

1 UNITED STATES OF AMERICA
2 U.S. DEPARTMENT OF ENERGY
3 BEFORE THE
4 BONNEVILLE POWER ADMINISTRATION
5

6 IN THE MATTER OF THE PROPOSED) BPA DOCKET NO. WP-07
7 WHOLESALE POWER RATE)
8 ADJUSTMENT PROCEEDING OF THE)
9 BONNEVILLE POWER)
10 ADMINISTRATION)
11

12
13
14 INITIAL BRIEF
15 OF THE
16 COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, NEZ PERCE TRIBE
17 AND THE YAKAMA NATION
18 AND
19 REQUEST FOR ADMINISTRATOR TO RECONSIDER HEARING OFFICER'S ORDER
20 STRIKING CERTAIN TESTIMONY
21

22
23 Robert Lothrop
24 Columbia River Inter-Tribal Fish Commission
25 729 N.E. Oregon, Suite 200
26 Portland, Oregon 97232
27 (503) 238-0667
28 Fax: (503) 235-4228
29

30 Tim Weaver
31 Weaver Law Office
32 Yakama Nation
33 P.O Box 487
34 Yakima, WA 98907
35 (509) 575-1500
36 Fax: (509) 575-1227
37

38 Dave Cummings
39 Nez Perce Tribe
40 Office of Legal Council
41 PO Box 305
42 Lapwai, ID 83540-0305
43 (208) 843-7355
44

45
46 April 17, 2006

Exhibit: WP-07-M-69

TABLE OF CONTENTS

1
2
3
4 **INTRODUCTION..... 1**

5 **I. STATEMENT OF THE CASE..... 2**

6 **A. Background and Summary 2**

7 **1) The Interests of the Tribes 3**

8 **B. Effects of BPA Actions on Tribal Interests 6**

9 **C. Standard of Review..... 7**

10 **1) Northwest Power Act..... 7**

11 **II. BONNEVILLE'S PROPOSAL DOES NOT COVER TOTAL SYSTEM COSTS..... 8**

12 **A. Background 8**

13 **B. Bonneville’s proposal does not adequately address other federal laws and has**

14 **underestimated the risk that it will not cover the Total System Costs. 9**

15 **1) Bonneville’s Proposal does not adequately address costs associated with the**

16 **Endangered Species Act and Northwest Power Act. 10**

17 **a) Bonneville has failed to consider evidence on the costs and risks associated**

18 **with implementing the Council Fish and Wildlife Program and ESA..... 12**

19 **b) Bonneville’s proposal is based on optimistic assumptions about river**

20 **operations that are not consistent with Federal District Court orders in the**

21 **Biological Opinion litigation. 20**

22 **B. Bonneville’s proposal does not adequately address cost and revenue uncertainties.. 23**

23 **C. Bonneville’s proposal does not appropriately address capitalizing certain fish and**

24 **wildlife costs..... 27**

25 **d) Bonneville’s proposal does not address its total system costs. 29**

26 **III. BONNEVILLE IS NOT LIKELY TO ASSURE PAYMENT TO THE TREASURY**

27 **AFTER MEETING ITS COSTS..... 29**

28 **A. Bonneville’s proposal does not assure repayment of the Treasury on a current basis**

29 **after meeting its costs. 29**

30 **1) Congressional Intent..... 30**

31 **2) BPA TPP goal does not assure repayment on a current basis..... 33**

32 **3) BPA treats multiple deferrals the same as a single deferral 34**

33 **B. Bonneville’s proposal does not meet its TPP goal if it experiences additional FCRPS**

34 **Biological Opinion costs. 35**

35 **1) Bonneville’s proposal does not meet its TPP goal if it experiences additional**

36 **Biological Opinion costs. 35**

37 **2) Bonneville has not demonstrated that its revised proposal will meet its TPP goal if**

38 **it experiences additional Biological Opinion costs..... 39**

| | | |
|----|--|-----------|
| 1 | 3) Bonneville has not demonstrated that the failure to meet its TPP goal if it | |
| 2 | experiences additional Biological Opinion costs is related to low reserves. | 43 |
| 3 | C. Bonneville’s revised proposal lowers its TPP goal..... | 43 |
| 4 | 1) BPA’s proposed substitute further reduces its ability to assure repayment to the | |
| 5 | Treasury..... | 45 |
| 6 | D. Bonneville’s proposal does not meet its TPP goal if it experiences other fish and | |
| 7 | wildlife costs..... | 49 |
| 8 | F. Bonneville’s risk mitigation strategies do not address the political risks it faces | 54 |
| 9 | IV. BONNEVILLE SHOULD NOT FURTHER WEAKEN THE RISK MITIGATION | |
| 10 | STRATEGIES..... | 56 |
| 11 | A. Customer opposition is not relevant to BPA’s obligations..... | 56 |
| 12 | V. BONNEVILLE IS NOT MEETING ITS TRIBAL TRUST AND TREATY | |
| 13 | OBLIGATIONS..... | 61 |
| 14 | A. Federal Trust Responsibility..... | 61 |
| 15 | VI. THE ADMINISTRATOR MUST PROPERLY COMPLY WITH NEPA IN THIS | |
| 16 | PROCEEDING | 66 |
| 17 | VII. BONNEVILLE HAS NOT ANALYZED THE ECONOMIC EFFECTS OF ITS | |
| 18 | PROPOSAL..... | 67 |
| 19 | VIII. BONNEVILLE HAS NOT PROVIDED EQUITABLE TREATMENT FOR FISH | |
| 20 | AND WILDLIFE | 71 |
| 21 | A. Fish and Wildlife are not receiving Equitable Treatment under the Northwest | |
| 22 | Power Act..... | 71 |
| 23 | IX. BONNEVILLE’S PROGRAM AND RATE PROCESS ARE NOT CONSISTENT | |
| 24 | WITH THE NORTHWEST POWER ACT AND THE ADMINISTRATIVE | |
| 25 | PROCEDURES ACT | 75 |
| 26 | A. Bonneville’s process for determining its total system costs is not consistent with the | |
| 27 | Administrative Procedures Act and Northwest Power Act. | 75 |
| 28 | 1) Bonneville’s process for determining its total system costs is not consistent with the | |
| 29 | Northwest Power Act..... | 76 |
| 30 | 2) Bonneville’s process for determining its total system costs is not consistent with the | |
| 31 | Administrative Procedures Act. | 77 |
| 32 | 3) Bonneville’s Power Function Review process is not consistent with the Northwest | |
| 33 | Power Act..... | 77 |
| 34 | X. RESERVATION OF CLAIMS | 78 |
| 35 | XI. REMEDIES..... | 78 |

1 **A. Bonneville should revise its revenue requirements to address its obligations under**
2 **Treaties with Columbia Basin Indian tribes, Federal laws, and the Fish and Wildlife**
3 **Funding Memorandum of Agreement. 79**
4 **1) Consider the additional fish and wildlife costs associated with implementing the**
5 **Biological Opinion and Council Program. 79**
6 **2) Revise river operation assumptions. 79**
7 **3) Address the cost and revenue uncertainties described above. 79**
8 **4) Bonneville should increase its TPP standard. 80**
9 **5) Bonneville should modify the trigger for the Emergency NFB Surcharge. 80**
10 **6) Bonneville should modify its Proposal to meet its tribal trust and treaty**
11 **obligations. 80**
12 **7) Bonneville should modify its rate design. 81**
13 **8) Bonneville should analyze the economic tradeoffs associated with its proposal. 81**
14 **9) Bonneville should explicitly address its equitable treatment responsibilities. 81**
15 **10) Bonneville should consult and coordinate with fish and wildlife managers. 81**
16 **B. These remedies will improve Bonneville’s ability to meet its costs, assure repayment**
17 **to the Treasury, and improve its competitiveness. 82**
18 **VI. CONCLUSION 83**
19

1 **TABLE OF AUTHORITIES**
2
3 **TABLE OF AUTHORITIES**

4
5 **Statutes**

6
7 **Northwest Power Act**

8 16 U.S.C. 837.....passim
9

10 **Flood Control Act**

11 16 U.S.C. 825s.....8
12

13 **Federal Columbia River Transmission Act**

14 16 U.S.C. 838 [16 U.S.C. 838g and 838h].....8
15

16 **Pacific Northwest Electric Power Planning and Conservation Act**

17 16 U.S.C. 839.....passim

18 16 U.S.C. 839b(h).....11

19 16 U.S.C. 839b (h)(10) (A).....11

20 16 U.S.C. 839b(h)(11)(A).....12

21 16 U.S.C. 839b(h)(11)(B).....12

22 16 U.S.C. 839b(h)(11)(A)(i).....passim

23 16 U.S.C. 839e(a)(1).....9

24 16 U.S.C. 839e(a)(2).....10

25 16 U.S.C. 839e(a)(2) (A)passim

26 16 U.S.C. 839e(a)(2)(B).....29

27 16 U.S.C. 839e(i).....18
28

29 **Endangered Species Act**

30 16 U.S.C. 1531-1543.....11
31
32

1 **Cases**
2
3 *Aluminum Company of America v. Bonneville Power Administration*, 891 F.2d 748 (1989).....18
4 *Confederated Tribes and Bands of the Yakima Indian Nation v.NPPC*,
5 35 F.3d. 1371 5
6 *Covelo Indian Community v. FERC*, 895 F.2d. 581 (9th Cir. 1990).....62
7 *Navajo Tribe of Indians v U.S.*, 364 F.2d 320 (1966).....61
8 *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*,
9 117 F.3d 1520, 1533 (9th Cir.1997).....72
10 *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256 (D.D.C.
11 1972)..... 61
12 *Pyramid Lake Pauite Tribe of Indians v. United States Dept. of Navy*, 898 F.2d 1401 (9th Cir.
13 1991).....62
14 *Seminole Nation v. United States*, 316 U.S. 286 (1942).....61
15 *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919)..... 4
16 *Washington v. Washington State Commercial Passenger FishingVessel*
17 *Association*, 443 U.S. 658 (1979).....4
18
19
20 **Other Citations**
21
22 Rules of Procedure Governing Rate Hearings, §1010.11(a)(1).....18
23 Rules of Procedure Governing Rate Hearings, §1010.11(a)(2).....18
24 51 Fed. Reg. 7,611 (1986)..... 1
25 210 Fed. Reg. 67699.....17
26 126 Cong. Rec. H9851 (daily ed. Sept. 29, 1980).....33
27 126 Cong. Rec. H10680 (daily ed. Nov. 17, 1980).....32
28 125 Cong. Rec. S11596 (daily ed. Aug. 3, 1979).....31
29 215 Fed. Reg. 67685 (November 8, 2005).....75
30 H.R.No.Rep. 96-976, pt. 1, 96th Cong., 2d Sess., at 49.....32
31 *U.S. Comptroller General, Hydroelectric Dams: Issues Surrounding Columbia River Basin*
32 *Juvenile Fish Bypasses*, H.R. Rep. No. 90-180, at 8 (1990).....5
33 *U.S. Department of Energy American Indian Policy*, DOE Order No. 1230.2 (April 8,
34 1992).....62
35 U.S. Senate Report 96-272. July 30, 1979, page 9.....30

TABLE OF CONTENTS

INITIAL BRIEF OF THE COLUMBIA RIVER INTER-TRIBAL FISH
COMMISSION, NEZ PERCE TRIBE AND YAKAMA NATION

WP-07-M-69

1 UNITED STATES OF AMERICA
2 U.S. DEPARTMENT OF ENERGY
3 BEFORE THE
4 BONNEVILLE POWER ADMINISTRATION

5 IN THE MATTER OF THE PROPOSED) BPA DOCKET NO. WP-07
6 WHOLESALE POWER RATE)
7 ADJUSTMENT PROCEEDING OF THE)
8 BONNEVILLE POWER)
9 ADMINISTRATION)

12 INITIAL BRIEF
13 OF THE
14 COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION
15 NEZ PERCE TRIBE AND THE YAKAMA NATION
16 AND
17 REQUEST FOR ADMINISTRATOR TO RECONSIDER HEARING OFFICER'S
18 ORDER STRIKING CERTAIN TESTIMONY

20 **INTRODUCTION**

21 The Columbia River Inter-Tribal Fish Commission ("CRITFC"), the Nez Perce
22 Tribe, and the Yakama Nation (collectively the Tribes) submit this brief pursuant to the
23 Procedures Governing Bonneville Power Administration Rate Hearings, 51 Fed. Reg.
24 7,611 (1986), and the Special Rules of Practice governing these proceedings. WP-07-O-
25 1. This brief describes the Tribes' factual, policy, and legal positions with respect to the
26 Bonneville Power Administration's Proposals in the WP-07 rate case.

27 In this brief the Tribes also request that the Administrator reconsider certain
28 aspects of the BPA Hearing Officer's orders to strike testimony of the Tribes. In so
29 doing, we have set forth portions of the stricken testimony solely for the purposes of
30 reconsidering the Hearing Officer's determination.

INITIAL BRIEF OF THE COLUMBIA RIVER INTER-TRIBAL FISH
COMMISSION, NEZ PERCE TRIBE, AND YAKAMA NATION

WP-07-M-69

1 The Tribes recommend changes to the proposal. To the extent not otherwise noted
2 in this Initial Brief, wherever contrary to the determinations in Bonneville's WP-07
3 proposals, the Tribes herein incorporate our direct, rebuttal, and sur-rebuttal testimony
4 in order to preserve the Tribes' issues raised in testimony. To the extent Bonneville's
5 WP-07 proposal departs from the recommendations contained in the Tribes' testimony
6 or briefs in this rate case proceeding, the Tribes reserve the right to raise such issues in
7 subsequent administrative and judicial proceedings.

8 **I. STATEMENT OF THE CASE**

9 **A. Background and Summary**

10 Bonneville's WP-07 rate proposal will determine whether Bonneville has
11 sufficient funds to meet its costs and repay the United States Treasury. It will also
12 greatly affect funding for the overall federal effort to recover Columbia River salmon
13 runs to sustainable, harvestable levels. Such levels are necessary to support the treaty-
14 reserved fishing rights of the Tribes.

15 The Tribes contend that Bonneville's rate proposal does not provide sufficient
16 financial capability for Bonneville to meet its total system costs, which include its
17 statutory and other legal duties to fund salmon recovery. Moreover, Bonneville has not
18 included the appropriate costs in its analysis of its financial obligations. Bonneville has
19 not adequately addressed the significant uncertainty it faces in future costs and revenues.
20 Bonneville's proposal unacceptably reduces the probability that it will make all of its
21 Treasury payments on time and in full if it experiences higher costs.

1 Because of these flaws in the proposal, Bonneville will face two untenable
2 alternatives. Bonneville will either defer needed fish and wildlife restoration (which is
3 already occurring) or it will not have sufficient funds to assure timely repayment of the
4 debt associated with the Federal Columbia River Power System (FCRPS). Neither of
5 these alternatives is acceptable. Bonneville will continue to fail to meet its obligations
6 under the Northwest Power Act (and other Federal laws) and most importantly, will fail
7 to fulfill its duties under the Treaties with the Tribes.

8 Our goal in this proceeding is to convince Bonneville to raise its rates and
9 improve its risk mitigation strategies to ensure that all of its costs, including the costs
10 associated with its Treaty and Trust obligations, the Northwest Power Act, the
11 Endangered Species Act, and other Federal laws are met while assuring repayment of its
12 debt to the Treasury pursuant to 16 U.S.C. 839e(a)(2) (A)&(B).

13 We believe that Bonneville can raise its rates and still be significantly below the
14 market cost of power. Raising rates and strengthening the risk mitigation package would
15 address the significant cost and revenue uncertainty facing Bonneville. Moreover, it
16 would improve the chances that Bonneville will be able to make full and timely payments
17 on its debt to the Federal Treasury to repay the investment in the FCRPS.

18 **1) The Interests of the Tribes**

19 The Tribes are participating in this rate proceeding to protect their interests
20 associated with their treaty-reserved rights, rights that must be proactively protected by
21 Bonneville as an agency of the federal government. Bonneville's fiduciary duty to the

1 Tribes to protect their treaty secured interests dictate that a higher standard of care must
2 be exercised in this proceeding as it affects these tribal interests.

3 Since time immemorial, the Columbia River and its tributaries were viewed by
4 the Columbia River Basin tribes as "a great table where all the Indians came to partake."
5 *Seufert Brothers Co. v. United States*, 249 U.S. 194, 197 (1919). More than a century after
6 the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of
7 the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the
8 Yakama Indian Nation, and the Nez Perce Tribe signed the treaties which created their
9 reservations, the tribes' place at the table has been subordinated to energy production and
10 other non-Indian land and water development. Today, the Columbia River treaty tribes
11 struggle for a very small fraction of their reserved fishing rights.¹ The treaties -- the
12 supreme law of the land under the United States Constitution -- promised more.

13 The Columbia River treaty tribes reserved the right to fish at all usual and
14 accustomed fishing stations "in common with" the citizens of the United States. The
15 fishing right means more than the right of Indians to hang a net in an empty river.
16 *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443
17 U.S. 658, 679 (1979). Columbia River runs of sockeye, steelhead, coho, and spring,

¹ The Northwest Power Planning Council offered a conservative estimate that in the early 1800s a population of 50,000 to 62,000 Columbia Basin aboriginal peoples caught approximately 5 to 6 million fish annually, almost 97 fish per individual. COMPILATION OF INFORMATION ON SALMON AND STEELHEAD LOSSES IN THE COLUMBIA RIVER BASIN at 74. In 1990, the Yakima Nation, Umatilla Confederated Tribes, Warm Springs and Nez Perce Tribe, whose members number approximately 16,000, took only 77,000 fish, or under five fish per person. TECHNICAL ADVISORY COMMITTEE, 1991 ALL SPECIES REVIEW COLUMBIA RIVER FISH MANAGEMENT PLAN (May 10, 1991).

1 summer, and fall chinook salmon have declined drastically since the mid-1800's.² Where
2 once the Columbia River produced annual runs of at least 10-16 million salmon, its runs
3 are now diminished to tens of thousands. *See generally, Confederated Tribes and Bands*
4 *of the Yakima Indian Nation v. Northwest Power Planning Council*, 35 F.3d 1371, 1375-
5 79 (9th Cir. 1994) (describing the effects of the development and operation of the Federal
6 Columbia River Power System upon the Basin's anadromous fishery resources)
7 (hereinafter cited as *Yakima Nation*).³ The devastation of fish runs has been inimical to
8 Indian treaties and the United States' trust responsibilities to tribes.

