of a preference customer’s load that can be served by the Federal Power System.²⁵ The sum of the preference customer’s HWMs establishes the maximum “claim” on the Tier 1 resources. The Tier 1 resources are then “allocated” to each preference customer for each rate period under the Replacement PSAs based on a ratio of that customer’s HWM to the total of all HWMs. It is expected that the allocation of Tier 1 resource to each preference customer will be slightly less than its actual power supply requirements, and Tier 1 resources will not be able to serve any new customers or load growth of the preference customer.

The power supply requirements of the preference customers not met by Bonneville’s Tier 1 resources are referred to as “Tier 2” loads. A Power City can meet its Tier 2 load obligation above the HWM by purchasing power: (i) from non-federal resources (i.e., the wholesale power

that cases involving such decisions cannot be decided adequately without some view by the Court of the policy considerations and background upon which the validity of a particular constitutional provision, statute or rule is grounded.

²³ 2008 BPA Facts at: http://www.bpa.gov/corporate/about_BPA/Facts/FactDocs/BPA_Facts_2008.pdf

²⁴ See *Regional Dialogue Guidebook - Background on Products, Rates and Resource Support Services available to BPA’s Public Utilities*, Updated February 8, 2008.

http://www.bpa.gov/power/PL/RegionalDialogue/Implementation/Documents/2008/2008-02-08_RDproductsratesguidebook_Revised.pdf; See Also: BPA Long-Term Regional Dialogue Final Policy, July 2007, http://www.bpa.gov/power/PL/RegionalDialogue/07-19-07_RD_Policy.pdf

²⁵ Chapter 12, *Bonneville’s Obligations*, Draft *Sixth Power Plan* of the Northwest Power and Conservation Council, Sept. 2009, p. 12-5; http://www.nwccouncil.org/energy/powerplan/6/Ch12_090309.pdf

market), (ii) from Bonneville at a rate that reflects Bonneville's marginal cost of acquiring additional power, or (iii) through a mix of Bonneville produced power and non-federal resources.²⁶

The amount of Tier 2 power needed by the Power Cities over the 17 year life of the Replacement PSAs will change for each rate period, and will be influenced by two variables: load growth (or loss of load) of a Power City and generation losses or reductions of the Federal Power System. The Federal Power System's generating capacity has been reduced in the past and is at risk for future reductions, due to a variety of factors. These risks include: (i) loss of the four main stem Snake River generating stations for anadromous fish passage purposes (i.e., "dam breaching")²⁷, (ii) loss of or operating restrictions placed on the Hanford nuclear generating facility, (iii) climate change mitigation measures requiring the bypass of water around generating turbines and/or reducing the amount of water available for electrical generation,²⁸ and (iv) force majeure type events affecting one or more generating resources of the FCRPS.²⁹

For electric rate setting purposes the Replacement PSAs are broken into three year rate periods, the first rate period running from October 1, 2011 until September 31, 2014.³⁰ For the first rate period Bonneville projects that the total of the preference customers' HWM will exceed Bonneville's Tier 1 generating capacity. Consequently, many of Bonneville's preference customers will have a Tier 2 power supply need at the onset of the Renewal PSA on October 1, 2011.

²⁶ *Id.*

²⁷ See US Army Corps of Engineers 2002 Report, Lower Snake River Juvenile Salmon Migration Feasibility Report/Environmental Impact Statement; http://www.nww.usace.army.mil/lsr/final_fseis/study_kit/summary.pdf

²⁸ Appendix L, *Climate Change and Power Planning*, Draft *Sixth Power Plan* of the Northwest Power and Conservation Council, Sept. 2009; http://www.nwccouncil.org/energy/powerplan/6/Ch12_090309.pdf

²⁹ See Master Regional Dialogue Contract Template, Uncontrollable Forces, § 21, p. 50, http://www.bpa.gov/power/pl/regionaldialogue/implementation/Documents/2008/2008-07-25_thru_29/2008-07-25_LoadFollowing_Tmplt_Clean.doc

³⁰ Regional Dialogue Policy and Guidebook, *Supra.*

The Power Cities have all signed Load Following Replacement PSAs with Bonneville (Under the Load Following PSAs, Bonneville will deliver power to meet the requirements of each Power City's electric system, up to its High Water Mark allocation). As Load Following customers each Power City must make periodic decisions on how it intends to acquire additional Tier 2 power. Each Power City was required to elect by November 1, 2009 a Tier 2 power supply alternative for the first rate period of 2011 – 2014 under the Replacement PSAs. Attachment 1 hereto is a document prepared by Bonneville entitled "*Exhibit C: Tier 2 Load-Following Choices*" which provides a visual flow-chart of the Tier 2 decisions that will be made by the Power Cities to acquire Tier 2 power.

