STATEMENT OF THE ADMINISTRATOR

Of the three BPA power rate cases I have had the responsibility for deciding, all have been contentious, but this has been by far the most difficult. This case involves the usual array of complex issues associated with projected revenues, rate design and rate levels one would expect to see in a rate case. But this case also includes the unprecedented challenge of responding to a remand from the Ninth Circuit Court of Appeals. Particularly vexing and of substantial economic importance are the issues associated with the Residential Exchange Program (REP). These issues, in turn, have magnified the intensity of regional parties' focus and debate on section 7(b)(2) of the Northwest Power Act, a byzantine sentence that nearly fills a page and which, in my view, is the most complicated section in the Northwest Power Act. As a result, BPA has had to address a plethora of issues, some of which have had a long history yet needed to be revisited because of the Court's decisions, and others that are entirely new.

Shortly after the issuance of the Court's decisions in May 2007, it was clear there would be a contentious discussion regarding the REP, which involves literally billions of dollars. This discussion would address, in part, issues with which we have become familiar and, in part, issues that would delve into a realm we have not witnessed before. From the beginning, we have taken this mission extremely seriously, devoting talented staff on a more than full-time basis and substantial management attention to ensure all of the issues raised are treated respectfully and thoughtfully.

We have come a long way since the Ninth Circuit released its decisions a little more than a year ago. We have had many discussions, both formal and informal, regarding how to properly respond to those decisions and respect the will of the Court. We have participated in public meetings, provided opportunities for public comment, and conducted this formal evidentiary rate case. Throughout these discussions, I and other BPA representatives stated that the agency's decisions must be based on the law. At the same time, I have stated that where the law offers me choices, my choices will be strongly influenced by the will of the region because, at its core, this is about allocating the value of the Federal system among regional consumers. We feel particularly strongly about following the law in this proceeding because it is important that the agency's decision be affirmed. The current exercise has seriously strained the resources of both BPA and the parties since the Court's decisions were issued and is diverting important human resources from other pressing challenges. In short, we would not want BPA, customers and constituents to go through this divisive and time-consuming effort again.

Recognizing the challenges associated with conducting and deciding this case, we have actively encouraged the stakeholders to settle all or parts of the case. We encouraged settlement before this case and, consistent with *ex parte* rules, during this case. In fact, there was an extraordinary effort by regional parties to accomplish just this end. Last year a group of investor- and consumer-owned utility representatives, representing the vast majority of regional utilities, engaged in an intensive effort to find common ground. BPA facilitated some of these discussions in the hope that finding common ground would reduce the number and complexity of the issues that would need to be addressed in this case. Ultimately, the parties to that discussion, although not representing all the parties to this case, were able to reach agreement on a set of recommendations for a financial "landing zone" they believed would be equitable as a long-term

solution addressing both the remand remedy and prospective REP benefits. The parties were Seattle City Light, PNGC Power, Public Power Council, Benton PUD, Lane Electric Cooperative, Northwest Requirements Utilities, Western Montana G&T, Idaho Power Company, Tacoma Public Utilities, Puget Sound Energy, Eugene Water and Electric Board, Northwestern Energy, Snohomish County PUD, Portland General Electric, Western Public Agencies Group, Avista Utilities, and Pacific Power. The parties reached these recommendations at a point where little time remained for initiation of this rate case and, therefore, little time remained for the parties to explore how the recommendations might be implemented consistent with law.

Although we were extremely pleased the parties could reach agreement on conceptual recommendations, the recommendations did not readily translate into BPA's rate development. Due to our position that our decisions must comport with the law, the very point of the Court's decisions, certain key elements of the recommendations from the investor- and consumer-owned utility representatives created challenges that BPA Staff and the parties have not been able to resolve. Key among these was defining a legal basis to provide long-term certainty regarding the level of REP payments.

I have explained our approach to this case repeatedly, including in a publicly noticed meeting as part of this proceeding that was designed to encourage the parties to make further movement toward settlement. In that meeting I said:

> When considering the issues raised in this proceeding, I will start from what the law requires. The Ninth Circuit decisions have created a period of great upheaval, uncertainty for all regional electric utilities, and a source of at least some regional discord. I do not want our legacy to be that BPA made decisions that led the Court to remand this case for a second time and put the region through this again. I am committed to developing a solution that is based on the statutes and the guidance provided by the Court, while keeping our Treasury payment probability high.
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> But as all of you know, these issues are extremely complex, the statute can be vague on matters of substantial financial consequence, and there are many issues the Court has not addressed. As a result, there are a number of areas where I have discretion how to resolve issues. Some issues can swing the level of benefits by hundreds of millions and possibly billions of dollars. In making my decisions, I must consider the entire rate case record. When I consider the issues raised in this proceeding, I will, when the discretion afforded me allows it, give greater weight to proposals that reflect agreement in the region when it exists.[2]

BPA's General Counsel provided guidance to me and BPA Staff on this issue prior to the initiation of the rate case. He emphasized that the law comes first but, where discretion allows, we will seek to work with regional parties' compromise positions:

[2] May 14, 2008, Administrator's Statement, offered in aid of settlement.