9 The Tribes have adopted a salmon recovery plan entitled: *Wy-Kan-Ush-Mi Wa-*
10 *Kit-Wit*, the *Spirit of the Salmon*. This comprehensive plan describes the actions that
11 must be taken to restore fish and wildlife and make progress toward meeting the tribes'
12 Treaty rights. The Tribes also participated actively in the preparation of subbasin plans
13 pursuant to the Northwest Power and Conservation Council's 2000 Columbia River
14 Basin Fish and Wildlife Program. The Program states:

15 The vision for this program is a Columbia River ecosystem that sustains an
16 abundant, productive, and diverse community of fish and wildlife, mitigating
17 across the basin for the adverse effects to fish and wildlife caused by the
18 development and operation of the hydrosystem and providing the benefits from
19 fish and wildlife valued by the people of the region. This ecosystem provides
20 abundant opportunities for tribal trust and treaty right harvest and for non-tribal
21 harvest and the conditions that allow for the recovery of the fish and wildlife
22 affected by the operation of the hydrosystem and listed under the Endangered
23 Species Act. (*See Program at page 13*).

² A run is the annual return of adult salmon and steelhead trout. Total runs include those fish that are harvested prior to reaching any dams. *See Generally*, U.S. COMPTROLLER GENERAL, HYDROELECTRIC DAMS: ISSUES SURROUNDING COLUMBIA RIVER BASIN JUVENILE FISH BYPASSES, H.R. Rep. No. 90-180, at 8 (1990).

³ Since publication of the opinion and the sources cited therein, Columbia River salmon stocks have generally continued to decline.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

The Program also has clearly defined Biological Objectives to address

anadromous fish losses:

- Halt declining trends in salmon and steelhead populations above Bonneville Dam by 2005. Obtain the information necessary to begin restoring the characteristics of healthy lamprey populations.
- Restore the widest possible set of healthy naturally reproducing populations of salmon and steelhead in each relevant province by 2012. Healthy populations are defined as having an 80 percent probability of maintaining themselves for 200 years at a level that can support harvest rates of at least 30 percent.
- Increase total adult salmon and steelhead runs above Bonneville Dam by 2025 to an average of 5 million annually in a manner that supports tribal and non-tribal harvest. Within 100 years achieve population characteristics that, while fluctuating due to natural variability, represent on average full mitigation for losses of anadromous fish. (See Program at pages 16 and 17).

B. Effects of BPA Actions on Tribal Interests

The Bonneville Power Administration provides significant financial capability for Columbia River salmon recovery. Given the overwhelming impacts of the Federal Columbia River Power System on the Basin’s salmon,⁴ this is appropriate. Salmon stocks throughout the Columbia Basin are now listed under the Endangered Species Act. A new FCRPS Biological Opinion and recovery plans are in development by the National Marine Fisheries Service, Bonneville Power Administration, U.S. Fish and Wildlife Service, Army Corps of Engineers and others.

During Bonneville’s next rate period the Program, federal salmon recovery plans, and actions under the Biological Opinion will be implemented. Substantial portions of their costs will be allocated to Bonneville as required by federal law. 16 U.S.C.

⁴ Eighty percent of the loss of salmon from these former runs sizes is attributable hydropower development and operation. *Id.* at 1376 citing Endangered and Threatened Species; Proposed Endangered Status for Snake River Sockeye Salmon 56 Fed. Reg. 14,055, 14,058 (1991).

1 839b(h)(8)(B), 839b(h)(10)(C). Bonneville’s rate proposal will determine its revenues
2 through 2009—a critical period for salmon restoration.

3 Unfortunately, the Bonneville Rate Proposal has given more weight to its policy
4 of keeping its rates as low as possible and less weight to the concerns of salmon or
5 fulfilling federal treaty obligations. Like the Northwest Power Planning Council in 1992,
6 Bonneville has “sacrific[ed] the Act’s fish and wildlife goals for what is, in essence, the
7 lowest common denominator acceptable to power interests and DSIs.” *Yakima Nation*, at
8 1395.

9 **C. Standard of Review**

10 **1) Northwest Power Act**

11 Standards for approval of Bonneville’s rates are set forth in the Northwest Power
12 Act. 16 U.S.C. 839e. Standards of review for Bonneville’s rate proposal by the Federal
13 Energy Regulatory Commission (FERC) are established in Section 7(a)(2) of the
14 Northwest Power Act. 16 U.S.C. 839e(a)(2). FERC is authorized to confirm and approve
15 power rates after a finding that such rates (1) are sufficient to assure repayment in the
16 Federal Columbia River Power System (FCRPS) after first meeting the Administrator’s
17 other costs and (2) that such rates are based upon the Administrator’s total system costs.
18 *See Central Lincoln Peoples’ Utility District v. Johnson*, 735 F.2d 1101, 1110 (9th Cir.
19 1984).

20 Under the Northwest Power Act, measures to protect, mitigate, and enhance fish
21 and wildlife damaged by the hydroelectric development and operations in the Columbia

1 River Basin are to be paid by the Bonneville Power Administration. 16 U.S.C.
2 839b(h)(8), 839b(h)(10). These costs are part of Bonneville’s total system costs.

3 Moreover, Bonneville must generally comply with other federal law in setting
4 rates. “All purposes of the Northwest Power Act, together with the provisions of other
5 laws applicable to the Federal Columbia River Power System are all intended to be
6 construed in a consistent manner. Such purposes are also intended to be construed in a
7 manner consistent with applicable environmental laws.” 16 U.S.C. 839. Section 7(a)(1)
8 of the Northwest Power Act, 16 U.S.C. 839e(a)(1), requires that rates be “established in
9 accordance with sections 9 and 10 of the Federal Columbia River Transmission System
10 Act (16 U.S.C. 838) [16 U.S.C. 838g and 838h], section 5 of the Flood Control Act of
11 1944 [16 U.S.C. 825s], and the provisions of this chapter.”

12 **II. BONNEVILLE'S PROPOSAL DOES NOT COVER TOTAL SYSTEM**
13 **COSTS.**

14 **A. Background**

15
16 Bonneville’s rate proposal will determine its revenues through 2009 and the next
17 few years represent important milestones in the salmon recovery effort in the Columbia
18 Basin. The National Marine Fisheries Service issued a Biological Opinion regarding
19 operation of the Federal Columbia River Power System (FCRPS) in 2004 that was struck
20 down. The Federal District Court found that the 2004 Biological Opinion did not comply
21 with the requirements of the Endangered Species Act and has ordered the Federal
22 agencies to prepare a new Biological Opinion in cooperation with the Tribes by October,
23 2006.

1 Bonneville’s proposal does not meet the costs of implementing the Program or
2 the cost uncertainties of implementing a new Biological Opinion and recovery plans.
3 Bonneville’s Proposal has turned a blind eye toward its cost risks by eliminating the
4 range of fish and wildlife costs from the previous rate case that was designed to address
5 some of the uncertainty associated with Bonneville’s future obligations. *See* WP-07-E-
6 BPA-08, page 12, line 1 through page 14, line 23.

7 Irrespective of Bonneville’s assumptions, Bonneville will have to address these
8 future fish and wildlife costs whether it has included them in its Proposal or not. By not
9 adequately addressing these costs and uncertainties in its Proposal, Bonneville has
10 unacceptably increased the risks that it will not be able to meet all of its costs and assure
11 timely repayment to the Treasury. We will demonstrate in this brief that Bonneville has
12 significantly underestimated the risks that it faces and has omitted material considerations
13 from its revenue requirements and its risk mitigation mechanisms needed to meet its
14 future Total System Costs while assuring timely repayment to the Treasury.

15 **B. Bonneville’s proposal does not adequately address other federal laws**
16 **and has underestimated the risk that it will not cover the Total System**
17 **Costs.**

18
19 Bonneville must adequately establish rates to recover its costs and expenses
20 incurred by the Administrator pursuant to the Northwest Power Act and other provisions
21 of law. 16 U.S.C. 839e(a)(1).⁵ Because Bonneville's total system costs are subject to
22 future events, inherent in these costs are risks that must be addressed in Bonneville's

⁵ The House Committee on Interstate and Foreign Commerce stated: The third purpose is that the BPA customers and the consumers of those customers will continue to pay all of the costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements. These costs include those related to fish and wildlife. H.R.No.Rep. 96-976, pt. I, 96th Cong., 2d Sess., at 49.

1 rates. It is Bonneville's responsibility to measure the risks involved in developing costs
2 for which complete accuracy is not possible based on substantial evidence. Bonneville's
3 Proposal must address the risks associated with uncertainty in its future revenue
4 requirement. The Proposal must provide rates that are based on and will repay the
5 Administrator's total system costs. 16 U.S.C. 839e(a)(2).

6 Bonneville has not incorporated important new information in its Revenue
7 Requirements Study about the costs to implement subbasin plans in the Program. Nor
8 has Bonneville addressed the uncertainties associated with implementing the new
9 Biological Opinions and recovery plans. Attempts by Bonneville to minimize these
10 actions or declare them outside the scope of this proceeding will not make them go away.
11 Failure to address these issues will increase the risk that Bonneville's rates will not be
12 sufficient to meet its costs and repay the Treasury.

13 **Issue: Does Bonneville's Proposal meet the cost of federal government obligations**
14 **to protect and restore Columbia Basin fish and wildlife?**

15
16 Bonneville has erred by not meeting the cost of the biological objectives in the
17 Program and meeting the potential additional costs of the new Biological Opinion and
18 recovery plans. These and other actions place additional risk that has not been
19 adequately addressed in the Proposal. This risk undermines Bonneville's ability to repay
20 Treasury and fully fund fish and wildlife measures necessary to comply with federal law.

21 **1) Bonneville's Proposal does not adequately address costs associated**
22 **with the Endangered Species Act and Northwest Power Act.**
23

1 The Endangered Species Act, 16 U.S.C. 1531-1543, protects species listed as
2 either endangered or threatened and imposes substantive duties on Bonneville.
3 Bonneville must ensure that its activities, including power sales, are not likely to (1)
4 jeopardize the continued existence of listed species or (2) adversely modify the critical
5 habitat of such species. The ESA also prohibits Federal agencies from “taking” (e.g.
6 harming) any endangered species. Bonneville has responsibilities in implementing the
7 ESA to recover listed salmon and steelhead in the Columbia and Snake rivers.

8 The Pacific Northwest Electric Power and Conservation Council (Council)
9 develops the Columbia River Basin Fish and Wildlife Program pursuant to the Section
10 4(h) of the Northwest Power Act. 16 U.S.C. § 839b(h). The scope of the Council
11 Program addresses all fish and wildlife in the Columbia River Basin affected by the
12 construction and operation of the hydroelectric system. As noted above, the Program’s
13 goal is to restore sustainable harvest levels of fish and wildlife to meet obligations under
14 the Northwest Power Act, other Federal laws, and Treaties with Indian tribes and Canada.
15 The Program is based on recommendations from the region’s federal, state, and tribal
16 fishery managers and others. The Council adopted Programs in 1982, 1984, 1987, 1992,
17 1994, and 2000. It also adopted amendments in 1995 specifically addressing resident fish
18 and wildlife.

19 The Act directs BPA to use its funds to protect, mitigate, and enhance fish and
20 wildlife in a manner consistent with the Council’s Program and take the Program into
21 consideration at each relevant stage of its decision making. 16 U.S.C. § 839b(h)(10)(A).
22 The Act also directs BPA to “exercise its responsibilities consistent with the purposes of

1 this Act and other applicable laws, to adequately protect, mitigate, and enhance fish and
2 wildlife, including related spawning grounds and habitat, affected by such projects in a
3 manner that provides equitable treatment for such fish and wildlife with other purposes
4 for which such system and facilities are managed and operated.” 16 U.S.C. §
5 839b(h)(11)(A). Bonneville must also coordinate its actions with tribal, state, and federal
6 fish and wildlife managers. *Id.* At 839b(h)(11)(B).

7 **a) Bonneville has failed to consider evidence on the costs and risks**
8 **associated with implementing the Council Fish and Wildlife**
9 **Program and ESA.**

10 Bonneville’s testimony on the revenue requirements associated with fish and
11 wildlife are based on the agency’s decisions in the Power Function Review. *See* WP-07-
12 E-BPA-02 pages 11 to 13. This testimony describes the PFR process and states that “The
13 comments gathered in these forums were used to inform forecast of FY 2007-2009
14 spending levels incorporated into PFR.” *Id.* at page 12, line 5. The BPA PFR
15 conclusions are inserted in full at Appendix A of the BPA-02 testimony. Bonneville has
16 issued no record of decision for the PFR.

17 The Bonneville testimony also states that “BPA is committed to conducting an
18 additional public process to review program spending levels that will be concurrent with
19 this rate proceeding so that any reduction in spending levels can be incorporated in the
20 final proposal.” *Id.* at line 17.

21 The Tribes testimony concludes that BPA had not analyzed whether its integrated
22 fish and wildlife program budgets were not adequate to implement the Council’s
23 Columbia River Basin Fish and Wildlife Program. *See* WP-07-E-CR/NZ/YA-01, page

1 testimony in Appendix A. It also specifically addresses the uncertainties that BPA
2 identifies in WP-07-E-BPA-04 at 46.

3 The Tribes stricken testimony would have provided evidence regarding the likely
4 costs of implementing the subbasin plans and other actions contained in the Columbia
5 River Basin Fish and Wildlife Program. The testimony also would have addressed the
6 costs of implementing the FCRPS Biological Opinion and the NOAA Fisheries Service
7 recovery plans. The testimony would have shown that BPA's proposal has not
8 incorporated any additional costs for the new Biological Opinion or recovery plans. The
9 testimony would have described the importance that the Federal District Court has placed
10 in demonstrating that implementation of the Biological Opinion is reasonably likely to
11 occur. The testimony would have provided evidence that BPA had not adequately
12 addressed the Northwest Power Act and Endangered Species Act. It also would have
13 provided evidence of the significant uncertainties facing BPA that could increase its
14 costs. The testimony also would have addressed the Tribes' analysis of BPA's
15 obligations under the Council's Program and conclusions that BPA is not likely to
16 achieve the biological objectives of the Program.

17 The Tribes' testimony did not suggest that Bonneville must make decisions in this
18 rate proceeding on its actual spending levels for fish and wildlife during the rate period.
19 Rather the Tribes' testimony documented detailed alternative fish and wildlife cost
20 assumptions in the context of BPA's Revenue Requirement Study and notes that BPA's
21 cost assumptions were not based on the best available information. *Id.* at 18-48. It
22 further considered the effect of these assumptions on BPA's Revenue Forecast. *Id.* at 48-

1 51. The Tribes’ testimony culminated in an analysis of the BPA rate proposal against
2 these assumptions as well as BPA’s own cost assumptions. The Tribes’ testimony
3 demonstrated that BPA’s proposed CRAC and NFB rate adjustment mechanisms do not
4 address the range of fish and wildlife cost risks that face BPA. *Id.* at 51-62. Having
5 identified deficiencies in BPA’s CRAC and NFB Rate Adjustment mechanisms, the
6 Tribes’ testimony suggested improvements. *Id.* at 62-66. The deficiencies in
7 Bonneville’s Initial Proposal concerning its revenue requirements and cost risk are
8 material and will place substantial risk on Bonneville and the United States Treasury
9 repayment probability if not properly addressed.

10 BPA also successfully moved to strike the Tribes’ sur-rebuttal testimony in WP-
11 07-E-JP13-03 page 4, line 15 through page 6 line 2 and attachment WP-07-E-JP13A. *See*
12 WP-07-0-30. In this sur-rebuttal the Tribes provided information rebutting BPA’s
13 characterization of PFR 2. For instance, in its rebuttal testimony, BPA states that:

14 “BPA will update the final studies to reflect the most current operational and
15 programmatic assumptions for the FY 2007-2009 rate period as well as BPA’s
16 fish and wildlife program financial obligations identified through the Power
17 Function Review 2 process” *See* WP-07-E-BPA-34, page 3, line 9 through 12).
18

19 The Tribes’ sur-rebuttal challenges this statement. BPA’s testimony states that it is
20 relying on PFR 2 to update information for the rate case, but then wants to exclude
21 evidence that the PFR 2 process is not addressing all of “the most current operational and
22 programmatic assumptions for the FY 2007-2009 rate period as well as BPA’s fish and
23 wildlife program financial obligations...” The Tribes’ testimony would have provided
24 information that the costs associated with implementing the FCRPS Biological Opinion
25 will be broader in scope than the issues addressed in PFR 2 and that costs to implement

1 the Columbia River Basin Fish and Wildlife Program are likely to be higher than
2 Bonneville has assumed. *See* WP-07-E-JP13-03 at page 5, line 7 through 17. The
3 testimony also notes that

4 The only way for BPA to address these costs, which are not being addressed in
5 PFR 2 and are almost certain to be higher than BPA’s current assumptions, is
6 through the risk mitigation mechanisms. This lack of coordination between
7 BPA’s inadequate risk mitigation measures and its uncertain program costs
8 increases the risk that BPA’s rates will not be based on its Total System Costs and
9 that BPA will not be able to assure repayment to the Treasury after meeting its
10 costs.

11
12 *Id.* at page 5, line 17 through page 6, line 2.

13 BPA also successfully moved to strike a reference to its own material on the BPA
14 website that describes the issues that are being addressed in PFR 2. This BPA material
15 clearly demonstrates that PFR 2 is not addressing “the most current operational and
16 programmatic assumptions for the FY 2007-2009 rate period as well as BPA’s fish and
17 wildlife program financial obligations...” as BPA claims in its testimony.

18 BPA also moved to strike the Tribes’ evidence regarding the issues that relate to
19 BPA total system costs. *Id.* page 5. Again, BPA wants to have it both ways: it claims that
20 PFR 2 will be used to “update the final studies to reflect the most current operational and
21 programmatic assumptions for the FY 2007-2009 rate period as well as BPA’s fish and
22 wildlife program financial obligations identified through the Power Function Review 2
23 process”, yet it wants to exclude as evidence BPA’s own description of the scope of PFR
24 2, which indicates that the PFR 2 process is something different than that which is
25 claimed in BPA’s rebuttal testimony. BPA also wants to exclude the Tribes’ evidence
26 that issues related to operational and programmatic assumptions for the FY 2007-2009 as

1 well as BPA’s fish and wildlife program financial obligations are not being addressed in
2 PFR 2. This testimony does not challenge PFR 2 or its intended outcomes. It does
3 challenge BPA’s characterization, in its rates testimony, of the PFR 2 process. The tribes
4 are entitled to rebut this characterization. According to the Federal Register Notice in
5 this rate case:

6
7 In the close-out letter, BPA responded to the comments provided on the draft and
8 laid out the program level cost estimates that would be used in BPA’s WP-07
9 Initial Proposal. In addition, BPA committed to revisit many of the program areas
10 when more information is known. BPA will hold discussions separately from the
11 rate case proceedings to share the updated forecasts, define associated policy
12 choices, and solicit feedback from customers and constituents before they are
13 incorporated into the final rates.

14
15 210 Fed. Reg. at 67688. The Tribes’ testimony provides evidence that there is a risk that
16 fish and wildlife costs could be higher than BPA has assumed and that PFR 2 will not
17 provide an update on these costs as BPA claims in its testimony.

