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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-114858

July 10, 1979

The Honorable Jim Weaver
House of Representatives

[Authorization of

Dear Mr. Weaver:

This is in answer to your request for our opinion on whether the Bonneville Power Administration (BPA) ~~is authorized under existing legislation~~ to engage in energy conservation measures. In addition, you asked us to undertake our analysis "keeping in mind [our] approval of BPA's 'net-billing' agreements, sent to Mr. Laurence Dunn, Assistant Secretary of Interior in response to his letter of September 23, 1970."

The letter to which you refer asked whether we would be required to object to the net billing provisions of certain proposed contracts with preference customers, implementing BPA's participation in the Ten Year Hydro-Thermal Power Program for the Pacific Northwest.

In response, we informed the Secretary of the Interior that--

> "* * *[S]ince the participants have no right to cash payments, we would not be required to object to the net billing provisions of these proposed contracts, and similar net billing provisions in future contracts, if they have been submitted to the House and Senate Appropriations Committees for the requisite period prior to their execution and provided the Congress is informed with respect to all transactions under such contracts." B-170878, October 21, 1970.

This approval, however, was based on the Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Act, 1970 (Pub. L. No. 91-144, 83 Stat. 323, 333), which provided funds in connection with proposed agreements containing net billing provisions, and on the House and Senate Appropriations Committee reports, which made it clear that the committees approved the use of net billing as a means of effecting payment to preference customers for their ownership share of generating capability from non-federally financed thermal plants. See B-170878, October 21, 1970 (copy enclosed). We have found no equally persuasive express manifestation of congressional intent that BPA may bear the cost of conservation

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measures. This is not to say, however, that absent such an express manifestation of legislative intent, energy conservation initiatives are necessarily unauthorized.

To enable the BPA Administrator (hereinafter, the Administrator) to carry out his statutory mandate, section 2 of the Bonneville Project Act of 1937 (1937 Act), 16 U.S.C. § 832a(f) (1976), granted the following contracting authority:

> "Subject only to the provisions of this chapter, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary."

In our letter of September 21, 1951, to the Secretary of the Interior (B-105397), we noted that the legislative history of the foregoing provision--

> "* * * indicates that its purpose was to free the Administration from the requirements and restrictions ordinarily applicable to the conduct of Government business and to enable the Administrator to conduct the business of the project with a freedom similar to that which has been conferred on public corporations carrying on similar or comparable activities. In view of such broad authority, it appears that the scope of the activities contemplated under the act and the appropriate means of accomplishing same, are matters for determination by the Administrator. * * *"

Accordingly, we would not find BPA's use of its powers for conservation purposes legally objectionable if, in the absence of some conflicting congressionally mandated limitation or prohibition, the Administrator should determine that such conservation is a reasonable means of attaining some end necessary or appropriate to fulfilling the responsibilities imposed on him by law. In requesting our opinion, you asked us to analyze several specific points set out in your March 7, 1979, letter to the Administrator. A restatement of these points with our analysis follows.

1. Is the BPA a "public utility" as defined in the National Energy Conservation Policy Act, Pub. L. No. 95-619 (1978), which would be prohibited by that Act from involvement in the supply, installation, and financing of residential energy conservation measures

Section 216 of Pub. L. No. 95-619, supra, places certain limitations on the supply, installation, and financing of residential energy conservation meaures by public utilities. A public utility is defined in section 210(4) of Pub. L. No. 95-619 as--

> "* * * any person, State agency, or Federal agency which is engaged in the business of selling electric energy, natural gas or electric energy, or both, to residential customers for use in a residential building * * *"

BPA is authorized to sell electric energy to private persons for direct consumption (16 U.S.C. § 832d(a)) but apparently does not sell directly to residential customers. BPA's customers fall into four major categories: (1) publicly owned utilities; (2) Federal agencies; (3) investor-owned utilities; and (4) direct service industries. (See Chapter 3 of our Report to the Congress, "Region at the Crossroads-The Pacific Northwest Searches for New Sources of Electric Energy" (hereinafter Crossroads Report), EMD-78-76, August [illegible], 1978.)

Inasmuch as BPA is a wholesale supplier which does not sell to residential customers for use in residential buildings, BPA is not a public utility, as defined above, and is therefore not subject to the limitations on participation in residential energy conservation activities in section 216 of Pub. L. No. 95-619. (BPA has pointed out, however, that section 216 does limit many of its public utility customers from engaging in residential energy conservation programs with their residential customers.)

