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February 5, 2003

Mr. Dennis Oster  
Account Executive  
Bonneville Power Administration – TBL  
7500 NE 41<sup>st</sup> Street  
Vancouver, Washington 98662

Re: Preliminary Comments of the Western Public Agencies Group on the Proposed Contract Lock

Dear Mr. Oster,

Enclosed you will please find the Preliminary Comments of the Western Public Agencies Group (“WPAG”) regarding the proposed contract lock. These comments are offered in response to the Bonneville Power Administration’s Notice of Public Process for Preserving Existing Transmission Rights, dated January 10<sup>th</sup>, 2003. Since this process is just getting under way, the enclosed comments are preliminary in nature, and based on the limited information currently available regarding this topic. As a consequence, the position of the WPAG utilities stated in the enclosed comments may change as additional information becomes available.

The utilities of the WPAG appreciate the opportunity to provide these comments, and look forward to working with you during the contract lock process.

Yours truly,

MARSH MUNDORF PRATT SULLIVAN & MCKENZIE



Terence L. Mundorf  
Attorney for the Western Public Agencies Group

TLM:ps  
encs.  
cc: Tom Noguchi  
Nancy Morgan

**PRELIMINARY COMMENTS**  
**OF THE**  
**WESTERN PUBLIC AGENCIES GROUP**  
**ON THE**  
**PROPOSED CONTRACT LOCK**

**1. Introduction**

The Western Public Agencies Group (“WPAG”) is an association of 22 preference utilities that includes full and partial requirements customers, purchasers under the Slice and Block products, and utilities that use Point to Point (“PTP”) and Network (“NT”) transmission contracts. WPAG includes cooperatives, mutuals, municipals and public utility districts that in combination purchase about 25 percent of the power that BPA sells to preference customers. As such, this group is truly a cross section of BPA’s preference transmission customers.

The purpose of the proposed contract lock is to provide BPA’s preference customers with contractual assurance that the nature and quality of transmission service that they currently receive under their PTP and NT contracts will not be materially altered by the advent of an RTO. To achieve this result, the contract lock must include all of the material aspects of current transmission service provided to preference customers, it must not materially alter current transmission service, it must be a legally enforceable commitment by BPA, and it must be resistant to subsequent alteration by an RTO or by the Federal Energy Regulatory Commission (“FERC”). Each of these areas will be addressed in turn.

**2. The Contract Lock Must Include All Material Matters**

The nature of service under the PTP and NT transmission tariffs is composed of various elements, including contract sections, tariff provisions, business practices, customs and informal procedures. In order for the contract lock to provide the preference transmission customers the protections that they will require under an RTO, the contract lock must include all of the items that, in combination, provide the quality of transmission service currently enjoyed by BPA’s preference customers.

The following is a listing by category of the topic areas which, at a minimum, the contract lock must address to provide even a modicum of protection to BPA’s preference transmission customers:

1. Operating Flexibilities
  - Ability to modify PORs and PODs on a short-term basis
  - Ability to redirect firm service up to 365 days
  - Ability to schedule federal power as a “system POR”

- Ability to schedule up to contract demand and make real time changes in schedules
  - Reliance on existing PTP and NT curtailment priorities
  - Ability to use contiguous PODs (both for forecasting and scheduling)
  - No involuntary redispatch of nonfederal resources
2. Self Supply Issues
    - Ancillary services
    - Real power losses
  3. Long Term Rights
    - Rollover rights
    - BPA's obligation for load growth and reliability
    - Right to request new long-term PODs and PORs
  4. Tariff Provisions
    - Contiguous PODs
    - Customer-Served Load (CSL)
    - Cost-based service (both transmission and ancillary services)
    - Rolled-in treatment of transmission costs, GTA costs, congestion management costs, and in some cases the costs of new construction
    - Continued payment of BPA rate (not RTO or company rate)

While this is a long list, it is essential that the items on it be included in the contract lock if it is to secure for the preference customers the quality of transmission service they currently enjoy. This means that the proposed scope of the contract lock, as described in the Notice of Public Process, must be substantially expanded to address all of the relevant aspects of current transmission service.