18 The Tribes participated in PFR 2 in good faith and have tried to ensure that BPA
19 updates the fish and wildlife costs. The Tribes did so in anticipation that “when more
20 information was known” it would be “incorporated into the final rates”. At this time,
21 there is no final product from PFR 2 that is available for BPA’s rates proceeding. The
22 Tribes offered testimony that the projected fish and wildlife costs were much higher than
23 BPA had assumed as their only mechanism to address these system costs and their
24 recovery through BPA’s rates as part of this proceeding. If the Hearing Officer’s order to
25 strike the Tribes’ testimony is allowed to stand, it would eliminate the only opportunity
26 for the Tribes to speak to these matters and effectively eliminates the Tribes’ opportunity

1 to rebut BPA's costs estimates, contrary to the Act's requirements and basic due process
2 considerations.

3 The Northwest Power Act instructs that the BPA rate hearings are to "develop a
4 full and complete record". "[A]ny person shall be provided an adequate opportunity by
5 the hearing officer to offer ... rebuttal of **any** material... submitted by the
6 Administrator". 16 U.S.C. 839e(i)(emphasis added). BPA has submitted information to
7 the record on matters concerning its revenue requirements, including its fish and wildlife
8 costs. By statute, the Tribes are entitled to submit information to rebut BPA's positions.
9 Striking the Tribes' testimony rebutting BPA's direct testimony would violate the
10 statutory provisions intended by Congress to govern this proceeding.

11 Bonneville's Rules of Procedure Governing Rate Hearings ("Rules") dictate a
12 similar result. Under the Rules "parties shall be provided an adequate opportunity to
13 offer refutation or rebuttal on **any** material submitted by any other party or by BPA."
14 Rules §1010.11(a)(1) (emphasis added). Furthermore, "any rebuttal to BPA's direct case
15 must be contained in a party's direct testimony, which shall also contain any affirmative
16 case that party wishes to present." Rules §1010.11(a)(2). It is the clear policy of the
17 Rules to allow the Tribes to rebut BPA's testimony.

18 Bonneville is required by statute to set rates that are based upon the
19 Administrator's total system costs. 16 U.S.C. § 839e(a)(2)(B). Bonneville must also
20 protect the public interest "by ensuring that federal hydroelectric programs recover their
21 own costs and do not require subsidies from the federal treasury." Aluminum Company
22 of America v. Bonneville Power Administration, 891 F.2d 748, at 760 (1989) (citing the

1 legislative history of the Bonneville Project Act, 16 USC § 832 et. seq.). As part of the
2 total system costs, Bonneville collects rates sufficient to fund various fish and wildlife
3 programs.⁶ In order to comply with its statutory mandates and Congressional policy,
4 Bonneville may not ignore testimony that is reasonably related to developing a full
5 understanding of issues that may affect Bonneville's ability to recover its total system
6 costs and to repay the Treasury. The disputed testimony and attachments are offered to
7 address the risks Bonneville faces in its revenue requirements so that Bonneville can
8 address these risks and establish its rates to recover its total system costs as required by
9 statute.

10 BPA and PPC/NRU argued that the Hearing Officer was directed in the FRN to
11 “exclude from the record any material attempted to be submitted or arguments attempted
12 to be made in the hearing which seek to in any way revisit the appropriateness or
13 reasonableness” of BPA’s decisions on spending levels (developed in the PFR), as
14 included in BPA’s revenue requirements for FYs 2007 through 2009, of BPA’s decisions
15 made in the Near-Term Policy ROD, or of BPA’s decisions made in the DSI ROD. *E.g.*
16 WP-07-M-14 at 2. The PFR is not complete. Moreover, the BPA and PPC/NRU views
17 of the FRN constraints do not comport with the statute or the rules of this proceeding,

⁶ In its explanation of the purposes of the bill, the Commerce Committee report makes it clear that BPA’s total system costs include its fish and wildlife costs:

The third purpose is that BPA customers and the consumers of those customers will continue to pay all of the costs necessary to produce, transmit, and conserve resources to meet the region’s electric power requirements. These costs include those related to fish and wildlife.

H.R. Report No. 96-976, Part I (Commerce), May 15, 1980, page 49. Bonneville has a duty to "...protect, mitigate and enhance fish and wildlife..." 16 USC § 839(6).

INITIAL BRIEF OF THE COLUMBIA RIVER INTER-TRIBAL FISH
COMMISSION, NEZ PERCE TRIBE, AND YAKAMA NATION

WP-07-M-69

1 which allow rebuttal testimony on any matter put forward by the Administrator. The
2 Tribes request that the Administrator set aside the Hearing Officer’s determination in
3 WP-07-O-23 and 30 to strike the foregoing testimony,⁷ consider and respond to the
4 tribes’ stricken testimony, and include the foregoing tribal testimony and attachments in
5 the record of this proceeding.

6 **b) Bonneville’s proposal is based on optimistic assumptions about**
7 **river operations that are not consistent with Federal District**
8 **Court orders in the Biological Opinion litigation.**
9

10 Bonneville has assumed operation of the FCRPS based on the 2004 Biological
11 Opinion. The fish related operations anticipated by BPA are described at WP-07-E-BPA-
12 09 Pages 11 to 13.

13 The Federal District Court of Oregon has found that the 2004 Biological Opinion
14 violates the ESA. Further, the court has ordered fish operations in 2005 and 2006 that are
15 different from and more costly than the 2004 Biological Opinion. Bonneville has
16 estimated the added costs of the Court-ordered river operation for 2005 at \$75 million; its
17 estimated that the 2006 Court-ordered operations are \$60 million. The Tribes believe
18 that, at a minimum, Bonneville should assume the continuation of the court-ordered 2006
19 operations through FY 2009 in its base forecast. In addition, Bonneville should revise its
20 cost adjustment mechanisms to adequately address other costs that may be needed to
21 implement the new biological opinion and recovery plans—we address this issue in more
22 detail below. *See* WP-07-E-CR/NZ/YA-01, page 49, lines 1 through 21.

⁷ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-CR/NZ/YA-01, page 18, line 4 through page 48, line 19; and related attachments, WP-07-E-JP13-03 page 4, line 15 through page 6 line 2; and attachment WP-07-E-JP13-03A.

1 The Tribes also raised concerns that Bonneville had not analyzed these costs. In
2 fact Bonneville admits that it “does not have any information nor has it conducted any
3 analysis for the purposes of BPA’s Initial Proposal regarding the impacts of the 2005
4 injunctive relief for river operations ordered by Judge Redden”. *See* WP-07-E-CR-01FF
5 (CR-BPA-010).

6 Bonneville’s revised proposal has not addressed this concern. In the rebuttal
7 testimony, BPA states that it will update the final studies to reflect the most current
8 operational and programmatic assumptions in its final studies. *See* WP-07-E-BPA, page
9 3, line 9. In clarification, BPA staff indicated that no decisions have been made on what
10 assumptions to use for river operations to meet ESA requirements. In a data request, the
11 Tribes asked Bonneville to “Please describe ‘the most current operational and
12 programmatic assumptions for the FY 2007-2009 rate period as well as BPA’s fish and
13 wildlife program financial obligations identified through the Power Function Review 2
14 process.’ For example, has BPA decided what river operations it will assume for FY 2007
15 through FY 2009?” Bonneville responded:

16 No additional information is available. BPA has not yet completed the work
17 required to update operational and programmatic assumptions for FY 2007-2009
18 and the PFR 2 process is not complete. BPA will incorporate these results into
19 the final studies.
20

21 *See* JP13-BPA-002. As we pointed out in our initial testimony, these assumptions could
22 have a significant impact on TPP.

1 Bonneville's assumptions and failure to analyze these costs makes it less likely
2 that Bonneville's rates are adequate to assure repayment to the Treasury after meeting its
3 costs. We further address these likelihoods later in this brief.

4 **Request to Reconsider Order Striking Certain Testimony**

5 In response to Bonneville's testimony, the Tribes offered testimony on the
6 differences in revenues and other impacts of Bonneville's assumptions compared to the
7 current implementation of the Court Ordered river operations. This testimony also
8 provides detailed analysis of the adverse biological effects associated with reducing flows
9 and spills as Bonneville has assumed. This testimony would have shown that adverse
10 biological effects increase the uncertainty that Bonneville's assumptions regarding river
11 operations are appropriate. *See* WP-07-E-CR/NZ-01, page 12, line 7 through page 15,
12 line 6. Bonneville moved to strike this testimony. *See* WP-07-M-14. The Hearing
13 Officer struck the foregoing material. WP-07-0-23 The tribes request that the
14 Administrator set aside the determination in WP-07-O-23 to strike the foregoing
15 evidence⁸, consider and respond to the tribes' stricken evidence, and include the
16 foregoing tribal evidence in the record of this proceeding. The stricken tribal testimony
17 rebuts Bonneville's direct testimony at WP-07-E-BPA-09 Pages 11 line 13 to page 15,
18 line 4. In conformance with the statute's mandate the stricken material should be
19 admitted to the administrative record.

20 **Summary: BPA's proposal must comply with federal laws. BPA has not considered**
21 **the costs and risks associated with meeting its fish and wildlife costs under the**
22 **Endangered Species Act and the Northwest Power Act. BPA has made overly**

⁸ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-CR/NZ/YA-01, page 11, line 16 through page 15, line 6 and attachments WP-07-E-CR-01C, D, K, L, M, and N.

1 **optimistic assumptions about the revenue from FCRPS river operations. Failure to**
2 **consider this information increases the risks that Bonneville’s Proposal is not based**
3 **on its total system costs and is not sufficient to ensure repayment to the Treasury**
4 **after meeting its costs.**
5

6 **B. Bonneville’s proposal does not adequately address cost and revenue**
7 **uncertainties.**
8

9 **Issue: Does Bonneville’s proposal address the uncertainties it faces in costs and**
10 **revenues? If not, Bonneville’s proposal will be unlikely to meet its costs and assure**
11 **repayment to the Treasury.**
12

13 BPA’s testimony concerning the fish and wildlife cost risk it faces admits some of
14 the uncertainty facing BPA in developing rates for the FY 07-09 rate period:

15 Fish recovery is an extremely important objective for BPA. Because of pending
16 litigation over BPA’s fish and wildlife obligations, it is very difficult to determine
17 what measures are required to accomplish this, let alone to determine their costs.
18 In the May 2000 Proposal, the uncertainty over the financial impacts of future fish
19 measures was reflected by the creation of a set of 13 distinct alternatives for fish
20 and wildlife. No such set of alternatives exists for the FY 2007 to 2009 period.
21 Today, BPA faces uncertainty about what kind of program will be required by
22 either a new BiOp or a court ordered program. The possibilities are many and
23 mostly unknowable, and probabilities cannot be estimated for any particular
24 scenario that might be created.
25

26 WP-07-E-BPA-04 at 46.

27 The Tribes concluded that “All of these uncertainties point to the likelihood of
28 increasing costs for Bonneville to meet its fish and wildlife responsibilities during the FY
29 2007 through FY 2009 rate period. The Initial Proposal does not adequately address
30 these uncertainties.” WP-07-E-CR/NZ/YA-01 at page 43, line 10. The analysis of the
31 associated uncertainties and supporting evidence for this conclusion was struck by the
32 Hearing Officer in response to a motion by Bonneville.

1 Bonneville has estimated that the plaintiffs' proposed operations would add \$347
2 million per year compared to the 2004 Biological Opinion with a range that showed that
3 BPA actually could have lower costs of \$28 million to higher costs of \$541 million. At
4 the estimated cost of \$347 million, BPA states that it would receive a U.S. Treasury
5 credit of \$45 million (Pursuant to Section 4(h)(10)(C) of the Northwest Power Act), so
6 the net impact would average \$302 million. *See* WP-07-E-CR-01GG on Page 7 at 14.
7 CRITFC staff calculated the cost of the proposed injunction operations at \$202 million;
8 the net increase (after estimating the Treasury credit) would be approximately \$176
9 million over the 2004 Biological Opinion. *See* WP-07-E-CR-01HH on Page 5 at 7.
10 Bonneville has not evaluated these uncertainties. *See* WP-07-E-CR-01JJ (CR-BPA-09);
11 WP-07-E-CR-01Y (CR-BPA-050); and WP-07-E-CR-01II (CR-BPA-011).

12 **Request to Reconsider Order Striking Certain Testimony**

13 The Tribes request reconsideration of the order striking their testimony, which
14 addressed a number of important uncertainties that BPA has not. *See* WP-07-O-23
15 (striking Sheets et al., WP-07-E-CR/NZ/YA-01 pages 18, line 4 to page 48 line 19 and
16 page 61, line 1 through page 62, line 16). For example, the Tribes requested that
17 Bonneville provide any data, analysis, documentation, and related materials that address
18 BPA's fish and wildlife cost uncertainty assumptions including any analysis of the
19 uncertainties BPA considered related to litigation regarding the adequacy of the FCRPS
20 Biological Opinion, or other pending litigation; changes that could be associated with
21 Treaty Trust responsibilities; changes that could result from the reviews of the FCRPS
22 biological opinions, Bonneville responded that:

1 The major risk categories included in NORM for Fish and Wildlife were
2 limited to potential variations in the annual spending in the Direct Program
3 hatcheries, capitalized habitat purchases, and implementation of the sub basin
4 plans. NORM did not account for any of the major uncertainties described in the
5 request. Its focus was on the potential cost variability of current actions,
6 assuming no major shift in emphasis or additional requirements being placed on
7 the FCRPS.

8 BPA performed no risk analysis regarding the uncertainties related to
9 litigation regarding the adequacy of the FCRPS Biological Opinion or any other
10 pending or threatened litigation.

11
12 WP-07-E-CR-01Y (CR-BPA-050). The Tribes' stricken testimony provides evidence

13 Bonneville faces a number of uncertainties regarding future fish and wildlife funding.

14 For example, the Council is working with fish and wildlife managers, and stakeholders to
15 amend the Columbia River Basin Fish and Wildlife Program. *See* WP-07-E-CR/NZ/YA-

16 01, page 30 lines 1-4 In addition, NOAA Fisheries is preparing recovery plans

17 pursuant to the Endangered Species Act; final plans were scheduled to be completed by

18 the end of 2006. *Id.* lines 4-15. The Tribes' stricken testimony indicated that these

19 recovery plans will likely identify additional activities, beyond current efforts, to meet the

20 requirements of the Endangered Species Act. Also, Bonneville's proposal does not

21 address the potential that the revision Biological Opinions will increase its costs.

22 The stricken testimony described the Tribes' concerns that the BPA proposal for

23 the Integrated Fish and Wildlife Program is not adequate to implement the Council

24 Program and the Biological Opinions. It further described how failure to make adequate

25 progress could increase the risk of extinction for listed species and makes it unlikely that

26 the region will achieve the fish and wildlife rebuilding goals in the Council's Program.

1 All of these uncertainties point to the likelihood of increasing costs for Bonneville
2 to meet its fish and wildlife responsibilities during the FY 2007 through FY 2009 rate
3 period. The Initial Proposal does not adequately address these uncertainties.

4 Bonneville also successfully moved to strike testimony on the uncertainties of
5 secondary revenues, Bonneville's internal costs, the costs of the Bureau of Reclamation,
6 Corps of Engineers, and Energy Northwest. The Tribes' testimony provided historical
7 information that indicated that, during the current rate case, these costs have been much
8 higher than Bonneville had originally assumed. The purpose of the testimony was not to
9 suggest that Bonneville should adopt some different cost assumptions; rather, Bonneville
10 should address these uncertainties in its risk mitigation analysis. The recent experience of
11 these higher costs should make Bonneville more risk averse in its Proposal. *See* WP-07-
12 E-CR/NZ/YA-01 page 61, line 1 through page 62, line 16.

13 As described earlier, it would be in error for Bonneville to fail to consider this
14 evidence. The Hearing Officer orders WP-07-0-23 struck the foregoing material. The
15 tribes request that the Administrator set aside the determination in WP-07-O-23 to strike
16 the foregoing evidence⁹, consider and respond to the tribes' stricken evidence, and
17 include the foregoing tribal evidence in the record of this proceeding. The stricken tribal
18 testimony rebuts Bonneville's direct testimony (*e.g.* WP-07-E-BPA-04 at 46). In
19 conformance with the statute's mandate the stricken material should be admitted to the
20 administrative record.

⁹ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-CR/NZ/YA-01 page 29, line 4 through page 31, line 2, including data response CR-BPA-050 incorporated by reference as WP-07-E-CR-01Y and page 61, line 1 through page 62, line 16.

1 **Summary: BPA's proposal does not address the cost and revenue uncertainties that**
2 **it faces. BPA has not considered many of the costs and risks that it faces. Failure to**
3 **consider this information increases the risks that Bonneville's Proposal is not**
4 **sufficient to meet its costs and repay the Treasury.**
5

6 **C. Bonneville's proposal does not appropriately address capitalizing certain**
7 **fish and wildlife costs.**
8

9 Bonneville's testimony describes the capital borrowing that it assumed for the
10 Proposal. *See* WP-07-E-BPA-10, page 5, lines 8-14 and WP-07-E-BPA-02, Appendix A.
11 These estimates include investment in fish and wildlife recovery funded by BPA.

12 **Request to Reconsider Order Striking Certain Testimony**

13 The Federal Register Notice specifically allows "capital recovery matters such as
14 interest rate forecasts, scheduled amortization, ... and interest expenses" to be addressed
15 in this proceeding. *See* 210 Fed. Reg. at 67689.

16 Bonneville has moved to strike our testimony and exhibits that relate to how
17 Bonneville should treat capitalization of land and water acquisition. This testimony is
18 directly relevant to Bonneville's total system costs.

19 Our stricken testimony pointed out that BPA's current policy for land
20 and water acquisition would add \$70 million per year to the full implementation
21 of the subbasin plans. *See* WP-07-E-CR/NAZ/YA-01 page 43, lines 14 through
22 page 44, line 3.