First, while we have urged the public utility and investor owned utility negotiators to reach agreement on what is to them an acceptable level of residential exchange benefits, we have been clear that (a) BPA is not and can not be a party to their deal, (b) if and once they bring us their deal (and it is "their" deal), their agreement will be an important consideration to us, but there are no guarantees, and the deal will need to be tested and reconciled with decisions that we must make, and (c) the issues are extremely complex and we must hear from other stakeholders that have not participated in the discussions that led to the conceptual agreement …

Second, let me be clearer as to the meaning of "their agreement will be an important consideration to us, but there are no guarantees, and the deal will need to be tested and reconciled with decisions that we must make." The fact of the matter is that there are a number of issues associated with developing the ASC Methodology and implementing section 7(b)(2) where the Administrator has choices. We are still exploring what those choices are. The Administrator has choices because the law affords them to him, either by not being prescriptive, by being general, or by being ambiguous. Rarely is the Administrator's discretion unbounded, so "choice" is a matter of what the reasonable alternatives are. And, yes, sometimes some choices are or may seem better than others, but they are still choices. What that means is that the Administrator has a range of choices – of discretion – afforded by the law, and that his choice of alternatives will be upheld by the court, assuming the court views the range of choices the same way we do as being within the law.

Having choices does not mean that the Administrator can abdicate his decision-making authority to customers. Under law, the decisions are his, not theirs. [The Administrator] knows that and has been unequivocal that the decisions are his to make. But, the Administrator does have a responsibility to implement the Northwest Power Act in a sound and businesslike manner, and to actively encourage and solicit public comment on many issues, such as those involved here. Clearly, in any business setting, what customers think is or should be important to the Administrator. So, here, when the customers who are either receiving the benefits or footing the bill say that they agree upon something, that should be and is an important consideration to the Administrator. But, the customers are not Congress, so the questions ultimately remain whether existing law affords the Administrator a range of discretion sufficient to accommodate what the customers want and, if so, if that is the direction he chooses after hearing from all sides.[3]

[3] General Counsel's guidance to BPA Staff for this proceeding.

On May 14 I went on to say that:

> Ideally, the decision in this case will result in a fair distribution of the benefits of the FCRPS, based on the law, and where discretion exists, in consideration of the parties' joint recommendations, because the parties are well positioned to identify where that equity lies. As stated repeatedly, BPA is prepared to respect compromises that can be generated across customer and other groups where such compromises are consistent with the law.[4]

We would have preferred that the parties had more time and were more successful at determining how to implement their recommendations and advance a settlement that could have then been reflected in the record. Lacking that, I asked at oral argument if the parties that endorsed the November recommendations continued to believe they are a fair foundation for settlement, and I heard there continued to be broad support among the signatories for that approach, although not all signatories were in the room when I asked the question. The November recommendations are in the rate case record. Consequently, as I have evaluated the issues and the choices afforded me by the law, I have kept in mind the recommendations of the IOU and COU representatives as to the amount of payments they believed to be fair, tempered by the realization that there are key elements of those recommendations, including the provision of long-term certainty, that are not applicable to the time horizon of this case and therefore would impact the parties' views as to fairness. The recommendations have helped provide a rudimentary compass that I recognize is both vague and not dispositive and that can only be referenced when there are issues that leave discretion to the Administrator.

Due possibly to the lack of time and to BPA Counsel and Staff's conclusion that BPA could not translate the customer recommendations as a whole into Staff's initial proposal, many of the same parties to that negotiation arrived at this rate case in the traditional mode of presenting arguments that would maximize benefits for their consumers. This rate proceeding is replete with "definitive" conclusions from various parties about the compelling nature of their arguments, but even more so how compelling the Court will find them. I have paid great attention to the parties' briefs and arguments, and after reading, listening and thinking through these points, it becomes clear that many of these issues rest on a debate between a literalist view and an interpretative view of the language contained in the Northwest Power Act. The literalist view speaks to the plain meaning of language, or at least what the party portrays as the plain meaning. Yet, as noted in this Record of Decision, there are times where the literalist view leads to illogical or absurd conclusions either with respect to the world as it existed at the time of enactment of the Northwest Power Act and/or in the world as it exists today. The interpretative view speaks to the intent of the language, which at some points goes beyond what appears from the literal statutory language.

[4] May 14, 2008, Administrator's Statement.

The briefs in this case do not, in general, adhere strictly to one or the other of these philosophies. My own impression, as someone not trained in the law, is that it is extremely difficult in good conscience to adopt either one or the other of these philosophies in total and render fair decisions. In fact, we have spent countless hours reviewing statutes, underlying legislative history, and the briefs, discussing the meaning of specific words and the intent of Congress. I have struggled to be sure that the choices presented to me truly were choices available under the law. Often this discussion has concluded with hypothesizing about the reaction of the Ninth Circuit to the decisions we are contemplating. More often than not we have struggled with uncertainty resulting from the fact that many of these decisions represent very close calls where a reasonable case can be made for various points of view based on the law.