All of the Power Cities have notified Bonneville that they would like Bonneville to be the Tier 2 power supplier for the first three-year rate period. All but one of the Power Cities have elected the "Short Term" Load Following Option for Tier 2 resource needs: meaning that seven Power Cities have preserved the option during the first three-year rate-period under the Replacement PSA to seek more advantageous non-federal Supplemental PSAs for Tier 2 power for subsequent rate periods.³¹

The November 1, 2009 Tier 2 election is the first in a series of Supplemental PSA decisions – and commitments – each Power City will need to make over the life of the Replacement PSA. Supplemental PSA opportunities may require a Power City to act on relatively short notice, ideally when wholesale market conditions are most favorable, or when seasonal demands necessitate and may involve commitments that extend beyond a City's current budget year. It is likely that it will be most advantageous for a Power City to enter into multi-year Supplemental PSAs to provide greater cost certainty and reduced administrative expenses.

³¹ For a more detailed explanation of these Tier 2 elections, see the two following documents prepared by Bonneville: (i) Attachment 2 – *November 1st Elections [for] Load Following Purchasers*, and (ii) Attachment 3 - *November 1, 2009 Notice Deadline Load Service Election Checklist for Load Following Customers*.

The practicality of scheduling and holding multiple ratification elections before acting to secure a favorable wholesale power market purchase would invariably result in forgone market purchase opportunities and the unenviable (and potentially disastrous) position of having to purchase supplemental power from the short term/spot market, on a rotating basis.

The barrier the Power Cities face is that each Bonneville Tier 2 notice (including the recent one of November 1, 2009) and every non-federal Supplemental PSA could be considered an “indebtedness or liability” subject to the requirements of Art. VIII, § 3 and the *Frazier* implication that an election should be held. But, there may never be a realistic opportunity to hold an election approving a Supplemental PSA, while still holding onto the market opportunity. Consequently, while the practicability of holding an election is not a litmus test under Art. VIII, § 3, it is important that the present case confirm the Power Cities’ understanding that payment obligations under a *bona fide* power purchase agreement (*i.e.*, not involving any dry-hole risk or unconditional payment obligation) constitute “ordinary and necessary expenses” under the proviso clause of Art. VIII, § 3. This Court’s recognition that *bona fide* power purchase agreements are not subject to the requirements of Art. VIII, § 3 will provide the Power Cities with the assurance that they will not have to attempt the “virtual impossibility” of presenting each of its many supplemental power contracts to the citizens for a vote.³²

VI. CONCLUSION

Frazier notwithstanding, this Court can find that the Replacement PSAs are an “ordinary and necessary” expense without a finding of “emergency” or “urgency.” Rather, as determined in *Asson*, the Replacement PSAs are not to be considered “in the nature of long term debt obligations.”

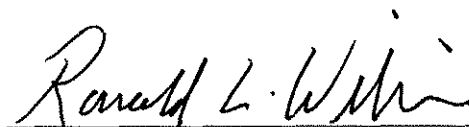
³² See *In re University Place/Idaho Water Center Project --- Idaho ---*, 199 P.3d 102, 122 (2008) (J. Jones, J., specially concurring).

The provision of reliable, low cost supplies of electricity to residential, commercial and industrial customers is necessary to promote and protect the public welfare and the local economy and core to the very mission of the Power Cities. The purchase of wholesale power supplies is no different than providing water, sewer or sanitation services, or any other routine “pay-as-you-go” expense associated with the regular operation of municipal government and the provision of essential governmental services.

The Replacement PSAs are an “ordinary and necessary expense authorized by the general laws of the state” and therefore exempt from the voting requirements of Art. VIII, § 3. The Replacement PSAs are the type of recurring, routine, usual expense that are essential to a core function of local government entailing nothing more than a service contract for the purchase of electrical power that is paid for as service is rendered by the supplier. Specifically, the Supreme Court’s holding in *Frazier* recognizes that certain expenses may be considered “ordinary and necessary” even absent the “urgency” that would be required for large scale capital projects to avoid a public vote.³³ Since the Replacement PSAs are an “ordinary and necessary” expense, they are exempt from the requirements of Art. VIII, § 3 and no vote is required for it to be a valid and binding obligation of the City. Any supplemental power purchase agreements which the Power Cities enter to supply power deficits not met by the Replacement PSAs are also “ordinary and necessary” expenses of the Power Cities and are valid and binding without a vote.

Respectfully submitted this 12 day of November, 2009.

WILLIAMS BRADBURY, P.C.