23 The Tribes also provided detailed information on this issue in comments on the
24 Power Function Review:

25 The CBFWA workgroup assumed that BPA will use its borrowing authority for
26 land and water acquisitions. This would allow Bonneville to implement more
27 habitat work while minimizing the effects on rates. To avoid prejudicing any

1 determination of allowable types of fish and wildlife investments that can be
2 capitalized, BPA should clearly and broadly define allowable fish and wildlife
3 investments to include land and water interests. Alternately BPA could deem all
4 of its fish and wildlife capital investment as revenue producing, since
5 Bonneville’s share of such investments include only those costs that are directly
6 attributable to the development and operation of the power purposes and to
7 federal dams. In this regard, the capital investments are inextricably linked to
8 maintaining power generation marketed by BPA.
9

10 Bonneville’s current policy has allowed capitalization of investment in land
11 acquisition for fish and wildlife if it meets the requirements of exceeding \$1
12 million and providing a creditable /quantifiable benefit against a defined
13 obligation for BPA. We continue to be concerned that Bonneville is restricting
14 the use of capitalization for habitat acquisitions.
15

16 First, limiting access to projects over \$1 million is a misinterpretation of section
17 4(h)(10)(B) of the Act. That section requires or directs Bonneville to capitalize
18 the construction costs of facilities when those costs exceed \$1 million and have an
19 expected life of greater than 15 years. That is, this section of the act says that
20 when securing an asset that fits this very specific definition, it must capitalize it.
21 However, this section of the Act does not broadly constrain the Administrator’s
22 financing options when an asset does not fit the definition of a facility that costs at
23 least \$1 million and has at least a 15 year life. In all instances where the asset
24 does not meet the definition of the class described in 4(h)(10)(B), the
25 Administrator is free to choose the method of financing—capitalization or the
26 Bonneville fund. Bonneville should clarify its policy to ensure that access to
27 capital for fish and wildlife land acquisitions is available even in instances where
28 the costs are less than \$1 million.
29

30 Second, we believe that the Administrator has broad discretion to decide what
31 may be capitalized. Neither applicable law nor FAS 71 requires that a specific
32 “crediting” system be agreed upon before Bonneville provides access to the
33 capital funds. We are concerned that Bonneville’s language requiring a “crediting
34 system” introduces an unnecessary impediment to implementing the Biological
35 Opinions and Fish and Wildlife Program.
36

37 Third, we are concerned that Bonneville’s proposed criteria will limit its ability to
38 fully utilize the \$36 million of capital borrowing that is assumed in the proposal.
39 We hope Bonneville will correct these issues. Failure to do so could constrain
40 Bonneville’s ability to capitalize needed habitat acquisition. If these critical
41 activities are expensed it will increase the impact on rates or limit the amount of
42 fish and wildlife protection that will take place.
43

44 *See* WP-07-E-CR-01R, pages 37-38.

1 If Bonneville addressed our recommendations in this proceeding it
2 would allow Bonneville to fund more of its fish and wildlife costs using capital
3 borrowing. This would allow Bonneville to meet more of its costs while
4 minimizing the effects on rates.

5 The Hearings Officer struck this material in WP-02-O-23. We ask that the order
6 as applied to this particular stricken material be set aside¹⁰. The Administrator needs to
7 consider this stricken material because it directly relates to issues raised in Bonneville's
8 testimony. The Federal Register Notice specifically excluded such material from
9 exemption.

10 **d) Bonneville's proposal does not address its total system costs.**
11

12 The discussion above demonstrates that Bonneville has not adequately addressed
13 the uncertainties it faces for future fish and wildlife costs and other costs. It has not
14 adequately addressed the uncertainty it faces for future revenues. Therefore, the
15 Bonneville proposal is not based on its total system costs and has not met the
16 requirements of 16 U.S.C. 839e(a)(2)(B).

17 **III. BONNEVILLE IS NOT LIKELY TO ASSURE PAYMENT TO THE**
18 **TREASURY AFTER MEETING ITS COSTS.**
19

20 **Issue: Does Bonneville's Proposal assure repayment to the Treasury?**
21

22 **A. Bonneville's proposal does not assure repayment of the Treasury on a**
23 **current basis after meeting its costs.**
24

25 This section discusses the Congressional intent of the Northwest Power Act and
26 shows that Bonneville's Treasury Payment Probability does not achieve the purposes of

1 the Act. It further shows that Bonneville’s analysis overstates the probability of repaying
2 the Treasury.

3 **1) Congressional Intent**
4

5 Among the purposes of the Northwest Power Act is clear guidance regarding
6 BPA’s obligation to collect revenues through its rates. The Act is intended:

7 To provide that the customers of the Bonneville Power Administration and their
8 customers continue to pay all costs necessary to produce, transmit, and conserve
9 resources to meet the region’s electric power requirements, including amortization
10 on a current basis of the Federal Investment in the Federal Columbia River Power
11 System;

12
13 16 U.S.C. §839 (4) (emphasis added).
14

15 The reports of the Congressional committees that considered the Northwest Power
16 Act each contain explanations of the bill. The Senate Energy and Natural Resources
17 Committee was the first to report out a version of the Northwest Power Act. The Senate
18 committee report states:

19 [BPA's] rates shall...become effective upon confirmation and approval by the
20 Federal Energy Regulatory Commission on the finding that such rates (1) are
21 sufficient to assure repayment of the Federal investment in the Federal
22 Columbia River Power System over a reasonable number of years after first
23 meeting the Administrator’s other costs, (2) are based upon the
24 Administrator’s total system costs including contingencies...
25

26 See U.S. Senate Report 96-272, July 30, 1979, page 9.
27

28 Failure to make annual payments to the Treasury was perceived as a subsidy for
29 the Northwest that kept rates artificially low and gave the Northwest a competitive
30 advantage over other regions. Treasury deferrals are scored by the Office of
31 Management and Budget as an increase in the Federal deficit. The Congressional debate

¹⁰ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-
INITIAL BRIEF OF THE COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, NEZ PERCE TRIBE, AND YAKAMA NATION WP-07-M-69

1 makes it clear that the sponsors of the Northwest Power Act, including the chairmen of
2 key committees believed there would not be a subsidy and the Northwest ratepayers
3 would pay all of the costs for supplying electricity. During the Senate debate, Senator
4 Warren Magnuson, the chairman of the Senate Appropriations Committee stated:

5 Mr. President, under this legislation the Pacific Northwest would
6 continue to pay all of the costs necessary to meet the region's electric
7 power requirements, including repayments with interest of the
8 Federal investment in the Federal Columbia River power system.
9 The legislation requires that all obligations of the Bonneville Power
10 Administration Administrator incurred under this act shall be secured
11 solely by his revenues from the sale of power and other services.
12 This provision makes explicit in this act the self-financing
13 requirements of the Federal Columbia River Transmission System
14 Act of 1974. **I am particularly pleased, as chairman of the**
15 **Appropriations Committee, to note that this self-financing**
16 **provision means that all cost incurred by BPA under this act will**
17 **be paid by BPA's own customers, and not the U.S. Treasury or**
18 **the U.S. taxpayer.**

19
20 125 Cong. Rec. S11596 (daily ed. Aug. 3, 1979) (statement of Sen. Magnuson, Senate
21 Appropriations Committee Chairman, emphasis added).

22 The House Committee on Interstate and Foreign Commerce produced the version
23 of the bill that eventually became the Northwest Power Act. The Commerce Committee
24 report states:

25 Section 7(a) requires that the Administrator periodically review and set BPA
26 rates to recover the Administrator's total costs, including the amortization of
27 the Federal investment in the Federal Columbia River Power System and
28 specifies the applicable laws upon which FERC shall approve and confirm the
29 Administrator's periodic rate filings, including the rates paid by BPA for
30 purchased power.
31

1 H.R. Report No. 96-976, Part I (Commerce), May 15, 1980, page 68. In its explanation
2 of the purposes of the bill, the Commerce Committee report makes it clear that these
3 costs include fish and wildlife costs:

4 The third purpose is that BPA customers and the consumers of those
5 customers will continue to pay all of the costs necessary to produce, transmit,
6 and conserve resources to meet the region's electric power requirements.
7 These costs include those related to fish and wildlife.
8

9 *Id.* at page 49. In addition, the Commerce Committee addressed the issue of whether the
10 pending legislation would adversely affect other regions. The Commerce Committee
11 concluded that:

12 Concerns have been expressed that the legislation may have the effect of
13 providing incentives for new commerce and industry to move to the Pacific
14 Northwest at the expense of other regions, or that the bill may afford
15 Northwest utilities special financing advantages over other parts of the
16 country...
17

18 In summary, the Committee was careful to ensure that this bill would not
19 detrimentally impact other regions and that any impact would, in fact, be
20 beneficial.
21

22
23 *Id.* at page 44. Congressman John Dingell, the Chairman of the House Committee on
24 Interstate and Foreign Commerce, stated that "There is no subsidy from the Federal
25 Government to the Pacific Northwest and there is no special treatment of any particular
26 category of users within the Pacific Northwest." 126 Cong. Rec. H10680 (daily ed. Nov.
27 17 1980) (statement of Rep. Dingell).

28 Congressman Al Swift, a primary sponsor of the bill and member of the
29 Commerce Committee, gave an overview of the legislation during the House debate that
30 described all of the key provisions of the legislation, including:

31 First. The bill does not involve Federal guarantees, subsidies or bailouts: All
32 costs will be borne by BPA's customers. BPA does not receive appropriations.

1 It is a wholly self-financed agency required by law to recover all its costs
2 through its rates.

3
4 ***

5 Seventh The bill does not harm other regions: Mr. Dingell, Mr. Udall, Mr.
6 Clausen, Mr. Brown of Ohio, Mr. Kazan, Mr. Lujan, Mr. Sharp, and all the
7 other members from other regions on the two committees that overwhelmingly
8 supported this bill would not have voted for it and worked for it if any other
9 region could conceivably have been harmed by it. And as a result, the bill is
10 filled with provisions to insure that no such harm can result, either as a
11 financial impact felt in other regions or as an unwelcome precedent.

12
13 126 Cong. Rec. H9851 (daily ed. Sept. 29, 1980) (statement of Rep. Swift).

14
15 The Report of the House Committee on Interior and Insular Affairs succinctly
16 captures Congress' intent:

17 Section 7(a) continues the requirement of existing law that BPA set rates to
18 recover, in total, the full costs (but not more than the full cost) of its financial
19 obligations. This section also sets forth the applicable law and procedure upon
20 which the Federal Energy Regulatory Commission shall approve and confirm
21 BPA's periodic rate filings.

22
23 H.R. Report 96-976, Part II (Interior), September 16, 1980, page 52.

24
25 All of the Congressional report language supports a reading that BPA must set
26 rates to recover the full costs of its financial obligations on a current basis. The Treasury
27 should not subsidize BPA rates. BPA rates should not put other regions of the country at
28 an unfair disadvantage. BPA must also include all of its costs, including fish and
29 wildlife, in its total system costs.

30 **2) BPA TPP goal does not assure repayment on a current basis**

31
32 In this Proposal, Bonneville has established a Treasury Payment Probability
33 (TPP) of 92.6 percent over the three-year rate period. This goal assumes a 7.4 percent
34 probability that Bonneville will not be able to repay the Treasury on time and in full

1 during the rate period. *See* WP-07-E-BPA-08, page 8, lines 21 to 26. Bonneville could
2 have selected a higher TPP goal; however, in its testimony Bonneville states that it
3 balanced competing objectives, including setting the lowest possible rates. *Id.* at page 5,
4 lines 6 through 20.

5 **3) BPA treats multiple deferrals the same as a single deferral**

6
7 In the WP-02 and SN-03 rate cases, the Tribes expressed concerns that Bonneville
8 treated cases that deferred payments to the Treasury two, or three years during the rate
9 period the same as a case that deferred one Treasury payment. This approach
10 significantly underestimated the risks that Bonneville faces. Clearly the consequences of
11 multiple deferrals are much more significant than a single deferral and move further away
12 from the Congressional goal to repay the Treasury on a current basis. In response to a
13 data request, Bonneville responded that it “had not performed this analysis, but has
14 provided data that makes this readily possible.” *See* WP-07-E-CR-01FFF (CR-BPA-16).
15 We believe that this analysis is important and that Bonneville should have evaluated this
16 risk. We note that when Save Our Wild Salmon examined this issue, they found that of
17 the 221 runs that had a deferral, 54—about one quarter—had more than one deferral. *See*
18 WP-07-E-JP8-01 page 9, lines 12-14 and *Id.* page 7, line 8 through page 11, line 16. If
19 Bonneville counted multiple deferrals it would effectively increase the number of times
20 that Bonneville expects to fails to make it Treasury payment to about ten percent over the
21 three year period.

22 Bonneville’s TPP standard, its treatment of multiple misses of Treasury payments,
23 and the uncertainties discussed above make it unlikely that Bonneville will be able to

1 make all of its Treasury payments on a current basis. Bonneville’s proposal has not met
2 the requirements of 16 U.S.C. §839 (4) or 16 U.S.C. 839e(a)(2).

3 **B. Bonneville’s proposal does not meet its TPP goal if it experiences**
4 **additional FCRPS Biological Opinion costs.**
5

6 Bonneville acknowledges that it faces risks and uncertainties during the rate
7 period. *See* WP-07-E-BPA-08, page 6, line 7gh page 8, line 17 and page 12, line 1
8 through page 13, line 24. Bonneville’s testimony then describes its risk package and
9 concludes:

10 The combination of reserves, PNRR, a CRAC, NFB Adjustment and a DDC
11 present BPA with a reasonable mix of fixed and flexible tools, and balances the
12 competing policy objectives in Section 3. **The selected package allows BPA to**
13 **meet its TPP standard** without setting “posted” rates at an unacceptably high
14 level or building up significant cash reserves in the FY 2007-2009 rate period
15

16 (Emphasis added) *Id.* at page 14, lines 14 through 18.
17

18 **1) Bonneville’s proposal does not meet its TPP goal if it experiences**
19 **additional Biological Opinion costs.**
20

21 Despite the assertion that the Proposal “allows BPA to meet its TPP standard”,
22 Bonneville did not conduct any TPP analysis of the impact of additional costs associated
23 with the biological opinion. *See* WP-07-E-CR-01QQ (CR-BPA-004); WP-07-E-CR-
24 01RR (CR-BPA-008); WP-07-E-CR-01SS (CR-BPA-012); WP-07-E-CR-01TT (CR-
25 BPA-019); WP-07-E-CR-01UU (CR-BPA-020); and WP-07-E-CR-01VV (CR-BPA-
26 021). Bonneville did not analyze the probability that the NFB adjustment would be
27 triggered. *See* WP-07-E-CR-01WW (CR-BPA-003). In several data responses
28 Bonneville states that it did not conduct the analysis because the proposed rate design of
29 the NFB adjustment accommodates any impact of river operations. The analysis below

1 demonstrates that Bonneville’s assertion was not accurate. *See* WP-07-E-CR/NZ/YA-01
2 page 55, line 9 through page 56, line 2.

3 The Tribes analyzed several alternatives where BPA experiences higher costs
4 associated with the Biological Opinion using the BPA Toolkit model. In these cases, the
5 Tribes’ analysis added the cost of the ESA operations in Toolkit cells N25, N26, and N27
6 and to the CRAC limits in cells F25, F26, and F27 of the model. The first alternative
7 assumed that the costs associated with the 2006 Court ordered operation would continue
8 for FY 2007 through FY 2009. The analysis assumed that the market costs were the
9 same as Bonneville assumed in its proposal. This resulted in reduced revenues of \$36
10 million in FY 2007, \$32 million in FY 2008, and \$30 million in FY 2009 assuming
11 average water conditions. *See* WP-07-E-CR-01N. If market costs were higher, these
12 impacts would also increase. These additional costs result in a TPP of 89.7 percent. *See*
13 WP-07-E-CR-01NN. The Tribes also analyzed the impacts of the plaintiffs’ proposal for
14 2006. If the Court ordered these operations for FY 2007 through FY 2009 it would
15 reduce revenues by \$249 million in FY 2007, \$211 million in FY 2008, and \$195 million
16 in FY 2009 assuming average water conditions. *See* WP-07-E-CR-01OO. These impacts
17 would reduce the TPP to 73 percent. *See* WP-07-E-CR-01PP and WP-07-E-CR/NZ/YA-
18 01 page 54, line 11 through page 55, line 8.

19 Bonneville also did not analyze the impacts on TPP if the Federal District Court
20 adopted the Federal government’s own plan for implementing the FCRPS Biological
21 Opinion. In response to a data request, BPA has stated that “no analysis has been
22 conducted regarding the impacts of the federal plan for river operations for FY 2006.”

1 See WP-07-E-CR-01ZZ (CR-BPA-013) and WP-07-E-CR/NZ/YA-01 page 56, lines 16
2 through 22.

3 In Bonneville’s declaration in the injunctive relief hearing for the 2006 operation
4 of the FCRPS as part of the Biological Opinion litigation, the second declaration of
5 Roger Schiewe analyzes the Federal Plan for Operation in 2006 and concludes that the
6 costs would be \$43 million in an average water year See WP-07-E-CR-01XX pages 15-
7 19. The Tribes analyzed these costs using the same methodology described above. The
8 additional costs of the Federal Plan would reduce the TPP to 88.8 percent. See WP-07-E-
9 CR-01YY; and WP-07-E-CR/NZ/YA-01 page 56, lines 3 through 15.

10 The Tribes requested that Bonneville provide any information or analysis of the
11 TPP if the NFB adjustment is implemented. The Bonneville response stated that “BPA
12 has performed no TPP analyses of the NFB adjustment.” See WP-07-E-CR-01EEE (CR-
13 BPA-038); and WP-07-E-CR/NZ/YA-01 page 58, lines 5 through 10.

14 The Tribes’ analysis also raised fundamental questions about the overall
15 effectiveness of the NFB adjustment. The analysis ran the BPA Toolkit model using the
16 cost assumptions described above in the low case, but without increasing the CRAC limit.
17 This lowered the TPP from 80.7 percent to 80.2 percent—the NFB has an impact of 0.5
18 percent. See WP-07-E-CR-01CCC. We also ran the high case without increasing the
19 CRAC limit and found that it lowered the TPP from 57.7 percent to 53.2 percent—the NFB
20 has an impact of 4.5 percent in cases that are already very low. See WP-07-E-CR-01DDD.
21 Therefore, it appears that the NFB, as currently designed, has very little impact on
22 improving TPP. WP-07-E-CR/NZ/YA-01 page 57, line 17 through page 58, line 4.

1 Bonneville provided a one sentence rebuttal to the Tribes’ analysis stating that
2 “BPA does not agree this is a valid test.” *See* WP-07-E-BPA-34, page 2, line 19. In
3 clarification, BPA staff said that its tools were designed to deal with probabilities and that
4 our analysis assumed a 100 percent chance of additional costs. The Tribes provide
5 several responses in the sur-rebuttal.

6 First, the Tribes have made a good faith effort, using BPA’s own models as
7 instructed by BPA staff, to analyze the impact of the BPA proposal on its ability to
8 address higher fish and wildlife costs with the risk mitigation tools that BPA has
9 proposed.

10 Second, higher costs will either happen or they won’t. In actual practice, BPA
11 will either face a 100 percent probability of some additional fish and wildlife costs or not.
12 In the Tribes’ analysis, these hypothetical additional costs, in combination with a number
13 of other uncertainties, were analyzed by BPA’s models. The Tribes’ analysis shows that
14 when additional costs are included in BPA’s risk models, the TPP falls below BPA’s goal
15 of 92.6 percent.

16 Third, BPA has made no effort to analyze this issue. That is the conclusion the
17 Tribes must draw from BPA’s data requests. *See e.g.*, WP-07-E-CR-01EEE.

18 The Tribes efforts to use BPA’s models in the manner instructed by BPA staff are
19 more informative than BPA’s approach, which is a total absence of any analysis in the
20 record on this issue. *See* WP-07-E-JP13-03 page 9 line 10 through page 10, line 13.