### 3. The Contract Lock Process Should Not Alter Current Service

In the Notice of Public Process, one of the objectives listed was to ensure sufficient transmission infrastructure investment while promoting locational marginal pricing for load growth. While this objective was not explained in the Notice of Public Process, it appears to be BPA's position that the costs of capital additions, and perhaps congestion clearing costs as well, may (or will) be directly assigned to transmission customers based on where the additions are made, or who is perceived as causing the need for the additions.

If this is a correct understanding of the locational marginal pricing as used in the Notice of Public Process, this objective is a material change to the way transmission service has been provided and priced historically. The contract lock cannot be used to alter in a material manner the quality of transmission service currently being provided. To use the contract lock process as a vehicle to change current practice under the NT and PTP contracts and rates will only cause vigorous opposition from BPA's preference transmission customers.

Exposure to locational marginal pricing is one of the primary reasons why BPA's preference transmission customers are likely to retain their current PTP and NT transmission contracts, and to resist converting to RTO service. It would be truly ironic if the contract lock process, which is being initiated to protect such customers from the detrimental impacts of an RTO, becomes the vehicle by which one of the least desirable aspects of an RTO is imposed on BPA's preference transmission customers. Imposition of locational marginal pricing for transmission additions must be eliminated from the purview of the contract lock process.

#### 4. The Contract Lock Must Be Legally Enforceable

In order for a contract lock that includes all relevant matters to truly provide protection to BPA's preference transmission customers, the performance of its provisions by BPA must be legally enforceable by the preference customers who sign it. The nature of BPA as an institution makes such a requirement difficult to fulfill, but failure to do so will mean that in the end the promise that transmission service will be essentially unchanged by the institution of an RTO may be illusory.

Raising this issue is not meant to impugn BPA's motives in proposing the contract lock, nor to infer that BPA intends to disregard the terms of the contract lock. Rather, it is in recognition of the simple fact that if national energy policy continues in the direction of a standardized national market with uniform transmission provisions, BPA will be under constant political and regulatory pressure to conform to this national policy, and to bring into line its recalcitrant preference transmission customers who have retained their PTP and NT contracts. The enforceability of the contract lock will be the measure of how successful BPA will be in resisting such pressures, and how much reliance BPA's preference transmission customers can safely place on the contract lock.

There are a number of factors that make this aspect of the contract lock proposal especially challenging. First, it is unusual for extraordinary writs to be granted against federal agencies such as BPA, so the opportunity to obtain a court order directing BPA to perform the contract lock provisions is limited. Second, a breach of the contract lock would normally result in a claim for damages that would likely be tried in the Federal Court of Claims, which has a notoriously slow process. Added to this is the difficulty that any judgment for money damages against BPA for breach of the contract lock would, in most instances, be paid for by BPA's customers. As a result, the parties injured by the breach would end up paying for the damages caused by the breach. Not exactly a prompt and meaningful remedy.

Finding a solution to this issue is as important as it is difficult. However, if the contract lock does not contain a prompt and reliable remedy for any breach, it will amount to an unenforceable promise that will not withstand the first serious political test.

## 5. FERC Approval of the Contract Lock

While it was not completely clear from the Notice of Public Process, it is the understanding of the WPAG utilities that BPA is considering submitting the agreement that memorializes the contract lock to the FERC for review and approval. This is a potentially dangerous course of action that does not appear to be legally required, and which should be given very serious consideration.

Asking the FERC to review and approve such a contract may have the unintended result of submitting this agreement to FERC jurisdiction. This in turn could give the FERC the ability to amend, alter or repudiate at a later date the provisions of this contract. Such an outcome would defeat the very purpose for which the contract lock is being undertaken.

Since neither BPA nor the preference customers who would be the primary beneficiaries of the contract lock are FERC jurisdictional utilities, there appears to be no legal requirement that the contract be submitted to the FERC. And given the possible negative implications of doing so, a lot more thought and analysis should be given to this topic before a decision to make such a submittal is finalized.

## 6. Conclusion

The idea behind the contract lock has merit. However, there are serious implementation issues that must be dealt with before there can be an informed decision on whether this undertaking will produce any meaningful benefit. The WPAG utilities look forward to working with BPA on these issues.