Ronald L. Williams
Attorney for Amici Curiae

³³ *Id.* at 7, 137 P.3d at 394.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Boise, Idaho, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 12 day of November, 2009.

DOCUMENT SERVED: APPLICATION OF AMICI CURIAE

ATTORNEY SERVED:

Dale W. Storer
Daniel C. Dansie
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
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Idaho Falls, Idaho 83402

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Molly O’Leary
Richardson & O’Leary, P.L.L.C.
515 North 27th St.
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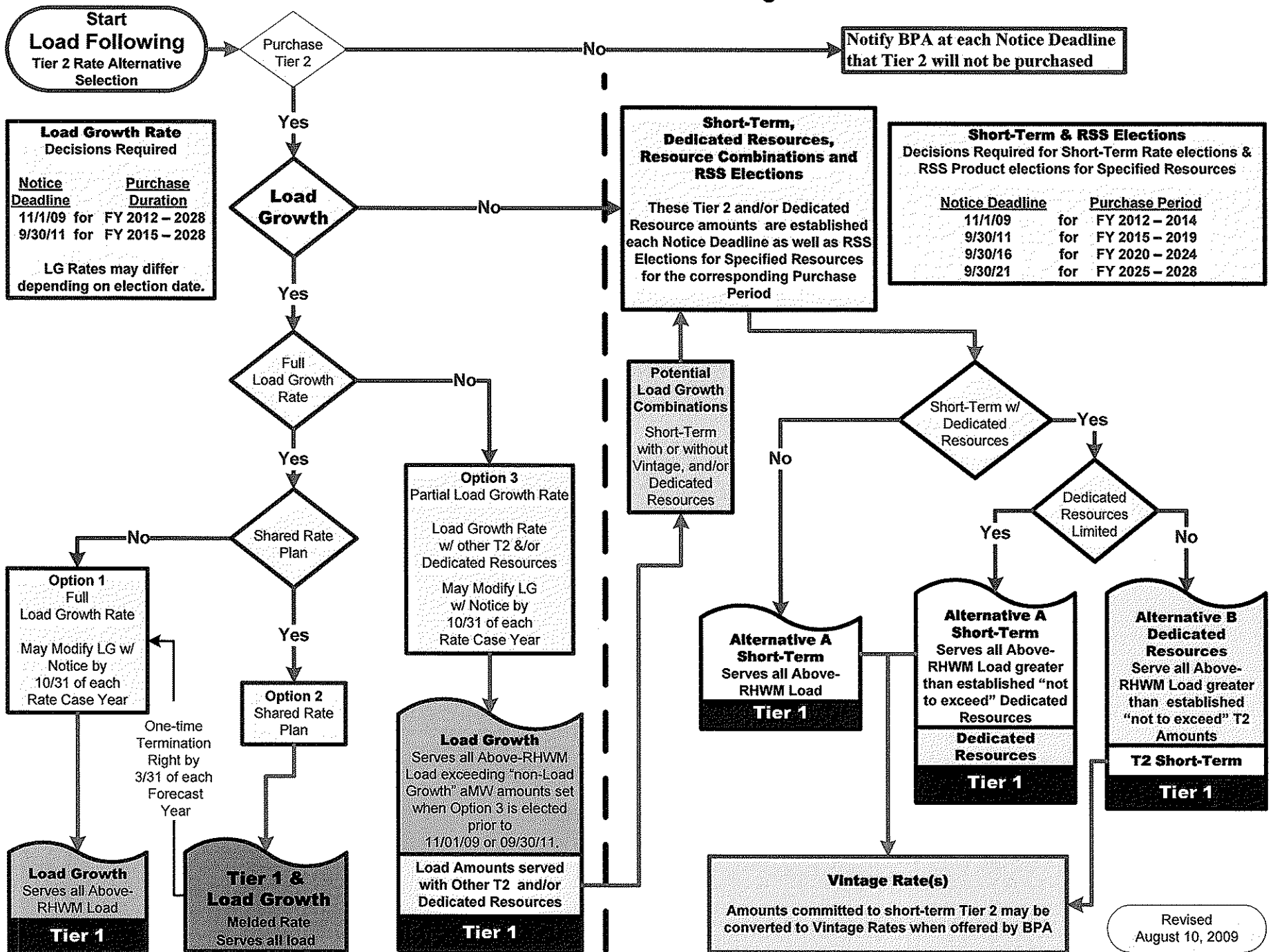


Ronald L. Williams
Williams Bradbury, P.C.