21 Bonneville’s TPP standard in combination with the uncertainties discussed above
22 makes it unlikely that it will be able to make all of its Treasury payments on a current

1 basis. Therefore, Bonneville’s proposal has not met the requirements of 16 U.S.C. §839
2 (4) or 16 U.S.C. 839e(a)(2).

3 **2) Bonneville has not demonstrated that its revised proposal will**
4 **meet its TPP goal if it experiences additional Biological Opinion**
5 **costs.**
6

7 The BPA rebuttal testimony states that “BPA agrees that the lag in the recovery of
8 cash through the CRAC of up-to-one year does prevent the NFB from providing the TPP
9 support BPA needs the NFB Adjustment to provide in years when BPA’s reserve levels
10 are low. In years when BPA’s reserve levels are high, the up-to-one-year lag in receiving
11 cash to compensate for the reduced net revenue does not jeopardize BPA’s Treasury
12 payment.” *See* WP-07-E-BPA-34, page 2, line 20. Therefore, “BPA proposes the
13 emergency NFB surcharge to recover the FCRPS BiOp related financial impacts resulting
14 from the current litigation through the forward-looking Emergency NFB Surcharge when
15 the time lag results in an agency TPP of less than 80 percent in that year.” *See* WP-07-E-
16 BPA-34, page 2, line 25. Bonneville admits that the remand process is not expect to be
17 complete prior to the final studies being run, thus BPA has proposed to address the
18 FCRPS Biological Opinion remand process through the Emergency NFB Surcharge and
19 the NFB adjustment of the CRAC cap. *See* WP-07-E-BPA-34; and JP13-BPA-005.

20 Bonneville has not demonstrated that the proposed Emergency NFB Surcharge
21 will ensure that BPA will be able to repay its debt to the Treasury on a current basis after
22 meeting its costs. The Tribes asked Bonneville to “Provide any information and/or
23 analysis on the impact of the emergency NFB surcharge, in combination with BPA’s
24 other risk mitigation strategies, on TPP. Bonneville responded:

1 BPA has not conducted any analysis regarding the Emergency NFB Surcharge
2 separately or in combination with BPA's other risk mitigation strategies. The
3 Emergency NFB Surcharge is designed to specifically recover for financial
4 impacts due to one or more of the trigger events described in WP-07-E-BPA-34
5 when BPA's financial reserves are low enough to threaten BPA's Treasury
6 payment.

7
8 JP13-BPA-007. We also requested any analysis of the impact of the Emergency NFB
9 Surcharge on meeting the 92.6 percent TPP goal. Bonneville responded:

10 BPA has not produced any additional documentation or conducted any analysis
11 regarding the impact that the emergency NFB surcharge has on meeting the 92.6
12 percent TPP goal. The Emergency NFB Surcharge is designed to specifically
13 recover for financial impacts due to one or more of the trigger events described in
14 WP-07-E-BPA-34 when BPA's financial reserves are low enough to threaten
15 BPA's Treasury payment.

16
17 *See* JP13-BPA-014

18
19 The Tribes requested information on how to use Bonneville's analytical models
20 so we could conduct independent analysis of the impact of the emergency NFB
21 surcharge, in combination with other risk mitigation strategies, on TPP if BPA
22 experiences higher ESA costs. Bonneville responded that:

23 It is not possible to adjust numbers in the cells located in Toolkit or other BPA
24 model to accurately measure the impact of the Emergency NFB Surcharge.

25
26 To conduct the analysis described in the request above, BPA or an independent
27 source would need to develop a complex set of financial assumptions regarding
28 how higher ESA costs would occur for each year, accounting for both operational
29 and program impacts. The results would then need to be assigned probabilities of
30 those events taking place. This analysis could be incorporated into NORM but
31 requires an additional application called @Risk and the knowledge of how to run
32 the program. It is also likely that additional programming changes to the Toolkit's
33 main macro function would be needed.

34
35 BPA has no such analysis and is not obligated to develop this type of analysis in
36 order to respond to this request.
37

1 See JP13-BPA-009. There is nothing in the record from Bonneville that indicates that it
2 can meet its TPP goal with the risk mitigation strategies it has proposed, included the
3 revised proposal that includes the Emergency NFB Surcharge. This is a serious weakness
4 in the proposal. The parties must take BPA's proposal on faith, without any supporting
5 analysis that can be tested and rebutted.

6 On the other hand, the Tribes analysis has shown that BPA is not able to meet its
7 TPP goals if its fish and wildlife costs are higher than it assumes. The Tribes' raised
8 significant concerns about the impacts on fish and wildlife when BPA is faced with
9 missing a Treasury payment. Some of this analysis was struck by the Hearing Officer at
10 the request of Bonneville and is discussed in the request to reconsider the struck material
11 below. We reserve the right to raise these issues in future proceedings. See WP-07-E-
12 JP13-03 page 7, line 1 through 6.

13 Request to Reconsider Order Striking Certain Testimony

14 BPA moved to strike the Tribes' testimony on BPA's ability to meet its TPP at
15 WP-07-E-CR/NZ/YA/-01 page 53, line 23 through page 54, line 10 and on page 57, lines
16 1 through 16. The Tribes' testimony deals directly with BPA's ability to meet its TPP
17 goals with the risk mitigation mechanisms it had proposed. The Hearing Officer struck
18 this material in WP-07-O-23.

19 The Tribes contend that this testimony was not intended to advocate a competing
20 budget as argued by BPA; rather, it was designed to test the BPA risk mitigation
21 strategies when faced with additional costs. It rebuts Bonneville's initial testimony that
22 the risk mitigation package "**allows BPA to meet its TPP standard.**" (Emphasis added)

1 WP-07-E-BPA-08 at page 14, line 16. The Tribes’ testimony should be considered in
2 this proceeding.

3 Bonneville also moved to strike the Tribes’ sur-rebuttal testimony at WP-07-E-
4 JP13-03 on page 7, line 10 through page 8, line 4. *See* WP-07-O-30. The Tribes’
5 testimony is based on “several purely hypothetical examples”. *See* page 7, line 18. The
6 analysis is sur-rebuttal to Bonneville’s rebuttal testimony which summarizes the Tribes’
7 analysis of the NFB and CRAC, proposes the emergency NFB surcharge, and
8 summarizes the changes to the initial proposal. *See* WP-07-E-BPA-34, page 2, line 3
9 through page 4, line 18.

10 The Tribes’ analysis of the hypothetical examples tests the ability of the NFB and
11 CRAC to effectively respond to a range of costs. In the stricken testimony, the Tribes
12 analyzed several purely hypothetical examples using BPA’s Toolkit. First, the Tribes
13 assumed that additional ESA costs add \$50 million per year and added these costs to cells
14 N25, N26, and N27. The analysis also increased the CRAC limits in F25, F26, and F27
15 by the same amount. The Toolkit results showed that the TPP was lowered from 92.6
16 percent to 88 percent. In the second hypothetical, the analysis assumed an increase in
17 ESA costs of \$100 million and using the same analytical method found that the TPP was
18 reduced to 83 percent. In the third hypothetical example, the analysis assumed \$200
19 million in ESA costs per year; this lowered the TPP to 75 percent. *See* WP-07-E-JP13-
20 03B, C, and D.

21 Improving BPA’s ability to meet TPP when faced with higher ESA costs is the
22 point of the BPA-34 rebuttal testimony, this information directly rebuts Bonneville

1 testimony and should be allowed for the reasons discussed above. The Tribes request
2 that the stricken testimony be considered and included in the record of this proceeding.¹¹

3 **3) Bonneville has not demonstrated that the failure to meet its TPP**
4 **goal if it experiences additional Biological Opinion costs is related**
5 **to low reserves.**
6

7 BPA has conceded that “the lag in the recovery of cash through the CRAC of up-
8 to-one year does prevent the NFB from providing the TPP support BPA needs the NFB
9 Adjustment to provide in years when BPA’s reserve levels are low. In years when BPA’s
10 reserve levels are high, the up-to-one-year lag in receiving cash to compensate for the
11 reduced net revenue does not jeopardize BPA’s Treasury payment.” *See* WP-07-E-BPA-
12 34, page 2, line 20. Bonneville provided no analysis to support the assertion that this is
13 only a problem when reserves are low. *See* WP-07-E-JP13-03, page 6, lines 16 through
14 21.

15 The Tribes conducted an independent analysis to test the Bonneville assertion.
16 The analysis sorted the reserves data for a hypothetical increase of ESA costs of \$100
17 million per year; we found that there was a wide range of reserves in 2006 that produced
18 Treasury deferrals in 2007, 2008, and/or 2009. Clearly, low reserves affect TPP, but at
19 the levels of reserves in this analysis and using BPA’s assumptions about PNRR, BPA
20 would fail to make Treasury payments in a wide range of ending reserves. WP-07-E-
21 JP13-03, page 8, lines 5 to 13.

22 **C. Bonneville’s revised proposal lowers its TPP goal.**
23

¹¹ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-
CR/NZ/YA/-01 page 53, line 23 through page 54, line 10 and on page 57, lines 1 through 16; WP-07-E-
JP13-03 on page 7, line 10 through page 8, line 4; and associated attachments.

1 The emergency NFB surcharge would not trigger unless the Court-ordered ESA
2 action lowers the TPP to below 80 percent. This is a significant reduction from the one-
3 year TPP goal of 95 percent. It means that BPA is accepting a 20 percent probability of
4 deferring all or part of a Treasury payment before triggering the surcharge. This will
5 increase the risk that BPA will find itself in a position where it will be required to either
6 defer payments to the Treasury or cut other costs, including fish and wildlife costs. *See*
7 WP-07-E-JP13-03 page 11, lines 1 through 10.

8 There are several problems with the surcharge as it has been proposed that could
9 mean that Bonneville is not able to meet even an 80 percent TPP. First, BPA will only
10 collect the amount of the additional ESA litigation-related costs. *See* WP-07-E-BPA-34,
11 page A-4. The mechanism is not designed to achieve 80 percent TPP (or a 95% TPP);
12 rather, it is designed to collect the amount associated with the FCRPS Biological Opinion
13 litigation. If the goal is to minimize the risk of a Treasury deferral, then at a minimum
14 BPA should trigger the emergency NFB surcharge if the current year TPP is below 95
15 percent. Also, if the goal is to minimize the risk of a Treasury deferral, then BPA should
16 trigger an emergency surcharge for any reason if its ability to repay the Treasury is
17 compromised. BPA has proposal assumes a very narrow trigger. It will only trigger the
18 surcharge to address changes in FCRPS Endangered Species Act compliance related to
19 the litigation over the 2004 BiOp. *See* WP-07-E-BPA-34, page A-3. As discussed
20 below, the proposed settlement is even narrower. BPA faces other risks and uncertainties
21 and should adopt a provision that it can trigger a surcharge if those risks and uncertainty

1 make it unlikely that it will be able to repay the Treasury on a current basis. *See* WP-07-
2 E-JP13-03 page 11, line 11 through page 12, line 2.

3 Second, there may be a delay in when BPA collects the funds. BPA proposes to
4 notify rate case parties two weeks after the trigger event occurs, hold a workshop, and
5 then notify customers about the amount to be collected. *See* WP-07-E-BPA-34, page A-6
6 and 7. The customers will then need to raise their rates to collect the additional revenue
7 and send the payments to BPA; this will add at least one-month for the billing cycle and
8 potentially more. Therefore, the delay in the receipt of the surcharge revenues could be
9 delayed by at least two months and potentially more.

10 Third, BPA has provided no analysis of how the schedule for implementing the
11 surcharge and limits it has adopted will affect its ability to repay the Treasury after
12 meeting its other costs. BPA should provide this analysis and provide an opportunity for
13 rebuttal.

14 BPA has not demonstrated that its proposal will ensure that BPA's rates are based
15 on its total system costs and that the rates assure repayment to the Treasury after meeting
16 BPA's other costs. *Id.* page 12, line 3 through page 13, line 5.

17 **1) BPA's proposed substitute further reduces its ability to assure**
18 **repayment to the Treasury**

19
20 Bonneville has proposed further restrictions on its ability to use the Emergency
21 NFB Surcharge to meet its TPP. The substitute Emergency NFB Surcharge section was
22 inserted into the record on April 13, 2006. *See* WP-07-O-33. Bonneville's original
23 rebuttal testimony stated that:

1 NFB triggering events are changes in the FCRPS Endangered Species Act
2 compliance that result in financial impacts due to the anadromous fish portion of
3 BPA’s fish and wildlife obligations. Such changes can arise from a court order
4 (including court-approved agreement) agreements related to litigation, a new
5 NMFS FECRPS BiOp, or BPA commitments to implement Recovery Plans under
6 the ESA related to litigation.

7
8 WP-07-E-BPA-34, page A-4. In a data response Bonneville clarified which actions are
9 subject to the emergency NFB surcharge:

10 BPA did not specify exactly what is included and not included in the Emergency
11 NFB Surcharge because there are simply too many possibilities due [sic] that can
12 change with different circumstances. Instead, BPA chose to define the
13 circumstances related to the 2004 FCRPS BiOp litigation that would qualify to be
14 included in the financial impact calculations. By taking this approach, the
15 language is sufficiently detailed to allow for arrangements that neither BPA nor
16 the parties have envisioned at this time.

17
18 See JP13-BPA-016. In Attachment A to WP-07-O-33 Bonneville has further restricted
19 the actions that are subject to the emergency NFB surcharge.

20 (a) A Trigger Event is when one of the following four kinds of events arises
21 and results in changes to BPA’s FCRPS ESA obligations compared to
22 those in the Final Studies of the WP-07 BPA rate proceeding:

- 23
24 i. A court order in *National Wildlife Federation vs. National Marine*
25 *Fisheries*, CV 01-640-RE, or any appeal thereof (“Litigation”);
26
27 ii. An agreement (whether or not approved by the Court) that results
28 in the resolution of issues in, or the withdrawal of parties from, the
29 Litigation;
30
31 iii. A new NMFS FCRPS BiOp; or
32
33 iv. A BPA commitment to implement Recovery Plans under the ESA
34 that results in the resolution of issues in, or the withdrawal of
35 parties from, the Litigation.

36
37 See WP-07-O-33, page 3.
38

1 These limitations will further reduce Bonneville’s abilities to trigger the
2 emergency NFB surcharge “for arrangements that neither BPA nor the parties have
3 envisioned at this time” and reduce Bonneville’s ability to assure repayment to the
4 Treasury after meeting its costs.

5 The substitute Emergency NFB Surcharge also includes a new section on the
6 factors that Bonneville will consider in calculating the 80 percent TPP trigger. The new
7 section includes “expense reductions and revenue increases”. This language implies that
8 Bonneville will make additional cost reductions, including fish and wildlife, before
9 deciding to trigger a surcharge to deal with additional fish and wildlife costs. The
10 substitute does not contain any information on how Bonneville will evaluate these cost
11 reductions and meet its obligations under federal laws and treaties. *Id.* page 4.

12 The substitute includes a new provision to review the Emergency NFB Surcharge
13 to address the need for the surcharge and whether it is set at the appropriate level. The
14 substitute states:

15 If the Administrator determines that the Surcharge Amount needs to be adjusted,
16 the close-out letter will establish the refund or credit amount to Customers for the
17 amounts over-collected or adjust the Surcharge then in effect for the remainder of
18 the year or remove it entirely if one or more of the following occur:

- 19
20 (1) the Agency Within-year TPP, not including future surcharge
21 payments, is determined at the time of the close-out letter, using
22 the methodology developed pursuant to subsection E.9, to be
23 greater than 90 percent;
- 24
25 (2) an updated Surcharge calculation results in a change compared to
26 the Surcharge calculated in subsection E.7.
- 27
28 (3) in BPA’s initial determination to assess the surcharge, BPA did not
29 follow the Within-year TPP methodology established pursuant to
30 subsection E.9.

1
2 *Id.* page 11. This provision is not clear and could be read that Bonneville must remove
3 the surcharge entirely “if one or more of the following occur.” A literal interpretation of
4 the language would require Bonneville to remove the surcharge entirely if it set the
5 surcharge too high or too low after the updated calculation in subsection (2).

6 The substitute also continues the proposal to lower the TPP and to limit how
7 much can be collected. The Tribes oppose the adoption of the substitute.

8 Bonneville’s reduced TPP standard in combination with the uncertainties
9 discussed above makes it unlikely that it will be able to make all of its Treasury payments
10 on a current basis after meeting its costs. Therefore, Bonneville’s proposal has not met
11 the requirements of 16 U.S.C. §839 (4) or 16 U.S.C. 839e(a)(2).

12 **Request to Reconsider Order Striking Certain Testimony**

13 The Tribes offered sur-rebuttal testimony and analysis on alternative risk
14 mitigation strategies that could improve Bonneville’s ability to repay the Treasury if it
15 experiences additional costs. *See* WP-07-E-JP13-03, page 12, lines 8-12. Bonneville
16 moved to strike this testimony. *See* WP-07-M-53. The Hearing Officer order WP-07-0-
17 30 struck this material. The Tribes request that the Administrator set aside the
18 determination in WP-07-O-30 to strike the foregoing evidence¹², consider and respond to
19 the tribes’ stricken evidence, and include the foregoing tribal evidence in the record of
20 this proceeding. The stricken tribal testimony rebuts Bonneville’s rebuttal testimony at
21 WP-07-E-BPA-34, page A-4. In conformance with the statute’s mandate the stricken
22 material should be admitted to the administrative record.

1 The stricken testimony, states that other factors would affect the TPP, including
2 increases in costs and decreases in revenues, and goes on to point out that limiting the
3 surcharge to only the amount of the ESA costs may not collect enough to assure Treasury
4 payment. BPA should modify its proposal so it can collect sufficient funds to repay the
5 Treasury. As described earlier, it would be in error for Bonneville to fail to consider this
6 evidence.

7 **D. Bonneville’s proposal does not meet its TPP goal if it experiences**
8 **other fish and wildlife costs.**
9

10 In the rebuttal testimony, BPA states that it “believes that its proposed rate design,
11 including the use of RiskMod, NORM, and CRACs, provide reasonable protection
12 against such uncertainties [associated with amendments to the Columbia River Basin Fish
13 and Wildlife Program, NOAA recovery plans, and the Biological Opinion]. With respect
14 to the 2004 FCRPS BiOp litigation exposure, BPA has proposed the Emergency NFB
15 Surcharge and NFB Adjustment to the CRAC cap. In any event, BPA will meet its fish
16 and wildlife funding responsibilities.” *See* WP-07-E-BPA-34, page 12, line 1 through 5.
17 The Tribes provided evidence in our testimony that the rate design did not address all of
18 these uncertainties. BPA’s new proposal has not demonstrated that it can address the
19 costs associated with the Fish and Wildlife Program. In rebuttal to BPA’s testimony
20 above, we analyzed a hypothetical additional \$100 million per year in Fish and Wildlife
21 Program costs using Toolkit with no increase in the CRAC limit and found that the TPP
22 dropped from 92.6 percent to 81 percent. *See* WP-07-E-JP13-03H.