In fact, at some points in our discussion we concluded the Court, in reviewing a particular decision that has multiple (sometimes more than two) lawful options, could or should sustain any of the options. If there are more than two lawful options, this translates into a less than 50 percent probability that BPA would choose the same option as any other knowledgeable, objective observer. The alternative proposed treatments for conservation resources in the section 7(b)(2) rate test are a good example.

There are vexing issues that result from the remand and, in particular, attempting to put the parties in the position they would have been in had the agency's error not been made. We have spent thousands of staff hours wrestling with these issues. For example, we have concluded, despite the reservations of some parties to this case, that because the Court found the original REP Settlement Agreements invalid, it is necessary for us to construct a case that describes what would have happened in the absence of the Agreements, knowing only what we knew at that time. We base this conclusion on our knowledge that, in fact, the existence of the Settlement Agreements altered the agency's (and in particular my) thoughts and behavior in terms of thoroughly considering non-settlement alternatives in the 2001 rate case that I was responsible for deciding. Recreating 2001 without the settlements involves a multitude of judgments as to what actions the agency would have taken in a world that was in the midst of radical upheaval as a result of the West Coast energy crisis, drought, and the associated direct and indirect effects of these prevailing conditions. I have found this to be a particularly difficult exercise as it requires substantial judgments about a hypothetical world, with the consequences of the decisions being that huge sums of money are, when all is said and done, transferred between consumers – residential, commercial, and industrial – of utilities throughout the Northwest. This is not about profits or losses; it is about how the region's consumers share the benefits of the Federal hydrosystem.

There are some decisions in this ROD that amend previous policies. These policies, including the Section 7(b)(2) Methodology and Legal Interpretation, have not undergone such a thorough internal or external review at any point since their initial implementation in the early 1980s, and probably ever. Ironically, this is in large part because rate case and REP settlements, including those with almost all exchanging preference customers, have allowed these issues to be deferred. Given the financial magnitude of what is at stake in this case, and particularly because some of these decisions impact financial benefit levels stretching across an 8-year period (whereas in

other cases the benefits being addressed were focused on the shorter term of the rate period), many of the individual decisions embedded in this case represent extraordinarily large sums of money. Therefore, we attempted to assure ourselves we had made every effort to explore every aspect of these issues, which includes reviewing the underlying foundation of the original policies adopted by the agency to test for consistency with the law, reasonableness, and to ensure that all concerns identified by parties were given fair consideration. We have revisited existing BPA policies both as a result of performing our own due diligence and in response to the exhortations of the parties. There are some issues in this proceeding where decisions have reconsidered and amended longstanding BPA policy to correct legal errors, such as the mid-Columbia resources in the section 7(b)(2) rate test, and, surprisingly, others that require new policy based on issues presented for the first time, such as the appropriate implementation of the cost allocation under section 7(b)(3). These changes occurred only after lengthy discussion of the statutory construct and consideration of the value of maintaining existing precedent. We concluded in these instances that a strict reading of the law leads us to make the changes.
A good example of the complexity of attempting to define what the law requires is provided by a decision regarding section 7(b)(3). We describe in this ROD the inherent conflict between the specific words of the Northwest Power Act, past BPA practice by default, and parties' arguments over language from the *PGE*, *Golden NW* and *Snohomish* decisions.

I would also note that the provisions of the Northwest Power Act are intertwined in ways that are frequently difficult to reconcile. Throughout our deliberations for this proceeding we would review proposals from the parties only to find that there were interconnections to other issues that produced outcomes we suspect the proposing parties did not realize. I would caution all observers of this Record of Decision to be aware that alternative solutions they propose have a good chance of leading to unintended consequences.

Because this case has been such a struggle, we recognize that reasonable minds can differ on the best way to resolve many of the issues in this case. We do not intend to suggest there is only one correct way to resolve these issues. At the same time we must make decisions, explain them and be prepared to defend them. Consequently, we have chosen in this Record of Decision to clearly and thoroughly lay out competing arguments, identify the strengths and weaknesses of these arguments, and lead the open-minded reader to understand and hopefully appreciate the close and difficult nature of the decisions. In doing so we hope the reader will come to understand that although they may disagree with particular decisions, none were reached without significant contemplation and a sincere attempt to understand and apply what the law requires, and to exercise administrative discretion only where it could and should be applied.

During oral argument, many of the presenters went out of their way to acknowledge the extraordinary dedication of the BPA Staff as displayed by their responsiveness to questions and willingness to ensure the parties had the information necessary to make well-informed decisions. I want to add my compliments as well for more than a year of superb and dedicated public service despite extremely long hours that have been mentally taxing, highly stressful, and have taken a toll on people's personal lives.

This has been a very difficult undertaking, fraught with complexity and with large financial stakes. I believe we have done the best we could do to find a legally sustainable and politically

equitable solution (in that order) to the challenge provided by the Ninth Circuit. Nevertheless, I would suggest there remains considerable uncertainty for the parties as to how REP issues may evolve in the future. For that reason I continue to urge the parties to work towards a lawful settlement that will provide greater long-term certainty and, because it will be defined by the parties, greater political equity than what any single Administrator, acting within the confines of the law, can provide.

Stephen J. Wright
Administrator