Attachment 1

Brief of Amici Curiae

Exhibit C: Tier 2 Load-Following Choices



Attachment 2

Brief of Amici Curiae

November 1st Elections
Load Following Purchasers

You may use something similar to the following brief sentences in the subsections i. or ii. within the various Tier 2 Rate alternatives, the minimum required information for Specified Resources (page 3), and applicable RSS elections (page 4) for Specified Resources for the November 2nd notice **after removing footnote designations**.

Election of a Tier 2 Rate alternative is required even if you are not expected to have a Tier 2 need. If your election is not received by BPA prior to November 2nd, the contract default is Short-Term Alternative A, noted in subsection 2.B.i. below, without non-Federal Resources.

1. Notice to Purchase Zero Amounts at Tier 2 Rates

- A. Will not purchase power at the Tier 2 Rate from BPA. Only choose this option if you don't want to have BPA serve any portion of your planned Above-RHWM Load greater than 8,760 MWh for the first Purchase Period. Customers making this choice would **not be served** with Tier 2 if the planned Above-RHWM Load exceeds 8,760 MWh, for any reason, for the first Purchase Period; they would have to rely completely on non-Federal resources once such loads are calculated. Within the rate period (*i.e.*, after the Above-RHWM Load has been calculated) any unexpected load, in excess of what is met by Tier 1 service and non-Federal resources, will be served at Load Shaping Rates.
- i. «Customer Name» elects not to purchase Firm Requirements Power at Tier 2 Rates to serve its Above-RHWM Load for the first Purchase Period identified in the Regional Dialogue Contract with the understanding BPA is not obligated to serve our planned Above-RHWM Load equal to or exceeding 8,760 MWh.

2. Load Following customer purchasing power from BPA at Tier 2 rates to serve **all** of its Above-RHWM Load requirements.

- A. Load Growth (17-year commitment) - Not convertible to a Vintage Rate if available
- i. «Customer Name» elects to purchase power to serve its entire Above-RHWM Load, equal to or exceeding 8,760 MWh, at the Tier 2 Load Growth Rate for the term of Regional Dialogue Contract; **or**
- ii. «Customer Name» elects to purchase power to serve its **entire** Above-RHWM Load, equal to or exceeding 8,760 MWh, at the Tier 2 Shared Rate Plan for the term of Regional Dialogue Contract.
- B. Short Term (3-year commitment)¹ – Convertible to a Vintage Rate if available.
- i. For the first 3-year Purchase Period identified in the Regional Dialogue Contract «Customer Name» elects to purchase power to serve its **entire** Above-RHWM Load at the Tier 2 Short-Term Rate Alternative A, equal to or exceeding 8,760 MWh.
- ii. Short-Term Rate Alternative B not applicable without non-Federal Resources unless in combination with the Load Growth.

¹ A customer electing a Tier 2 Short-Term rate option may elect a Load Growth option prior to September 30, 2011, for a 14-year commitment beginning FY 2015.

November 1st Elections
Load Following Purchasers

3. **Load Following** customer purchasing **both** Unspecified Resources and BPA at Tier 2 Rates to serve its Above-RHWM Load requirements.

A. Load Growth (17-year commitment) – Not convertible to a Vintage Rate.

- i. «Customer Name» elects to purchase power to serve its entire Above-RHWM Load, equal to or exceeding 8,760 MWh, at the Tier 2 Load Growth Rate **except** for the following power amounts for the term of Regional Dialogue Contract.²

Load Amounts Not Subject To Tier 2 Load Growth Rates (aMW)									
Fiscal Year	2012	2013	2014	2015	2016	2017	2018	2019	2020
Annual aMW	x.xxx ³	x.xxx ³	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴
Fiscal Year	2021	2022	2023	2024	2025	2026	2027	2028	
Annual aMW	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	x.xxx ⁴	

Note: Fill in the table above with annual Average Megawatts rounded to three decimal places.

For the first Purchase Period identified in the Regional Dialogue Contract «Customer Name» elects to purchase power to serve its entire Above-RHWM Load with Unspecified Resources delivered in the default shape (Exhibit C, section 3.1.1.) **except** for the following power amounts (table in Exhibit C section 2.4.1.3) to be served at the Tier 2 Short-Term Rate Alternative B, equal to or exceeding 8,760 MWh (i.e. Zero's indicate 100% non-Federal).

- (A) FY 2012 – x.xxx aMW³
- (B) FY 2013 – x.xxx aMW³
- (C) FY 2014 – x.xxx aMW⁴

B. Short-Term (at least a 3-year commitment)¹ – Convertible to a Vintage Rate.

- i. For the first Purchase Period identified in the Regional Dialogue Contract «Customer Name» elects to purchase power to serve its entire Above-RHWM Load at the Tier 2 Short-Term Rate Alternative A, equal to or exceeding 8,760 MWh, **except** for the following amounts served with Unspecified Resources delivered in the default shape (Exhibit C, section 3.1.1.).