¹² The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-JP13-03, page 12, lines 8-12.

1 Our testimony and sur-rebuttal demonstrate that additional costs to implement
2 Fish and Wildlife Program costs will reduce BPA’s TPP. Therefore, BPA’s proposal
3 does not assure repayment to the Treasury. *See* WP-07-E-JP13-03 page 14, line 16
4 through page 15, line 15.

5 **Request to Reconsider Order Striking Certain Testimony**

6 BPA moved to strike testimony on its ability to meet TPP if it experiences fish
7 and wildlife costs that are not related to the FCRPS Biological Opinion litigation. BPA
8 moved to strike the Tribes’ initial Testimony at WP-07-E-CR/NZ/YA/-01 page 53, line
9 23 through page 54, line 10 and on page 57, lines 1 through 16 regarding BPA’s ability to
10 meet its TPP goals with the risk mitigation mechanisms it had proposed. The Hearing
11 Officer struck this material in WP-07-O-23. The tribes request that the Administrator set
12 aside the determination in WP-07-O-23 to strike the foregoing evidence¹³, consider and
13 respond to the tribes’ stricken evidence, and include the foregoing tribal evidence in the
14 record of this proceeding. The stricken tribal testimony rebuts Bonneville’s rebuttal
15 testimony at WP-07-E-BPA-34, page A-4. In conformance with the statute’s mandate,
16 the stricken material should be admitted to the administrative record.

17 The Tribes contend that this testimony was not intended to advocate a competing
18 budget; rather, it was designed to test the BPA risk mitigation strategies when faced with
19 additional Northwest Power Act costs.

20 In the first section of the stricken testimony, the Tribes analyzed two cases where
21 the costs associated with implementing the Columbia River Basin Fish and Wildlife

1 Program were higher than Bonneville has assumed. The first case considered an
2 additional \$57 million in FY 2007, \$82 million in FY 2008, and \$97 million in FY 2009.
3 This case reduced the Treasury Payment Probability (TPP) from Bonneville's target of
4 92.6 percent down to 83.7 percent. *See* WP-07-E-CR-01LL. The second case considered
5 an example wherein BPA incurred the foregoing additional costs, but did not capitalize
6 land and water acquisitions and thus incurred an additional \$70 million per year in fish
7 and wildlife costs. This case reduced the TPP to 77 percent. *See* WP-07-E-CR-01MM.
8 The analysis of these examples would have demonstrated that Bonneville's proposal is
9 not adequate to address additional costs and uncertainties that are not related to the ESA
10 litigation and meet its target for repayment to the Treasury.

11 In the second section of the stricken testimony, the Tribes used the Toolkit model
12 to analyze two cases where Bonneville would implement the Court-ordered river
13 operations under the biological opinion litigation and the Columbia Basin Fish and
14 Wildlife Program. The low case results in a TPP of 80.7 percent. *See* WP-07-E-CR-
15 01AAA. The high case results in a TPP of 57.7 percent. *See* WP-07-E-CR-01BBB. This
16 is a critical issue in this proceeding and it would be an error not to consider this
17 testimony.

18 Bonneville also moved to strike the Tribes testimony on WP-07-E-JP13-03, page
19 13, lines 11 through 23. The Hearing officer struck this material in WP-07-O-30. The
20 tribes request that the Administrator set aside the determination in WP-07-O-23 to strike

¹³ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-CR/NZ/YA/-01 page 53, line 23 through page 54, line 10 and on page 57, lines 1 through 16 and related attachments.

1 the foregoing evidence¹⁴, consider and respond to the tribes' stricken evidence, and
2 include the foregoing tribal evidence in the record of this proceeding. The stricken tribal
3 testimony rebuts Bonneville's rebuttal testimony at WP-07-E-BPA-34, page 13, line 15.
4 In that testimony, Bonneville asserts that it "proposes to deal with uncertainty in
5 additional fish and wildlife financial impacts for the 2007-2009 rate period by including
6 the NFB Adjustment..."

7 The Tribes stricken testimony rebuts this statement by stating that BPA fails to
8 acknowledge that it has limited the NFB to ESA related costs and specifically excluded
9 Northwest Power Act related costs or other fish and wildlife costs from either the NFB or
10 the emergency NFB surcharge. The Tribes believe that BPA should modify its rates for
11 whatever additional costs it has. Failure to do so will mean that BPA's rates are not
12 based on its total system costs and will reduce BPA's ability to assure repayment to the
13 Treasury after meeting its costs.

14 In conformance with the statute's mandate the stricken material should be
15 admitted to the administrative record.

16 **E. Bonneville did not evaluate other alternatives to meet its TPP goal if it**
17 **experiences higher costs.**

18
19 Bonneville did not analyze other alternatives to address the low TPP that BPA
20 would result if it experiences higher Biological Opinion, Northwest Power Act, or other
21 costs. The Tribes provided analysis of other alternatives in sur-rebuttal. Bonneville
22 successfully moved to strike this testimony. We discuss this issue in the section below

¹⁴ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-JP13-03, page 13, lines 11 through 23.

1 requesting reconsideration of the order striking our testimony and reserve our right to
2 raise these issues in future proceedings.

3 **Request to Reconsider Order Striking Certain Testimony**

4 The Tribes offered testimony and analysis on alternative risk mitigation strategies
5 that could improve Bonneville's ability to repay the Treasury if it experiences additional
6 costs. *See* WP-07-E-JP13-03, page 8, line 14 through page 9, line 9. Bonneville moved
7 to strike this testimony. *See* WP-07-M-53. The Hearing Officer order, WP-07-0-30,
8 struck the foregoing material. The tribes request that the Administrator set aside the
9 determination in WP-07-O-30 to strike the foregoing evidence¹⁵, consider and respond to
10 the tribes' stricken evidence, and include the foregoing tribal evidence in the record of
11 this proceeding. The stricken tribal testimony rebuts Bonneville's rebuttal testimony at
12 WP-07-E-BPA-34 Page 2 at 24. In conformance with the statute's mandate the stricken
13 material should be admitted to the administrative record.

14 In the stricken testimony, the Tribes analyzed a hypothetical case where BPA had
15 \$100 million higher ESA costs per year and tested the impact of increasing the limit on
16 the CRAC, increasing PNRR, and increasing the Accumulated Net Revenues threshold.
17 In the first case the analysis increased the CRAC limit by an additional \$100 million and
18 found that the impact on TPP was small. It increased from 83 percent to 84.5 percent.
19 *See* WP-07-E-JP14-03E. The Tribes also analyzed an increase in PNRR of \$100 million
20 and found that it increased TPP from 83 percent to 92.8 percent with a 95 percent TPP for
21 2009. *See* WP-07-E-JP14-03F. Finally, the analysis increased the ANR threshold by

¹⁵ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-JP13-03, page 8, line 14 through page 9, line 9 and related attachments.

1 \$100 million so the CRAC would trigger at \$540 million in 2007 and \$600 million in
2 2008 and 2009 and found that the TPP increased to 90 percent. *See* WP-07-E-JP13-03G.

3 Therefore, the Tribes concluded in their stricken testimony that increasing PNRR
4 and/or the reserve threshold would have a more significant improvement on TPP than
5 increasing the CRAC limit. BPA apparently did not evaluate these options and has
6 provided no analysis of the alternatives it considered prior to proposing the emergency
7 NFB surcharge.

8 Since there is no way to currently analyze the emergency NFB surcharge, the
9 Tribes also concluded that increasing PNRR and/or the reserve threshold would provide a
10 more certain improvement in TPP than the emergency NFB surcharge.

11 As described earlier, it would be in error for Bonneville to fail to consider this
12 evidence.

13
14 **F. Bonneville’s risk mitigation strategies do not address the political**
15 **risks it faces**

16
17 Based on Bonneville’s rate methodology, when Bonneville underestimates its
18 costs or overestimates its revenues, it reduces the probability that it will be able to assure
19 repayment to the Treasury after meeting its costs. This forces Bonneville to choose
20 between making its Treasury payment and reducing its costs. *See* WP-07-E-CR/NZ/YA-
21 01, page 59, lines 3 through 9. Bonneville successfully moved to strike the remainder of
22 our testimony on this issue and it is address in the request to reconsider the order striking
23 certain testimony below.

24 **Request to Reconsider Order Striking Certain Testimony**

1 The Tribes offered testimony regarding the impacts of Bonneville’s risk
2 mitigation strategies. *See* WP-07-E-CR/NZ/YA, page 59, line 9 through page 62, line 16.
3 Bonneville moved to strike this testimony. *See* WP-07-M-14. The Hearing Officer order
4 WP-07-0-23 struck the foregoing material. The tribes request that the Administrator set
5 aside the determination in WP-07-O-23 to strike the foregoing evidence¹⁶, consider and
6 respond to the tribes’ stricken evidence, and include the foregoing tribal evidence in the
7 record of this proceeding. The stricken tribal testimony rebuts Bonneville’s rebuttal
8 testimony at WP-07-E-BPA-08 Page 14, lines 13 through 23. In conformance with the
9 statute’s mandate the stricken material should be admitted to the administrative record.

10 In the stricken testimony, the Tribes provide evidence that in practice, Bonneville
11 has operated to a 100 percent TPP and when Bonneville has been forced to choose
12 between making its Treasury payment and reducing its costs, Bonneville has decided to
13 reduce fish and wildlife protections and programs.

14 The Tribes’ stricken testimony provided examples of cases where Bonneville has
15 reduced fish and wildlife protection rather than defer a payment to the Treasury.
16 Bonneville’s rationale for the reduction of fish actions has been that “failure to make a
17 Treasury payment would encourage administrative and congressional review and possible
18 limitation on BPA operations.” *See* WP-07-E-CR-01HHH page 16; WP-07-E-CR-01III.
19 The BPA Administrator has noted that “There would be political fallout. We want to
20 operate without creating the view that taxpayers are subsidizing the federal Columbia
21 River system, he said. If Congress thinks there is a subsidy, the region could lose control

¹⁶ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-CR/NZ/YA, page 59, line 9 through page 62, line 16 and related attachments.

1 of the federal system.” See WP-07-E-CR-01GGG. Concerning 2006 river operation,
2 Mr. Paul Norman, Bonneville’s senior vice-president has confirmed that “The
3 fundamental measure of BPA’s financial integrity is the probability of making its annual
4 debt service payment to the U.S. Treasury at the end of each fiscal year.” Mr. Norman
5 also raised concerns that the proposed fish operations could unacceptably increase the
6 probability that that could not make these payments WP-07-E-CR-01GG at page 11,
7 paragraph 21. Mr. Norman’s declaration demonstrates Bonneville’s own belief that its
8 current cost recovery mechanisms are not adequate to ensure Treasury repayment after
9 meeting its costs.

10 As described earlier, it would be in error for Bonneville to fail to consider this
11 evidence.

12
13 **Summary: Bonneville’s rate proposal does not assure repayment to the Treasury on**
14 **a current basis, it does not meet BPA stated TPP goal if BPA experiences higher**
15 **costs, it lowers the TPP goal to 80 percent, it does not contain mechanisms to**
16 **achieve an 80 percent TPP, and Bonneville did not consider other alternative risk**
17 **mitigation strategies that could be more effective. Therefore, Bonneville’s proposal**
18 **has not met the requirements of 16 U.S.C. §839 (4) or 16 U.S.C. 839e(a)(2).**
19

20
21 **IV. BONNEVILLE SHOULD NOT FURTHER WEAKEN THE RISK**
22 **MITIGATION STRATEGIES**
23

24 **Issue: Should Bonneville weaken the risk mitigation strategies by adopting**
25 **recommendations from customers?**
26

27 **A. Customer opposition is not relevant to BPA’s obligations.**

28 The Joint Customers Group (JP9) is comprised of Alcoa, Inc. (AL), Avista
29 Corporation (AC), Portland General Electric Company (GE), Industrial Customers of
30 Northwest Utilities (IN), Northwest Requirements Utilities (NR), PacifiCorp (PL),

1 Pacific Northwest Generating Cooperative (PN), Public Power Council (PP), and
2 Western Public Agencies Group (WA). The testimony proposes a number of limits on
3 BPA’s proposed cost adjustment mechanisms. The current BPA proposal does not
4 maintain the Treasury Payment Probability (TPP) goal when additional fish and wildlife
5 costs are added. *See* WP-07-E-CR/NZ/YA-01, pages 51, line 7 through page 57, line 16.
6 The Joint Customer Group’s proposed limitations would further reduce BPA’s ability to
7 repay the Treasury. The Joint Customers Group would also limit the use of the NFB
8 adjustment by excluding costs associated with recovery plans or any agreements related
9 to litigation. The Tribes are also concerned that the Joint Customers Group proposed that
10 BPA look for tradeoffs within the fish and wildlife budget to address additional costs. *See*
11 WP-07-E-JP9-01, page 6, at lines 5 to 9. As discussed below, the Joint Customer do not
12 provide any analysis about whether current funding levels are adequate, they do not
13 analyze the impacts of the trade-offs they propose on BPA’s obligations¹⁷. *See* WP-07-E-
14 CR-02, page 1, line 3 through 18.

15 In response to our data request CR-JP9-002, the Joint Customers Group states
16 “We did not conduct analyses of the effect on TPP of the NFB as currently proposed by
17 BPA.” The Joint Customers Group response to data request CR-JP9-001 states: “We did
18 not conduct analyses of TPP if the NFB was limited to \$100 million or less. Under our
19 proposal of a capped NFB, BPA would conduct a new rate case to ensure cost recovery if
20 the amount to be collected exceeded the cap”. BPA should not rely on proposals that are
21 not supported by analysis. *Id.* page 1, lines 19 through page 2, line 13.

¹⁷ The Tribes rebuttal also demonstrated that the Washington Public Agency Group and Northwest Requirements Customers also did not provide analysis. *See* WP-07-E-CR-02 pages 6, line 3 through page
INITIAL BRIEF OF THE COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, NEZ PERCE TRIBE, AND YAKAMA NATION

1 BPA has set a goal of maintaining a Treasury Payment Probability of 92.6
2 percent. Maintaining TPP requires a combination of Planned Net Revenues for Risk
3 (PNRR)—these are increases in the base rate—and rate adjustments to deal with the
4 uncertainties that BPA faces. Limitations on the rate adjustment mechanisms result in
5 either an increase in PNRR or a reduction in TPP. The Joint Customers Group’s
6 testimony does not call for an increase in PNRR or the base rate and it does not support a
7 reduction in TPP. The Joint Customer Group proposal does not add up and should not be
8 incorporated in the design of the NFB.

9 The Joint Customers Group calls for a new 7(i) rate proceeding if ESA costs
10 exceed \$100 million per year. Such a process would delay BPA’s timing to collect
11 additional revenue by two to six months (and possibly longer); this would likely reduce
12 its ability to repay the Treasury. *Id.* page 2, line 14 through page 3, line 2.

13 The Joint Customers recommended further reducing the \$100 million limit on the
14 amount that could be collected in the NFB if BPA increased the amount of river
15 operations costs in its final rate analysis *See* WP-07-E-JP9-02, page 4 line 15 through
16 page 5, line 7). They note that BPA had assumed the 2004 Biological Opinion
17 operations. If BPA changed that assumption in its final proposal, they argue that the
18 added cost should be subtracted from the limit. For example, if the hydro operations
19 reduced revenues by \$60 million per year, they propose that the cap on the NFB would be
20 \$40 million. The Joint Customer’s proposal would not reduce the risk that BPA faces.
21 The Federal District Court has already found the 2004 Biological Opinion was illegal and

7, line 2.

1 ordered the Federal government to prepare a new plan that complies with the
2 requirements of the ESA. The Court has also ordered interim operations to protect
3 salmon. The new biological opinion or other actions could increase BPA's costs or
4 reduce its revenues. The Joint Customer's proposal would require BPA to either increase
5 PNR or reduce its probability of repaying the Treasury. *Id.* page 3, line 3 through 18.

6 The Joint Customer Group has proposed a number of limits on the use of the
7 NFB. For example, their proposal would not allow BPA to use the NFB for additional
8 costs associated with ESA recovery plans or for agreements related to litigation. It would
9 also change the NFB to say that the Administrator "may" trigger the NFB under the
10 remaining circumstances that JP9 would support. *See* WP-07-E-JP9-02, page 6, line 10
11 through page 8, line 15. This rate proceeding cannot limit or define BPA's obligations
12 under the ESA. Recovery plans and agreements related to litigation may increase BPA's
13 costs or reduce its revenue. A limitation in the use of the NFB will not eliminate those
14 uncertainties and risks. The Joint Customer Group proposal would require an increase in
15 PNR to address these uncertainties and risks or would result in a reduction in BPA's
16 ability to repay the Treasury. The Tribes' testimony documents the reduction in TPP
17 under the current BPA proposal. *See* WP-07-E-CR/NA/YA-01 page 54, line 11 through
18 page 56, line 22 and page 57, line 17 through page 58, line 10; and WP-07-E-
19 CR/YA/NZ-02 page 3, line 19 through page 4, line 11.

20 The Joint Customers Group proposes that BPA consider tradeoffs within the fish
21 and wildlife budget if there are additional ESA costs. *See* WP-07-E-JP9-02, page 6, lines
22 5-9; page 6, line 12 to page 8, line 26. However, the Joint Customer Proposal has not

1 demonstrated that it has conducted any analysis of the adequacy of BPA's rate structure
2 to address BPA's future ESA costs. *See* CR-JP9-003, -005, -007. Apparently, it's the
3 Joint Customer Group's recommendation that BPA's future ESA costs can be met by
4 tradeoffs within existing budgets. The Joint Customers provide no analysis or other
5 evidence for support of this conclusion. The Joint Customer position is inconsistent with
6 BPA's own recognition in its testimony that BPA's future fish and wildlife costs are
7 uncertain and may exceed its anticipated budget.

8 The Joint Customers Group proposes that BPA consider the cost-effectiveness of
9 various measures in tradeoffs within the fish and wildlife budget if there are additional
10 ESA costs. *See* WP-07-E-JP9-02, page 6, lines 5-9. The Tribes support efforts to restore
11 fish and wildlife as quickly and effectively as possible. However, it is important to
12 recognize that cost-effectiveness is a function of the cost of a measure and its ability to
13 produce a given result, compared to other measures in achieving a specified objective. In
14 analyzing cost-effectiveness, all available measures would be displayed on a supply
15 curve. If the results, in this case additional fish and wildlife, exceed the goal (for
16 example, five million fish returning above Bonneville Dam) then cost-effectiveness
17 analysis would select the least-costly measures needed to achieve the goal. The standard
18 in Section 4(h)(6)(C) requires the Northwest Power and Conservation Council to "utilize,
19 where equally effective alternative means of achieving the same sound biological
20 objective exist, the alternative with the minimum economic cost." At this point, neither
21 BPA nor the Council (nor anyone else) has demonstrated (or even asserted) that the
22 measures in Program, including the subbasin plans, will achieve or exceed the biological

1 objective of the five million fish established in the 1987 and 2000 Columbia River Basin
2 Fish and Wildlife Program, pursuant to the Northwest Power Act. Therefore, there are no
3 equally effective means to achieve the same sound biological objective and it is not
4 appropriate to eliminate measures based on cost-effectiveness analysis.

