

**PORT OF SEATTLE**  
**MEMORANDUM**

**COMMISSION AGENDA**

**Item No.** 5B

**Date of Meeting** April 12, 2011

**DATE:** April 1, 2011

**TO:** Tay Yoshitani, Chief Executive Officer

**FROM:** David Soike, Director Facilities & Maintenance  
Craig Watson, General Counsel  
Trevor Emtman, Utilities Manager & Sr. Engineer

**SUBJECT:** Settlement Agreement with the Bonneville Power Administration regarding the Residential Exchange Program.

**Amount of This Request:** \$0.00

**Source of Funds:** N/A

**Potential Net Savings:** 3 to 4% of Seattle-Tacoma Airport's Utility Bills

**ACTION REQUESTED:**

Requests authorization for the Chief Executive Officer to execute a Settlement Agreement with the Bonneville Power Administration (BPA), Contract No. 11PB-12322.

**SYNOPSIS:**

As part of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) of 1980, the Residential Exchange Program (REP) was created to provide residential and small farm customers of the various utilities in the four state region of Pacific Northwest a form of access to low-cost federal power. Under the REP, the Bonneville Power Administration (BPA) purchases power from the many participating utilities at each utilities own Average System Cost (ASC). The BPA then offers, in exchange, to sell an equivalent amount of power to the utility at BPA's Priority Firm (PF) exchange rate. This exchange provided lower costs for the Pacific Northwest utility companies and for their customers. Utility ASCs, once established, were one component used by BPA to forecast the REP costs that must be collected in rates. This was the practice of BPA and many local utilities for over two decades

In 2007, the Ninth Circuit Court of Appeals held that the REP Settlement Agreements executed by BPA and its investor owned utilities were inconsistent with the Northwest Power Act. To respond to the Ninth Circuit's decisions, BPA revised its wholesale power rate determinations. A large number of parties challenged BPA's determinations in the Record of Decision in the Ninth Circuit Court. Many litigants involved in these challenges began meeting with a professional mediator seeking to resolve the many differences. The mediation concluded with an Agreement

## **COMMISSION AGENDA**

T. Yoshitani, Chief Executive Officer

April 1, 2011

Page 2 of 4

in Principal (AIP) signed by most parties to the mediation. The AIP resolved most aspects of the disputes and committed those signing the AIP to negotiate a Settlement Agreement (SA) defining the resolution of all disputed issues.

A Settlement Agreement (SA) was provided to the Port of Seattle on March 3, 2011. With this SA, BPA has mandated that 91 percent of Preference Customer load and all six regional IOUs must sign the SA before they will determine whether the BPA Administrator should sign the SA and commit the agency to abide by its provisions for the term of the Agreement. BPA, if it adopts the REP Settlement, would set rates for all BPA PF power purchasers consistent with the Settlement's terms. The Port is a PF wholesale customer. The certainty and protection afforded by the REP Settlement Agreement, however, only apply to those parties that sign the REP Agreement. If the signing threshold is met, then the next decision point is July 2011, when BPA decides to sign the SA or not. If BPA signs the SA, the Administrator will set BPA rates consistent with the settlements terms. The resulting rates to the Airport could be reduced by 3 to 4 percent. If the signing threshold is not met or BPA does not sign the SA, the SA becomes void, rates will be set using a traditional calculation of REP benefits, and the parties will proceed with litigation. Resolution of litigation would take significant time, and the extent of Port involvement is identified later in this memorandum.

### **BACKGROUND:**

On November 11, 2008, Port Commission authorized a power sales agreement, contract # 09PB-13094, with the BPA. This power sales contract will expire on September 30, 2028. The REP settlement agreement will set rates for the duration of this contract based, in part, on the terms of the Settlement Agreement.

#### **History:**

1980 Northwest Power Act signed into law by President Carter.

1980 REP program created

2001 REP settlements challenged in court

2003 Proposed settlement fails

2007 Ninth Circuit court issues two opinions favoring Consumer Owned Utilities

2010 Agreement in Principal signed by most parties

2011 Settlement Agreement is proposed

## **COMMISSION AGENDA**

T. Yoshitani, Chief Executive Officer

April 1, 2011

Page 3 of 4

### **IMPLICATIONS TO SIGNING THE SETTLEMENT AGREEMENT (SA):**

#### **Justification to proceed with signing the SA:**

Most parties to the mediation arising from the lawsuits over the REP signed an Agreement in Principal (AIP). The REP settlement agreement carries out the intent of the AIP and seeks to ensure lawful resolution of disputed issues.

Key provisions of this agreement include:

- Certainty of the effect of the REP on our rates through 2028.
- A fixed dollar total of REP benefit payment through 2028.
- Resolution of current litigation and avoidance of future litigation on the REP issue through 2028.

#### **Consequences of not proceeding with signing the SA:**

- The Port of Seattle cannot be certain of power rates paid to BPA.
- The Port may end up paying more for power than those parties who signed the agreement.

#### **Principal Legal Comments:**

1. Obligation to support the Settlement Agreement.
  - a. The Port as a signatory to the SA would be obligated to support the agreement and urge Congress to pass legislation. It would be reasonable to expect the Port to be required to sign litigation, rate case pleadings and letters in support of the SA.
2. Legality and Enforceability.
  - a. Given the Ninth Circuit Court's decisions, the enforceability of this SA is uncertain, if not problematic. The lawfulness of the SA may turn on the yet-to-be-written BPA Administrator's Record of Decision; however, uncertainty about lawfulness of the SA is not a reason to not sign it.
  - b. The SA is probably the only way to avoid many more years of costly litigation with uncertain outcomes.
3. Legislation.
  - a. Statutory ratification of the SA would resolve uncertainty about whether the SA is itself legal. However, proposing legislation carries risks. Local utilities and Northwest energy groups might be unable to control the scope of legislation. If legislation becomes the tool of interest groups in other regions, there might be debate to try to kill legislation or negotiate.

## **COMMISSION AGENDA**

T. Yoshitani, Chief Executive Officer

April 1, 2011

Page 4 of 4

### **FINANCIAL ANALYSIS:**

On behalf of the Port of Seattle and other member Public Utility Districts (PUDs), the Public Power Council engaged extensively over the last month in analytical efforts around the potential settlement of the REP. Based on all the foregoing analysis in combination with the Public Power Council and legal assessment, it is the position of Port of Seattle staff that the proposed Settlement Agreement is in the financial best interest of the Port of Seattle for the length of the settlement. The SA could save the port of Seattle an estimated \$3 to \$4 million over the remaining 17-year period of our power sales contract. The savings cannot be precisely determined and could be more or less depending on future litigation.

Over the next 17 years the Airport will pay the BPA in excess of \$100 million for electrical power. As noted above, if the settlement agreement is accepted and legally adopted by the BPA, then the potential benefit to the Airport could be a reduction in electrical power costs that would represent a savings of 3 to 4 percent over this long time period. Any savings realized could not be used for other purposes, rather it would only come in the form of lower electricity rates to the Airport. The Airport in turn would have the ability to reduce its rates to its retail concessionaire and airline customers.

### **PREVIOUS COMMISSION ACTION:**

None