- (A) FY 2012 – x.xxx aMW³
- (B) FY 2013 – x.xxx aMW³
- (C) FY 2014 – x.xxx aMW⁴

- ii. For the first Purchase Period identified in the Regional Dialogue Contract «Customer Name» elects to purchase power to serve its entire Above-RHWM Load with Unspecified Resources delivered in the default shape (Exhibit C, section 3.1.1.) **except** for the following power amounts (table in Exhibit C section 2.4.1.3) to be served at the Tier 2 Short-Term Rate Alternative B, equal to or exceeding 8,760 MWh.

- (A) FY 2012 – x.xxx aMW³
- (B) FY 2013 – x.xxx aMW³
- (C) FY 2014 – x.xxx aMW⁴

C. If your situation is more complicated or you plan to use Specified Resources⁵ to serve Above-RHWM Load, please call me to discuss alternatives.

² Annual Average Megawatts must be identified for each Fiscal Year by November 1, 2009, including years with “0.000” also if you intend to have the Short-Term Alternative B serve these amount you must.

³ The amounts for must be less than or equal to the Above-RHWM Load identified for FY 2012 – 2014, unless you have a better estimate for FY 2014, when the Transition High Water Mark was established and for Load Growth future amounts through FY 2028 as well.

⁴ Customer inserts its best binding, not to exceed amounts, forecast for these years. The amount noted for FY 2014 for determining the Transition HWM is the suggested starting amount for FY2014 unless you have an updated estimate you prefer.

⁵ If you are planning on serving Above-RHWM Load with a Specified Resource the minimum information required on November 1, 2009 is attached and titled as, “Specified Resource Information needed by the Notice Deadline” and “RSS Decoder for New Specified Resources in Exhibit A of a Load Following Contract” are attached for guidance.

November 1st Elections
Load Following Purchasers

Specified Resource Information needed by the Notice Deadline:

Customers notifying BPA by the Notice Deadline that they will be adding a Specified Resource to their Regional Dialogue Agreement to serve their Above-RHWM Load should provide at least the following information concerning such Specified Resource in their written notification:

1. Resource Name
2. Annual aMW (to three decimal places) of Above-RHWM Load the resource will be serving
3. Fuel Type
4. Resource Nameplate in MW

BPA needs the resource fuel type and nameplate information to help determine how the resource will be applied to load (aka if RSS is applicable). For example: if the resource nameplate is less than 1MW, then the Load Following customer may not need Resource Support Services; or if the fuel type is not a renewable source, then the Slice customer will not be able to purchase RSS.

Section 3.3.1.2 of the RD Agreement states that BPA in consultation with the customer will determine the firm energy amounts for each Diurnal period (and peak amounts if a Load Following customer) consistent with the 5(b)/9(c) Policy. Such monthly/diurnal amounts (and the remaining resource profile information) can be determined between the Notice Deadline and March 31st.

November 1st Elections
Load Following Purchasers

RSS Decoder for New **Specified Resources** in Exhibit A of a Load Following Contract

New Resource Size (Nameplate) = X	Resource Location	Resource Type	List in Contract in Section 2 of Exhibit A?	RSS Available (and needed if do <u>not</u> apply as a predefined hourly amount)?	Resource Shaping Charge (RSC) Applied?
$X \leq 200$ kW	Within customer's distribution system	Does not matter	No	No	No, but Load Shaping is billed off of net load
200 kW $< X \leq 1$ MW	Within customer's distribution system	Does not matter	Yes, as Small Non-Dispatchable Resource (SNDR)	No, except if in combo with other SNDR's, then may need DFS and/or FORS	Yes, in some fashion
200 kW $< X \leq 1$ MW	In another service territory	Does not matter	Yes	DFS and FORS (if resource has capacity value)	Yes, in some fashion
$X > 1$ MW	Does not matter	Zero capacity value	Yes	DFS	Yes, along with the RSC Adjustment
$X > 1$ MW	Does not matter	Some capacity value	Yes	DFS and FORS	Yes, along with the RSC Adjustment
$X > 200$ kW	Does not matter	PURPA	Yes	Must take DFS (or equivalent service if DFS is not available due to Transfer situation) and FORS as applicable if must run resource to load	Yes, in some fashion
$X > 200$ kW	Within customer's distribution system	Consumer-Owned Resource	Yes, if customer is purchasing output and dedicating to load as a Specified Resource. If not, then only need to list in section 7 of Exhibit A.	If Specifying the resource then above rules regarding DFS and FORS (if resource has capacity value) apply	Yes, in some fashion

Attachment 3

Brief of Amici Curiae

Date Issued: 8.31.09

November 1, 2009 Notice Deadline Load Service Election Checklist for Load Following Customers

This document is intended to serve as guidance for how to make elections for service from BPA at a Tier 2 Rate and for the application of non-Federal resources under the Regional Dialogue contract.