5 The limitations proposed by the customers in combination with Bonneville's TPP
6 standard and the uncertainties discussed above would further reduce the likelihood that
7 Bonneville will be able to make all of its Treasury payments on a current basis.
8 Therefore, the customers proposals do not met the requirements of 16 U.S.C. §839 (4) or
9 16 U.S.C. 839e(a)(2) and should not be adopted.

10 **Summary: The customers have not provided any analysis to support their**
11 **recommendations to limit Bonneville's risk mitigation package. The limitations**
12 **proposed by the customers in combination with Bonneville's TPP standard and the**
13 **uncertainties discussed above would further reduce the likelihood that Bonneville**
14 **will be able to make all of its Treasury payments on a current basis. Therefore, the**
15 **customers proposals do not met the requirements of 16 U.S.C. §839 (4) or 16 U.S.C.**
16 **839e(a)(2) and should not be adopted.**

17
18 **V. BONNEVILLE IS NOT MEETING ITS TRIBAL TRUST AND**
19 **TREATY OBLIGATIONS**

20
21 **A. Federal Trust Responsibility**

22 The federal trust responsibility imposes strict fiduciary standard on the conduct of
23 executive agencies. Federal actions affecting Indian tribes are "judged by the most exacting
24 fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942);
25 *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966). Federal agencies are
26 required to "assert [their] statutory and contractual authority to the fullest extent possible" to
27 fulfill their trust obligations. *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256
28 (D.D.C. 1972). Such standards apply to all executive departments that may deal with

1 Indians and not simply to the Bureau of Indian Affairs. *See e.g., Pyramid Lake Paiute Tribe*
2 *of Indians v. United States Department of Navy*, 898 F.2d 1401, 1411 (9th Cir. 1991);
3 *Covelo Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990); *Nance v. EPA*, 645
4 F.2d 701, 711 (9th Cir. 1981). Both the Department of Energy (DOE) and Bonneville have
5 explicitly recognized that a trust relationship exists between federal agencies and Indian
6 tribes as discussed *supra*. The DOE has acknowledged that the agreements that the United
7 States enters into with Indian tribes "create a variety of legal responsibilities by the United
8 States toward American Indian Tribes" and that the DOE and, accordingly Bonneville, has
9 the duty to uphold obligations of the federal government to Indian tribes. *See U.S.*
10 *Department of Energy American Indian Policy*, DOE Order No. 1230.2 (April 8, 1992).

11 Bonneville did not analyze this issue in its proposal. *See* WP-07-E-CR/NZ/YA-
12 01 page 6, lines 12 through 13. Rather, it moved to strike the Tribes' testimony on fish
13 and wildlife costs, Bonneville's fish and wildlife obligations, and Bonneville's failures to
14 honor commitments to the Tribes. *See* WP-07-M-14.

15 In the WP-02 rate case, Bonneville developed Fish and Wildlife Funding
16 Principles that made commitments to fund BPA's fish and wildlife obligations and
17 position Bonneville to be able to meet future obligations while ensuring repayment of its
18 debt to the Treasury. These principles also addressed tribal treaty rights. We could not
19 find any similar principles in the current proposal. *Id.* page 5, lines 10 through 17.

20 Bonneville's actions are contrary to its fiduciary obligations. Not only is
21 Bonneville shifting the risk of addressing future uncertainties to the salmon and the
22 tribes, Bonneville is compounding its error by refusing to even consider relevant

1 information that addresses its financial risks and abilities to fulfill needed fish and
2 wildlife measures. Bonneville should remedy this error by admitting the Tribes'
3 testimony, carefully considering it, and adopting our recommendations. Bonneville must
4 be risk averse with respect to the protection and restoration of Columbia River salmon
5 and other fish and wildlife resources impacted by the dams.

6 **Request to Reconsider Order Striking Certain Testimony**

7 Bonneville successfully moved to strike a number of sections of the Tribes'
8 testimony that address the Tribes' Treaty-related interests. *See* WP-07-O-23 (Striking
9 Sheets et al., WP-07-E-CR/NZ/YA-01 page 1 line 16 through page 4, line 2; page 4, line
10 19 through page 5, line 9; page 5, line 18 through page 6, line 7; page 6, line 19 through
11 page 11, line 14; page 12, line 3 through page 15, line 6; pages 18, line 4 through page
12 48, line 19; Page 53, line 23 through page 54, line 10; page 59, line 9 through page 62,
13 line 16). The Tribes request that the Administrator set aside the determination in WP-
14 07-O-23 to strike the foregoing evidence¹⁸, consider and respond to the tribes' stricken
15 evidence, and include the foregoing tribal evidence in the record of this proceeding. The
16 stricken tribal testimony rebuts Bonneville's rebuttal testimony at WP-07-E-BPA-08
17 page 14, lines 13 through 23. In conformance with the statute's mandate the stricken
18 material should be admitted to the administrative record.

19 The Tribes stricken testimony would have provided historical information on how
20 Bonneville's prior actions have adversely affected Tribal interests, including concerns

¹⁸ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-CR/NZ/YA-01 page 1 line 16 through page 4, line 2; page 4, line 19 through page 5, line 9; page 5, line 18 through page 6, line 7; page 6, line 19 through page 11, line 14; page 12, line 3 through page 15, line 6;

1 that BPA had used optimistic assumptions about its costs and revenues, that BPA had not
2 used the best available information about its total system costs, and that BPA's proposal
3 was not adequate to meet its costs and assure repayment to the Treasury. The result was
4 that the BPA prior proposal increased the risk that BPA would face an unpalatable
5 choice: defer payments to the Treasury or defer fish and wildlife protections. This is
6 critically important to the Tribes Treaty interests and the testimony expressed concerns
7 that Bonneville was making the same errors in the new proposal. *See* WP-07-E-
8 CR/NZ/YA-01 page 1 line 16 through page 4, line 2, and page 4, line 19 through page 5,
9 line 9.

10 The stricken testimony would have described the Tribes' concerns that
11 Bonneville's proposal does not address whether its actions, as affected by its rates
12 decisions, to implement the FCRPS Biological Opinion are reasonably likely to occur.
13 This is a critical issue in restoring listed salmon stocks that are currently constraining the
14 Tribes' Treaty harvest. *Id.* page 5, line 18 through page 6, line 7.

15 The stricken testimony describes a number of examples where Bonneville has not
16 honored commitment to Columbia Basin Indian Tribes. For example, Bonneville cut fish
17 and wildlife funding in 2001 contrary to the 1996 Memorandum of Agreement on
18 Bonneville Power Administration's Financial Commitment for Columbia River Basin
19 Fish and Wildlife Costs. Bonneville made assurances to the Tribes in 1999 that it would
20 fully fund its fish and wildlife obligations, even if it had to raise its rates or defer its
21 Treasury payments. Yet in 2001, Bonneville eliminated fish and wildlife river operations

pages 18, line 4 through page 48, line 19; Page 53, line 23 through page 54, line 10; page 59, line 9 through
page 62, line 16 and related attachments.

INITIAL BRIEF OF THE COLUMBIA RIVER INTER-TRIBAL FISH
COMMISSION, NEZ PERCE TRIBE, AND YAKAMA NATION

WP-07-M-69

1 to meet its Treasury payment and capped its fish and wildlife funding through the
2 remainder of the rate period, rather than raising rates to meet its funding obligations as it
3 promised. The limited mitigation Bonneville offered for the 2001 “emergency” was also
4 cut. The stricken testimony documents that Bonneville and other Federal agencies have
5 failed to meet flow targets 53 percent of the time since 1995. The Administration
6 committed that the implementation of the Endangered Species Act would complement
7 the obligation to restore the Tribes’ Treaty fishery, yet the Federal efforts focus almost
8 exclusively on ESA species, not fish for the tribal treaty interests. Funding for resident
9 fish, wildlife, and salmon and steelhead that are not yet listed has been eliminated or
10 deferred in order to give priority to listed species. The only new projects that have been
11 initiated by BPA in the last three fiscal years have been directed at listed species (with the
12 exception of ongoing efforts for wildlife operations and maintenance). In fact, more than
13 \$100 million of new, scientifically supported projects have been deferred in the latest
14 round of the Council's project selection process due to lack of Bonneville funding. These
15 examples raise concerns about whether needed actions are reasonably likely to occur.
16 These failures to honor important commitments have resulted in a failure to stop the
17 decline of listed species and to make progress on rebuilding Treaty-protected resources.

18 The Tribes stricken testimony offered these examples as context for the current
19 WP-07 proposal and notes that Bonneville’s Proposal results in rates that are 41 percent
20 below market rates while shifting the risks that Bonneville faces to fish and wildlife and
21 the tribal cultures that depend on them. WP-07-E-CR/NZ/YA-01, page 6, line 19
22 through page 11, line 14.

1 The stricken testimony describes the Tribes' concerns with Bonneville's
2 assumptions about river operations and pointed out that the Court-ordered operations in
3 2005 resulted in a 64 percent increase in survival for migrating fall Chinook—a key
4 population for the Tribes' treaty harvest. WP-07-E-CR/NZ/YA-01 page 12, line 3
5 through page 15, line 6.

6 The Tribes stricken testimony would have provided evidence regarding the cost
7 and uncertainties that should be address in the Bonneville Proposal. The Tribes
8 addressed these issues at pages 23 to 27 of this brief.

9 The stricken testimony would have also provided specific examples where
10 Bonneville has reduced protection for the Tribes' treaty-protected resources to avoid
11 deferring payments to the Treasury. WP-07-E-CR/NZ/YA-01 pages 59-60.

12 The deficiencies in Bonneville's Initial Proposal concerning its revenue
13 requirements and cost risk will place substantial risks on the Tribes' treaty-protected
14 resources. Given Bonneville's trust and fiduciary responsibilities and the requirements of
15 the Northwest Power Act and Bonneville's administrative rules, it would be an error for
16 Bonneville to fail to consider this information.

17 **VI. THE ADMINISTRATOR MUST PROPERLY COMPLY WITH NEPA**
18 **IN THIS PROCEEDING**

19
20 Bonneville has not addressed requirements under the National Environmental
21 Protection Act in its proposal. *See* WP-07-E-CR/NZ/YA-01, page 6, lines 12 to 15.
22 While CRITFC and Yakama acknowledge that Bonneville has indicated that it intends to
23 comply with NEPA in a separate proceeding, we do not waive any NEPA claims and
24 reserve the right to address these issues as part of this proceeding. The Business Plan EIS

1 and subsequent NEPA compliance documents do not consider the environmental impacts
2 and alternatives associated with the policy choices Bonneville will make in this
3 proceeding. These include, but are not limited to, the allocation of risk and benefits
4 between Bonneville's fish related obligations and the desires of its customers, the risk of
5 failure to repay Treasury on time and in full, the need for increased revenues necessary to
6 support the agency's statutory mission, and the additional policy choices reflected in
7 concerns of the Tribes as set forth in this brief and our testimony. Failure by Bonneville
8 to raise its rates sufficiently to recover all of its costs and timely repay Treasury was not
9 among the alternatives contemplated in the Business Plan EIS and subsequent NEPA
10 documentation. Bonneville can remedy its NEPA problems by adopting the
11 recommendations of the Tribes offered in this brief and in our direct, rebuttal, and sur-
12 rebuttal testimony.

13

14 **VII. BONNEVILLE HAS NOT ANALYZED THE ECONOMIC EFFECTS**
15 **OF ITS PROPOSAL**

16

17 **Issue: Has Bonneville evaluated the economic impact of its Proposal? Does**
18 **Bonneville's Proposal appropriately balance the economic impacts of its proposal**
19 **with its obligations under Federal laws and treaties? Could Bonneville address**
20 **these obligations, other uncertainties, improve its TPP and still be competitive with**
21 **market-priced electricity?**

22

23 In the testimony of financial and policy objectives, Bonneville describes how it
24 balanced competing objectives, including repayment to the Treasury and setting the
25 lowest possible rates. *See* WP-07-E-BPA-08 page 5, lines 5 through 20. This appears to
26 be the fundamental policy issue in this proceeding.

1 The Tribes asked Bonneville to provide a copy of any information or analysis
2 regarding the impacts of BPA’s rates on the regional economy and to provide all relevant
3 documentation and analyses, including email and other correspondence. Bonneville
4 responded that it had conducted no such analysis for the development of the rate
5 proposal. *See* WP-07-E-CR-01TTT (CR- BPA-049). Given the importance of this trade-
6 offs among setting the lowest possible rates, repayment to the Treasury, and risk
7 mitigation strategies, it is surprising that Bonneville has done no analysis of the issue.
8 Bonneville’s rates are significantly below market rates and lower than most other parts of
9 the country, we believe that Bonneville can incorporate the costs to fully implement the
10 Council Program and the Biological Opinion and still benefit the Northwest economy.
11 *See* WP-07-E-CR/NZ/YA-01 page 72, lines 3 through 15.

12 In rebuttal testimony, Bonneville also states that it has balanced the need for
13 additional revenues against the complexity of the rate adjustment and the “hardship it
14 could cause the region.” WP-07-E-BPA-34, page 5, lines 3 through 5.

15 NRU provided economic analysis that concluded that “By paying higher
16 electricity bills, the customer loses an equivalent amount of otherwise available income,
17 and the money is removed from the local economic base.” *See* WP-07-E-NR-01 page 6 at
18 lines 21-30. However, NRU’s analysis was incomplete. Its customers live in the rural
19 areas that would most benefit from the habitat and production activities called for in the
20 subbasin plans to rebuild fish and wildlife. This activity would be added to the local
21 economic base. *See* WP-07-E-CR-02, page 8.

1 **Request to Reconsider Order Striking Certain Testimony**

2 Bonneville successfully moved to strike a number of sections of the Tribes’
3 testimony that addresses rate and economic impacts. *See* WP-07-O-23 (Striking Sheets et
4 al., WP-07-E-CR/NZ/YA-01 page 66 line 12 through page 72, line 2 and page 73, line 10
5 through page 74, line 15). The Tribes request that the Administrator set aside the
6 determination in WP-07-O-23 to strike the foregoing evidence¹⁹, consider and respond to
7 the tribes’ stricken evidence, and include the foregoing tribal evidence in the record of
8 this proceeding. The stricken tribal testimony rebuts Bonneville’s testimony at WP-07-E-
9 BPA-08 page 5, lines 5 through 20; WP-07-E-BPA-34, page 5, lines 3 through 5; and
10 NRU’s testimony WP-07-E-NR-01 page 6 at lines 21-30. In conformance with the
11 statute’s mandate the stricken material should be admitted to the administrative record.

12 The Tribes offered their direct testimony to provide relevant information that
13 Bonneville could revise the balance it set in its policy decisions that gave too much
14 weight to the lowest possible rates. Bonneville could give more weight to repayment of
15 the Treasury and addressing the uncertainties that it faces and still be significantly below
16 the market price of electricity.

17 The Tribes’ stricken testimony provided evidence that Bonneville’s rates are
18 currently 59 percent below the 2006 market rate that Bonneville has assumed in other
19 forums. Bonneville’s assumptions about market prices during the rate period are
20 significantly lower than market prices; as a result, the Tribes’ evidence shows that on
21 average, Bonneville would be 41 percent below market for FY 2007-2009. The Tribes’

1 analysis provided several scenarios for additional costs to address the obligations and
2 uncertainties that Bonneville faces and found that average rates would still be 29 to 38
3 percent below market prices during the rate period. The analysis also estimated the rate
4 impacts for residential utility customers from the scenarios. The purpose of the analysis
5 was not to argue that Bonneville should adopt a particular set of costs in this rate
6 proceeding; rather, the analysis demonstrated that Bonneville could strike a different
7 balance among its cost and uncertainty assumptions, its ability to repay the Treasury, and
8 its ability to offer rates that were significantly below other alternative electricity
9 suppliers. *See* WP-07-E-CR/NZ/YA-01 page 66 line 12 through page 72, line 2.

10 The stricken testimony also provided evidence that expanding the implementation
11 of the fish and wildlife program would provide thousands of jobs in the region, primarily
12 in rural and tribal communities. This information is relevant to the balancing decisions
13 that Bonneville will make in this proceeding and should be evaluate when Bonneville
14 considers the “hardship it could cause the region”. *Id.* page 73, line 10 through page 74,
15 line 15, and WP-07-E-CR-01R, pages 22-24.

16 Given the requirements of the Northwest Power Act and Bonneville’s
17 administrative rules, it would be an error for Bonneville to fail to consider this
18 information.

19 **Summary: One of the key objectives of the Bonneville Proposal is provided the**
20 **lowest possible rates, yet Bonneville has not analyzed the economic impacts of its**
21 **Proposal. It has not analyzed the negative impacts on tribal and rural economies.**
22 **Bonneville has not analyzed how it balanced its obligations under Federal laws and**
23 **treaties; its requirement to base its rates on its total system costs, including the costs**

¹⁹ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-CR/NZ/YA-01 page 66 line 12 through page 72, line 2 and page 73, line 10 through page 74, line 15 and related attachments, and WP-07-E-CR-01R, pages 22-24.

1 and uncertainties that it faces; its requirement to repay the Treasury on a current
2 basis; and its objective of providing the “lowest possible rates”. If Bonneville had
3 conducted such analysis it is likely that the studies would have shown that economic
4 benefits from fish habitat restoration activities in rural communities would far
5 outweigh any adverse effects of the associated rate impact. It is also likely that the
6 study would show that Bonneville’s customers have received billions of dollars of
7 benefit while tribal economies and cultures dependent on fishing have been
8 decimated. Bonneville could increase its rates to meet its obligations under Federal
9 laws and Treaties and improve its TPP and still have rates that are competitive with
10 the long-term market price of electricity.

11
12 **VIII. BONNEVILLE HAS NOT PROVIDED EQUITABLE TREATMENT**
13 **FOR FISH AND WILDLIFE**

14
15 **A. Fish and Wildlife are not receiving Equitable Treatment under the**
16 **Northwest Power Act.**

17
18 In 1980, Congress enacted the Northwest Power Act, 16 U.S.C. 839-839h, and in
19 so doing, acknowledged "that no longer should fish and wildlife be given a secondary
20 status. *Yakama Nation v. NPPC*, 35 F.3d 1371 at 1377, citing 126 Cong. Rec. H10681
21 (1980) (Rep. Dingell).

22 The [Act] marked an important shift in federal policy. Continually declining fish
23 runs had revealed the failures of previous legislative efforts requiring that "equal
24 consideration" be given to fish and wildlife affected by resource exploitation. The
25 [Act] ensured the "equitable treatment" of fish and wildlife; it marked the shift of
26 the burden of uncertainty - of proving specific harm to salmon from particular
27 activities - from the salmon to the hydropower system, or so was its intent. In
28 doing so, it created a new obligation on the region and various Federal agencies to
29 protect, mitigate, and enhance fish and wildlife.