Under the Regional Dialogue contract, customers must provide BPA written notice for these elections by November 1, 2009. Following this notice, BPA will update the contract by March 31, 2010, to reflect the customer's elections. The form for this written notice is flexible. For example, customers may fill out the applicable sections of their contract reflecting their elections and then send those materials to the AE to serve as written notice of the customer elections. Alternatively, a customer may provide a letter with the necessary notices and BPA will fill out the applicable sections and confirm this with the customer prior to March 31, 2010.

Explanation of the checklist—

The following checklist is broken into three sections to aid in providing the necessary information to BPA.

Section 1: Determines if BPA and/or non-federal resources will be used to serve above Rate Period High Water Mark (above-RHWM) load starting in FY 2012.

Section 2: Determines what Tier 2 rate alternatives a customer will elect for the first purchase period.

Section 3: Determines how non-federal resources will be scheduled to meet above high water mark load. Section three also addresses which Resource Support Services will be purchased from BPA for new and existing resources.

Important Note: A customer that is planning to meet all of their above high water mark load growth with Tier 2 from BPA and does not have any existing dedicated resources should focus on sections 1 and 2. A customer that is planning to go entirely non-federal should focus on sections 1 and 3. A customer that is planning to go with both BPA Tier 2 and non-federal should review all three sections.

Date Issued: 8.31.09

Part 1) BPA TIER 2 or NON-FEDERAL RESOURCES - One of the following (a-c) options is available:

- a) A customer can elect to purchase only at BPA Tier 2 rates during at least FY2012-2014. Proceed to Part 2 to get guidance on how to fill out Exhibit C.
- b) A customer can elect to serve all above-RHWM load with non-Federal resources during at least FY2012-2014 and will not purchase power under any Tier 2 Rate during that time. Note on Page 1 of Exhibit C that Zero Tier 2 is desired for the first Purchase Period. Proceed to Part 3 to get guidance on how to fill out Exhibit A.
- c) A customer can elect a combination of BPA Tier 2 and non-Federal resources during at least FY2012-2014. Proceed to Parts 2 and 3 to get guidance on how to fill out Exhibits A and C.

Note: If BPA receives no written election, the Tier 2 Short-term Rate (Alternative A) is the default election for service to all above-RHWM load service during FY2012-2014.

Part 2) TIER 2 RATE ELECTIONS - Note in Exhibit C the option that applies and fill in the corresponding table if required.

- a) *Load Growth Rate* - To elect the Load Growth Rate, select one of the following (i-iii) options in Section 2.2.3 of Exhibit C:
 - i) Option 1 (Section 2.2.3.1 of Exhibit C): To elect the full Tier 2 Load Growth Rate beginning FY2012.
 - ii) Option 2 (Section 2.2.3.2 of Exhibit C): To elect the Shared Rate Plan beginning FY2012.
 - iii) Option 3 (Section 2.2.3.3 of Exhibit C): To elect the Partial Tier 2 Load Growth Rate beginning FY2012.

Under Option 3, amounts not subject to the Tier 2 Load Growth Rate must be entered in the table in Section 2.2.3.3 of Exhibit C. Once completed proceed to either or both Part 2)b)ii) (Short-Term Rate Alternative B) and Part 3 (Non-Federal Resources).

- b) *Short-Term Rate* - To elect the Short-Term Rate, select one of the following (i-ii) options in Section 2.4.1 of Exhibit C:

Date Issued: 8.31.09

- i) Alternative A (Section 2.4.1.1 of Exhibit C): A customer can elect the Short-Term Rate under Alternative A. In this alternative Short-Term amounts “flex” to meet above-RHWM load beyond limited amounts of non-Federal Resources, if any are elected. **This is the default alternative.**

Amounts, if any, of non-Federal Resources that a customer wants apply to serve above-RHWM load need to be entered in the table in Section 2.4.1.1 of Exhibit C for each year of the first Purchase Period. “X’s” should also be placed in the table in Section 2.4.1.3 of Exhibit C for each year of the first Purchase Period.

- ii) Alternative B (Section 2.4.1.2 of Exhibit C): A customer can elect the Short-Term Rate under Alternative B. In this alternative Non-Federal resource or Load Growth Rate amounts “flex” to meet above-RHWM load beyond limited Short-Term Rate amounts.

Amounts of power purchased at the Short-Term Rate will be limited to the amounts entered into the table in Section 2.4.1.3 of Exhibit C for each year of the first Purchase Period. The customer must specify these limited amounts when they make their election.

Part 3) NON-FEDERAL RESOURCES -- Customer elections regarding the application of non-Federal resources will be stated in Exhibit A. For non-Federal resources, read through all the applicable Parts in a) and b) below. Any resource shape other than a flat annual block will result in a Resource Shaping Charge/Credit.

- a) Unspecified Resource Amounts. At a minimum, the annual aMW Unspecified Resource Amounts for FY2012 and FY2013 should be entered in the table in Section 3.1.2 of Exhibit A. Proceed to Part i) and ii) below for guidance on the Unspecified Resource Shapes.

Note 1: Flat Annual Shape and Flat Within-Month Shape are the defaults for Unspecified Resource amounts and will be the default for Specified Resources added between notice deadlines unless another shape is elected. Even if a customer is not planning on using Unspecified Resource Amounts in the future, but does intend to apply a Specified Resource mid purchase period, the Flat Annual Shape and Flat Within-Month Shape will be your default shapes unless you select another shape by this notice deadline.

Note 2: If Zero Tier 2 is elected but no non-Federal resources are elected, Unspecified Resource Amounts are the default.

- i) Monthly Shape Options. The table in Section 3.1.1 of Exhibit A reflects should reflect the customer's Monthly Shape election. Check the Total Retail Load Monthly Shape if the default is not desired:
(1) Flat Annual (default)
(2) Total Retail Load Monthly Shape
- ii) Within Month Shape Options. The table in Section 3.1.1 of Exhibit A should reflect the customer's Within Month Shape election. Check the HLH Diurnal Shape if the default is not desired:
(1) Flat Within-Month Shape (default)
(2) HLH Diurnal Shape. If the HLH Diurnal Shape is desired, the HLH to LLH ratios for the first Purchase Period must be entered in table in Section 8.2.2 of Exhibit A.
- iii) Resource Support Services are *not* available for Unspecified Resource Amounts

b) Specified Resources:

- i) New Resources (added after September 30, 2006)
(1) Each **new Specified, Generating Resource** should be listed and have a Resource Profile in Section 2.1 of Exhibit A filled out. A customer may also fill out the Specified Resource Amounts for

each resource, but it is not required. A customer will need to communicate in writing its reshaping requests, if it has any. Those options are listed in Parts (a) and (b) below. A customer will also need to communicate its Resource Support Service or Resource Remarketing Service requests, if it has any. Those options are listed in Parts (c) and (d) below.

- (a) Monthly Shape Options. A customer must note in a letter one of the following (ii), (iii) or (iv) to elect something other than the default:
- (i) Resource Monthly Shape (default). Proceed to Part (c) and (d) below for guidance on RSS and RRS products, if desired.
 - (ii) Flat Annual Shape
 - (iii) Total Retail Load Monthly Shape
 - (iv) PNCA Shape, if a PNCA resource

- (b) Within Month Shape Options. A customer must note in a letter one of the following (ii) or (iii) to elect something other than the default:
- (i) Resource Diurnal Shape (default). Proceed to Parts (c) and (d) below for guidance on RSS and RRS products, if desired.
 - (ii) Flat Within-Month Shape
 - (iii) HLH Diurnal Shape. If the HLH Diurnal Shape is desired, a customer may enter in the new monthly diurnal MWh amounts for the first purchase period into the Specified Resource Amounts table in Section 2.1 of Exhibit A. Alternatively, if the resource numbers are not yet agreed to the customer can submit the HLH to LLH ratios in a table like that which is below.

HLH Diurnal Shape for Specified Resource Amounts												
Purchase Period	HLH to LLH Ratios (HLH:LLH)											
	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep
FY 2012 – FY 2014												

- (c) Resource Support Services. A customer must note in a letter all of the RSS that apply to each applicable new Specified Generating Resource:
- (i) Diurnal Flattening Service
 - (ii) Forced Outage Reserve Service
- (d) Resource Remarketing Service is available on a case-by-case basis. A customer must note in a letter if they request to purchase RRS for each applicable new Specified Generating

Resource. Such a request does not guarantee that BPA will offer the service.

- (2) Each **new Specified, Contract Resource** should be listed and have a Resource Profile in Section 2.2 of Exhibit A filled out. A customer may also fill out the Specified Resource Amounts for each resource, but it is not required. A customer will need to communicate in writing your reshaping requests, if it has any. Those options are listed in Parts (a) and (b) below. A customer will also need to communicate its Resource Support Service or Resource Remarketing Service requests, if it has any. Those options are listed in Parts (c) and (d) below.