30
31 *Id.* at 1377-78 (citation omitted, emphasis added).

32
33 The Act placed a premium on prompt action, allowing decisions to be made on
34 the best available scientific knowledge. It also limited the role of economic
35 considerations in decision-making. Most importantly, however, the Act acknowledged
36 fish and wildlife as an irreplaceable finite resource.

1 Bonneville has specific obligations to implement the Columbia River Basin Fish
2 and Wildlife Program developed by the Northwest Power Planning Council:

3 The Administrator shall use the Bonneville Power Administration
4 Fund and the authorities available to the Administrator under this Act
5 to protect, mitigate, and enhance fish and wildlife to the extent
6 affected by the development and operation of any hydroelectric
7 project of the Columbia River and its tributaries in a manner
8 consistent with the plan, if in existence, the program adopted by the
9 Council under this subsection, and the purposes of this [Act].

10

11 16 U.S.C. 839b(h)(10)(A). In addition, the Act requires:

12

13 The Administrator and other Federal agencies responsible for the
14 managing, operating, or regulating Federal or non-Federal
15 hydroelectric facilities located on the Columbia River or its tributaries
16 shall—exercise such responsibilities, taking into account at each
17 relevant stage of decision making processes to the fullest extent
18 practicable, the program adopted by the Council pursuant to this
19 subsection.

20

21 16 U.S.C. 839b(h)(11)(A).

22

23 Bonneville did not analyze its equitable treatment obligations in its proposal. *See*
24 WP-07-E-CR/NZ/CR-01 page 6, lines 8 through 11.

25 In other administrative proceedings, Bonneville has taken the position that it relies
26 on its implementation of the Council’s Fish and Wildlife Program is a significant
27 contribution to meeting Bonneville’s equitable treatment responsibilities. *See Northwest*
28 *Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1533 (9th Cir.1997).

29 Bonneville has argued that it must balance power needs with the needs of fish and
30 wildlife; however, Bonneville’s financial and policy objectives do not even include fish
31 and wildlife as an objectives. *See* WP-07-E-BPA-08, Page 5, line 6 through 16.

1 Bonneville’s proposed rates are significantly below market rates and significantly below
2 other parts of the country. *See* WP-07-E-CR/NZ/YA-01 page 72, line 11.

3 In Bonneville’s rebuttal testimony it has proposed the Emergency NFB
4 Surcharge. This provision would trigger if activities related to the FCRPS Biological
5 Opinion litigation increase Bonneville’s costs in a year when its probability of repaying
6 the Treasury is below 80 percent. The amount Bonneville proposes to attempt to collect
7 would be limited to the impact of the litigation-related action and not designed to meet a
8 specific TPP. *See* WP-07-E-BPA-34, pages A-3 to A-5.

9 The Tribes requested that Bonneville “provide any information regarding whether
10 BPA has any system emergency provisions; for example, the policy that BPA used during
11 the 2001-2002 period to eliminate river operations for salmon because of a “financial
12 emergency.” Bonneville responded:

13 The Emergency NFB Surcharge protects fish and wildlife obligations from
14 financially harming the agency if a NFB trigger event took place in a dry year and
15 the agency was facing a difficult financial situation. There is no formal plan or
16 policy for system emergency provisions that the NFB is attempting to replace or
17 augment. The referenced to the 2001-2002 Operation Plan is attached.

18
19 JP13-BPA-023.

20 The attached Operation Plan describes the criteria for triggering a power system
21 emergency. According to Bonneville’s document “The financial criterion for a power
22 system emergency is exceeded when the probability of FCRPS financial reserves being
23 \$0 or less after meeting all expected financial obligations exceeds 20% for any of the
24 next 12 months.” If this criterion is met, Bonneville could curtail fish and wildlife
25 protection river operations. *See* Federal Agencies’ 2001 Operations Plan, page 10.

1 Bonneville’s proposal could create a situation where its self-imposed limits on the
2 Emergency NFB Surcharge could result in a TPP of less than 80 percent. At the same
3 time, the financial criterion for a power system emergency and Bonneville could curtail
4 fish and wildlife protections. Bonneville has designed a process that could reduce the
5 survival of fish and wildlife while limiting the rate impacts on utility customers and
6 continuing to sell electricity that is significantly below market prices. Such actions are
7 not consistent with equitable treatment requirements under the Northwest Power Act. 16
8 U.S.C. § 839b(h)(11)(A)(i), and Bonneville must structure its WP-07 rates to avoid such
9 outcomes in the future.

10 **Request to Reconsider Order Striking Certain Testimony**

11 The Tribes offered testimony on whether Bonneville was fully implementing the
12 Council’s Program. This testimony was directly relevant to Bonneville’s position that
13 such action is a demonstration of its equitable treatment responsibilities. *See* WP-07-E-
14 CR/NZ/YA pages 18, line 4 through page 41, line 2. The Tribes also offered testimony
15 regarding Bonneville’s previous actions that eliminated fish protection river operations
16 and Bonneville’s continuing arguments that fish protection river operations may reduce
17 Bonneville’s ability to repay the Treasury. *Id.* page 59, line 9 through page 62, line 16.
18 Bonneville moved to strike this testimony. *See* WP-07-M-14. The Hearing Officer orders
19 WP-07-0-23 struck the foregoing material. The tribes request that the Administrator set
20 aside the determination in WP-07-O-23 to strike the foregoing evidence²⁰, consider and
21 respond to the tribes’ stricken evidence, and include the foregoing tribal evidence in the

1 record of this proceeding. The stricken tribal testimony rebuts Bonneville’s rebuttal
2 testimony at WP-07-E-BPA-08 Page 14, lines 13 through 23 and is directly relevant to
3 Bonneville’s responsibilities under 16 U.S.C. § 839b(h)(11)(A)(i). In conformance with
4 the statute’s mandate the stricken material should be admitted to the administrative
5 record.

6
7 **IX. BONNEVILLE’S PROGRAM AND RATE PROCESS ARE NOT**
8 **CONSISTENT WITH THE NORTHWEST POWER ACT AND THE**
9 **ADMINISTRATIVE PROCEDURES ACT**

10
11 **A. Bonneville’s process for determining its total system costs is not**
12 **consistent with the Administrative Procedures Act and Northwest Power**
13 **Act.**

14
15 The Federal Register Notice (FRN) for this rate proceeding describes the scope,
16 process, and issues to be considered. 215 Fed. Reg. 67685 (November 8, 2005). In Part
17 II—Purpose and Scope of Hearings the FRN provides an overview and background on
18 this rate filing and describes a number of processes, including the Power Function
19 Review. In the rebuttal testimony, BPA further elaborates that:

20 “BPA will update the final [rates] studies to reflect the most current operational
21 and programmatic assumptions for the FY 2007-2009 rate period as well as
22 BPA’s fish and wildlife program financial obligations identified through the
23 Power Function Review 2 process”
24

25 See WP-07-E-BPA-34, page 3, line 9 through 12. The Bonneville testimony also states
26 that “BPA is committed to conducting an additional public process to review program
27 spending levels that will be concurrent with this rate proceeding so that any reduction in
28 spending levels can be incorporated in the final proposal.” *Id.* at line 17. Bonneville is

²⁰ The stricken testimony referenced here that we asked to be restored to the record is: WP-07-E-
CR/NZ/YA pages 18 , line 4 through page 41, line 2 and page 59, line 9 through page 62, line 16 and
INITIAL BRIEF OF THE COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, NEZ PERCE TRIBE, AND YAKAMA NATION

1 conducting a second process to review its costs. Likewise, in its rebuttal testimony, BPA
2 states that, “BPA will update the final studies to reflect the most current operational and
3 programmatic assumptions for the FY 2007-2009 rate period as well as BPA’s fish and
4 wildlife program financial obligations identified through the Power Function Review 2
5 process”. See WP-07-E-BPA-34, page 3, line 9 through 12.

6 The schedule for PFR 2 is not coordinated with the deadlines of this rate
7 proceeding. For example, the draft close out letter for PFR 2 was released on April 4,
8 2006 and comments are due on April 26, 2006. Any final “decision” will occur after the
9 deadline for rate case briefs. BPA concedes that “No Record of Decision exists for the
10 Power Function review or for the Power Function Review 2” and that “the PFR 2 process
11 is not complete.” See JP13-BPA-002 and -003. The schedule of the PFR 2 and the Rate
12 Case is such that the Tribes are effectively precluded from rebutting any of the outcomes
13 of the PFR2 process as they may be reflected in the Administrator’s rates decisions. This
14 is inconsistent with the explicit congressional direction in section 7 of the Act and the
15 Tribes’ constitutional rights to be heard.

16 **1) Bonneville’s process for determining its total system costs is not**
17 **consistent with the Northwest Power Act.**
18

19 Bonneville is arbitrary in updating information that it will rely on in the rate case.
20 It has limited PFR 2 to “any reduction in spending levels.” Increases in spending levels
21 would clearly be relevant to determining Bonneville’s total system cost, yet it appears
22 that the Bonneville processes (PFR2 and by extension the rates proceedings) exclude
23 such information. This is patently arbitrary. Bonneville is also arbitrary in determining

related attachments.

INITIAL BRIEF OF THE COLUMBIA RIVER INTER-TRIBAL FISH
COMMISSION, NEZ PERCE TRIBE, AND YAKAMA NATION

1 which issues were “decided” in PFR 1 and which are open for further discussion in PFR
2 2. The draft PFR 2 close out letter addresses a number of the issues, but not all of the
3 issues described in the FRN. It appears that Bonneville’s process is designed to exclude
4 rebuttal from parties relevant to total system costs unless the comments relate to
5 reductions in costs or Bonneville, in its sole discretion, wants to consider new
6 information.

7 **2) Bonneville’s process for determining its total system costs is not**
8 **consistent with the Administrative Procedures Act.**
9

10 Bonneville’s decision to categorically exclude rebuttal testimony related to its fish
11 and wildlife costs is inconsistent with the Administrative Procedure Act, which excludes
12 only "irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d). As a
13 basic principle all parties should have the opportunity to meet in the appropriate fashion
14 all materials that influence the Administrator’s decision. *See generally*, Davis,
15 Administrative Law Treatise §15:15 (Procedures for Challenging Facts an Agency Uses
16 in an Adjudication). Moreover, the Northwest Power Act is specific in this regard,
17 allowing any party to rebut information put forward by BPA.

18
19 **3) Bonneville’s Power Function Review process is not consistent with**
20 **the Northwest Power Act.**
21

22 Bonneville has treated some portions of PFR as final actions but has not issued a
23 record of decision and provided an opportunity for judicial review. The Yakama Nation
24 provided comments during the PFR that decisions in the Power Function Review do not
25 appear to fit in the list of final actions subject to judicial review under 16 USC 839g (e).
26 In fact BPA has prepared no Record of Decision for the PFR. Moreover, the PFR has yet

1 to be concluded. BPA's PFR and ratemaking procedures effectively hides its fish and
2 wildlife costs from the scrutiny envisioned by the Northwest Power Act. BPA cannot
3 refuse to make a final decision on the PFR issues while relying on the PFR outcomes in
4 its testimony in the rate case, on the one hand, and exclude these issues from examination
5 in the rate case on the other. Such procedures deny the Tribes due process rights to be
6 heard and are inconsistent with the APA and the Northwest Power Act. If BPA believed
7 that the PFR was a final decision under Section 9(e) it should have clearly stated its
8 reasons and prepared a record of decision that could be challenged in the Ninth Circuit
9 Court of Appeals. BPA cannot have things both ways and shield itself from judicial
10 challenge on its failure to meet its fish and wildlife obligations under Federal laws and
11 Treaties.

12

13 **X. RESERVATION OF CLAIMS**

14

15 The Tribes reserve the right to raise additional issues in briefs or on appeal.
16 Among other things, the Tribes anticipate that they will respond to arguments of other
17 parties and reserve the right to do so on any issue raised.

18

19 **XI. REMEDIES**

20 For the reasons stated above, the Tribes urge the Administrator to adopt the
21 following recommendations:

1 **A. Bonneville should revise its revenue requirements to address its**
2 **obligations under Treaties with Columbia Basin Indian tribes,**
3 **Federal laws, and the Fish and Wildlife Funding Memorandum of**
4 **Agreement.**

5
6 **1) Consider the additional fish and wildlife costs associated with**
7 **implementing the Biological Opinion and Council Program.**
8

9 The Tribes recommend that the Administrator admit the relevant stricken
10 testimony and use the recommendations provided by the Tribes as the best estimate of
11 fish and wildlife revenue requirements. *See* WP-07-E-CR/NZ/YA-01 pages 33-48.

12 **2) Revise river operation assumptions.**

13 The Tribes recommend that the Administrator admit the relevant stricken
14 testimony and use the recommendations made by the Tribes for its river operations
15 assumptions so that Bonneville assumes the Court-ordered river operations for 2006 will
16 continue for the next rate period. Bonneville's risk analysis should address the potential
17 for lower revenue if additional flow and spill protections are ordered. WP-07-E-
18 CR/NZ/YA-01 pages 13, 15 and 49-51.

19 **3) Address the cost and revenue uncertainties described above.**

20 The Tribes recommend that the Administrator admit the relevant stricken
21 testimony and use the recommendations provided by the Tribes so that Bonneville's risk
22 mitigation strategies address the cost and revenue uncertainties identified in the Tribes.
23 WP-07-E-CR/NZ/YA-01 pages 33-48. Bonneville's risk analysis should address the
24 potential for lower revenue if additional flow and spill protections are ordered. *Id.* pages
25 13, 15 and 49-51.

1 **4) Bonneville should increase its TPP standard.**

2 Bonneville should adopt a 95 percent TPP standard for triggering the Emergency
3 NFB Surcharge. This will significantly improve the probability of repaying the Treasury
4 and reduce the conflict between making those payments and meeting fish and wildlife
5 obligations. *See* WP-07-E-JP13, page 11.

6 **5) Bonneville should modify the trigger for the Emergency NFB**
7 **Surcharge.**

8
9 If the goal is to minimize the risk of a Treasury deferral, then BPA should trigger
10 an emergency surcharge for any reason if its ability to repay the Treasury is
11 compromised. BPA faces other risks and uncertainties and should adopt a provision that
12 it can trigger a surcharge if those risks and uncertainty make it unlikely that it will be able
13 to repay the Treasury on a current basis. Bonneville should also expedite when additional
14 revenue can be collected. WP-07-E-JP13, page 11-12.

15 **6) Bonneville should modify its Proposal to meet its tribal trust and**
16 **treaty obligations.**

17
18 Bonneville should admit the Tribes testimony that describes the actions that are
19 needed to address Bonneville tribal trust and treaty obligations. Bonneville should
20 carefully consider this information. Bonneville should adopt our recommendations for
21 improving its Proposal as part of its tribal trust and treaty responsibilities. In addition,
22 Bonneville should be risk averse with respect to the protection and restoration of
23 Columbia River salmon and other fish and wildlife resources impacted by the dams.
24 Bonneville should not shift risks to these important tribal trust resources.

1 **7) Bonneville should modify its rate design.**

2 The Tribes recommend that the Administrator admit the relevant stricken
3 testimony and use the recommendations provided by the Tribes. The Tribes’ testimony
4 demonstrates that increasing the amount of PNRR and/or raising the reserve threshold to
5 trigger a rate adjustment would provide a greater improvement in meeting TPP than the
6 NFB provision. WP-07-E-JP13 page 8-9.

7 **8) Bonneville should analyze the economic tradeoffs associated with its**
8 **proposal.**
9

10 The Tribes recommend that the Administrator admit the relevant stricken
11 testimony and use the recommendations provided by the Tribes and Bonneville should
12 conduct an economic analysis of the costs and benefits of its proposal compared to an
13 alternative that fully implements the Tribes’ recommendations for implementing the
14 Columbia River Basin Fish and Wildlife Program, FCRPS Biological Opinion, and
15 NOAA Fishery Services recovery plans, while giving special attention to the impacts on
16 tribal and rural communities. *See* WP-07-E-CR/NZ/YA-01 pages 66-74.

17 **9) Bonneville should explicitly address its equitable treatment**
18 **responsibilities.**
19

20 Bonneville should provide a detailed rationale regarding how its Proposal
21 appropriately allocates benefits and risks according to its responsibilities under 16 U.S.C.
22 § 839b(h)(11)(A)(i).

23 **10) Bonneville should consult and coordinate with fish and wildlife**
24 **managers.**
25
26

1 Bonneville should consult and coordinate with fish and wildlife managers as it
2 implements its responsibilities to provide equitable treatment for fish and wildlife and to
3 take into account, at each relevant stage of decision making, the Council Program
4 according to its responsibilities under 16 U.S.C. § 839b(h)(11)(B). This would include
5 decisions regarding funding for fish and wildlife and river operations to protect fish and
6 wildlife.

7 **B. These remedies will improve Bonneville’s ability to meet its costs, assure**
8 **repayment to the Treasury, and improve its competitiveness.**
9

10 The costs and revenues assumed in Bonneville’s Proposal do not fully cover the
11 likely costs to restore fish and wildlife under the Endangered Species Act, the Northwest
12 Power Act, and Treaties with Columbia Basin Indian tribes or other Federal laws. By
13 setting its rates too low to cover its costs Bonneville will make it difficult to cover its
14 total system costs and assure repayment of its debt to the Treasury. We are concerned
15 that Bonneville’s policy will mean that fish and wildlife restoration will not be
16 implemented. Under Bonneville’s rate proposal it will be forced to defer fish and
17 wildlife restoration or to reduce the probability of repaying the Treasury for the debt
18 associated with the Federal Columbia River Power System. We are further concerned
19 that if the choice is either deferring Treasury payments or fully funding fish and wildlife
20 restoration then fulfillment of our Treaty rights will be at risk.

21 Bonneville has a responsibility to meet its Treaty and trust obligations and
22 responsibilities under Federal law. Those responsibilities have associated costs that
23 should be included in Bonneville’s total system costs for the purpose of setting rates.

1 The Tribes believe the changes we have recommended would result in rates below
2 the market rate of electricity. It would allow Bonneville to meet all of its costs and assure
3 full repayment of the FCRPS pursuant to 16 U.S.C. 839e(a)(2) (A)&(B).

4
5 **VI. CONCLUSION**

6 For the reasons contained in this brief, the Tribes respectfully request that
7 Bonneville modify its Proposal to address our concerns and incorporate the remedies we
8 have recommended.

9
10
11
12
13
14 DATED April 17, 2006

15 Respectfully submitted,

16 /s/ Tim Weaver

17 _____
18 Tim Weaver
19 Attorney for the Yakama Nation

20
21 /s/ Rob Lothrop

22 _____
23 Rob Lothrop
24 Attorney for the Columbia River
25 Inter-Tribal Fish Commission

26
27 /s/ Dave Cummings

28 _____
29 Dave Cummings
30 Attorney for the Nez Perce Tribe
31