(a) Monthly Shape Options. A customer must note in a letter to elect something other than the default:

- (i) Flat Annual Shape (default). Proceed to Parts (c) and (d) below for guidance on RSS and RRS products, if desired.
- (ii) Total Retail Load Monthly Shape

(b) Within Month Shape Options. A customer must note in a letter to elect something other than the default:

- (i) Flat Within-Month Shape (default). Proceed to Part (3) below for guidance on RSS and RRS products, if desired.
- (ii) HLH Diurnal Shape. If the HLH Diurnal Shape is desired, a customer may enter in the new MWh amounts for the first purchase period into the Specified Resource Amounts table in Section 2.2 of Exhibit A. Alternatively, if the resource numbers are not yet agreed to a customer can either submit the HLH to LLH ratios in a table like that which is below.

HLH Diurnal Shape for Specified Resource Amounts												
Purchase Period	HLH to LLH Ratios (HLH:LLH)											
	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep
FY 2012 – FY 2014												

(c) Resource Support Services. A customer must note in a letter all of the RSS that apply to each applicable new Specified Contract Resource:

- (i) Diurnal Flattening Service
- (ii) Forced Outage Reserve Service

(d) Resource Remarketing Service is available on a case-by-case basis. A customer must note in a letter if they request to

purchase RRS for each applicable new Specified Generating Resource. Such a request does not guarantee that BPA will offer the service.

- (3) Each **new Small Non-Dispatchable Resource** should be listed and have a Resource Profile in Section 2.3 of Exhibit A. A customer may also fill out the Specified Resource Amounts for each resource, but it is not required.
- ii) Existing Resources (added before October 1, 2006)
 - (1) Each **existing Specified, Generating Resource** should already be listed in the contract. If reshaping of these resources or RSS is desired, then written notice must be given. For guidance on reshaping options, please see Parts (a) and (b) below, and for guidance on RSS, please see Part (c) below.
 - (a) Monthly Shape Options. If a customer elects something other than the default, they must note in a letter or by submitting revised Specified Resource Amounts from the table(s) in Section 2.1 of Exhibit A one of the following (ii), (iii), or (iv):
 - (i) Resource Monthly Shape (default). Proceed to Part (c) below for guidance on RSS product(s), if also desired.
 - (ii) Flat Annual Shape
 - (iii) Total Retail Load Monthly Shape
 - (iv) PNCA Shape, if a PNCA resource
 - (b) Within Month Shape Options. If a customer elects something other than the default, they must note in a letter or by submitting revised Specified Resource Amounts from the table(s) in Section 2.1 of Exhibit A one of the following (ii) or (iii):
 - (i) Resource Diurnal Shape (default). Proceed to Part (c) below for guidance on RSS product(s), if also desired.
 - (ii) Flat Within-Month
 - (iii) HLH Diurnal Shape. If the HLH Diurnal Shape is desired, a customer may enter in the new monthly diurnal MWh amounts for the first purchase period into the Specified Resource Amounts table in Section 2.1 of Exhibit A.
 - (c) Resource Support Services. A customer must note in a letter all of the RSS that apply to each applicable existing Specified Generating Resource:
 - (i) Diurnal Flattening Service
 - (ii) Forced Outage Reserve Service
 - (iii) Secondary Crediting Service, Option 1

(iv) Secondary Crediting Service, Option 2

- (2) Each **existing Specified, Contract Resource** should already be listed in the contract. If reshaping of these resources or RSS is desired, then written notice must be given. For guidance on reshaping options, please see Parts (a) and (b) below, and for guidance on RSS, please see Part (c).
- (a) Monthly Shape Options. A customer must note in a letter or by submitting revised Specified Resource Amounts from the table(s) in Section 2.2 of Exhibit A to elect something other than the default:
- (i) Flat Annual Shape (default). Proceed to Part (c) below for guidance on the RSS product(s), if also desired.
 - (ii) Total Retail Load Monthly Shape
- (b) Within Month Shape Options. A customer must note in a letter or by submitting revised Specified Resource Amounts from the table(s) in Section 2.2 of Exhibit A to elect something other than the default.
- (i) Flat Within-Month Shape (default)
 - (ii) HLH Diurnal Shape. If the HLH Diurnal Shape is desired, a customer may enter in the new monthly diurnal MWh amounts for the first purchase period into the Specified Resource Amounts table in Section 2.2 of Exhibit A.
- (c) Resource Support Services. A customer must note in a letter all of the RSS that apply to each applicable existing Specified Contract Resource:
- (i) Diurnal Flattening Service
 - (ii) Forced Outage Reserve Service