2. Does BPA's primary enabling legislation place any [illegible] prohibitions on BPA energy conservation activity?

The authority of the BPA Administrator derives primarily from the 1937 Act, 16 U.S.C. §§ 832 et seq., together with the Reclamation Laws, as amended and supplemented (particularly section 9(c) of the Reclamation Act of 1939, 43 U.S.C. § 485h(c) (1976) and section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s (1976)). The most recent congressional pronouncement on the Administrator's authority is contained in the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. § 838 et seq. (1976), which enables the Secretary of the Interior, through the Administrator, to finance BPA operations from revenues of BPA, without appropriation of additional funds by Congress. 16 U.S.C. § 838i(b) authorizes the Administrator to make expenditures from the BPA fund--

> "* * * which shall have been included in his annual budget submitted to Congress, without further appropriation and without fiscal year limitation, but with[illegible]

such specific directives or limitations as may be included in appropriation acts, for any purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law. * * *"

Although this provision confers broad administrative discretion on the Administrator, that discretion must always be exercised in furtherance of the purposes, and subject to the provisions, of BPA's enabling legislation. Hence, while we are aware of no express prohibition in BPA's enabling legislation of its participation in energy conservation, BPA, if it does participate, must do so consistent with its statutory mandate. This raises an issue addressed by your third and fourth points.

3. Are conservation policies and programs consonant with the purposes of BPA's enabling legislation and with its statutory mandate to encourage widespread use of federally generated power?

Whether conservation is a reasonable means of carrying out the purposes of BPA's enabling legislation is a matter for the Administrator's determination. We requested the views of the Administrator, who responded by sending us, among other documents, copies of his April 12 letter to you and the March 2, 1979, opinion of BPA's General Counsel on the "Need for Express Congressional Approval Authorizing BPA to Implement Long-Range Conservation Programs."

In the April 12 letter, the Administrator sets forth BPA's present conservation efforts but cautions that, because these depend on implied, rather than express, statutory authority, BPA believes that it may not fund what it terms "purchase of energy conservation," as contemplated by H.R. 13931, 95th Congress. H.R. 13931 would have provided for investments in conservation by BPA "running into the hundreds of millions of dollars," for such things as waste energy recovery, installation of renewable energy equipment, insulation, weatherization, and increased system efficiency.

The March 2 opinion expands on this. The General Counsel points out that the Federal Columbia River Transmission System Act authorizes BPA to purchase power, but only "on a short term basis to meet temporary deficiencies in electric power which the Administrator is obligated by contract to supply," unless express authority exists to purchase it for some other purpose. 16 U.S.C. § 838i(b). He contends that--

"The power marketing statutes pursuant to which the Bonneville Power Administration conducts business

> contain no express authority to acquire the long-term output of any project, nuclear, conservation, or otherwise. While implied authority is found, it is limited to the purchase of energy that can demonstrably be shown to maximize the economical and efficient operation of the hydro projects from which BPA markets power. The use of such authority to engage in conservation is therefore limited: conservation can be engaged in not for its own sake but only to the extent that it can be shown to augment the hydro resource or to meet temporary deficiencies in the Administrator's contractual obligation to deliver power." (Footnotes omitted.)

He also suggests that uncertainty about BPA's statutory authority to engage in a major acquisition for conservation may affect the marketability of its obligations.

Investment in conservation is thus viewed by BPA as a source of supply for additional electrical power and hence as a purchase of power which is, therefore, subject to those limitations which apply solely to BPA's authority to acquire power from non-hydro sources. Conservation may also be viewed as a demand reduction device. We understand that, unlike BPA, most utility companies view conservation in terms of demand reduction rather than in terms of power acquisition.

Even viewing conservation as a demand reduction method rather than as an investment in increased production, the question remains whether conservation is a reasonable means of achieving the objectives of BPA's enabling legislation. The 1937 Act charges BPA with the transmission and marketing of electricity generated at Federal dams constructed and maintained by the Bureau of Reclamation and the U.S. Army Corps of Engineers. Further, 16 U.S.C. § 832a(f) authorizes the Administrator to enter into such arrangements for achieving the objectives of the 1937 Act "as he may deem necessary." In view of the breadth of the authority granted to the BPA Administrator by that section, we advised the Secretary of the Interior in 1951 that the responsibility for determining whether the artificial inducement of precipitation was necessary for carrying out the objectives of the Act was vested solely in the Administrator. B-105397, supra.

Accordingly, to the extent that the Administrator, on a reasonable basis, determines conservation to be a desirable device for discharging his transmission and marketing functions, and includes projected expenditures therefor in his annual budget submitted to the Congress, we would find it consistent with BPA's enabling legislation. Likewise,

we think the above rule applies to the determination of whether conservation policies and programs are consonant with BPA's statutory mandate to encourage widespread use of federally generated power.

Section 2(b) of the Bonneville Project Act, 16 U.S.C. § 832a(b), directs the Administrator to build a transmission system--

> "In order to encourage the widest possible use of all electric energy that can be generated and marketed and to provide reasonable outlets therefor * * *." (Emphasis supplied.)

In addition, he is to establish rate schedules with a view to encouraging this widespread use (but also having regard to recovery of costs over a reasonable period). 16 U.S.C. § 832e. These directives are applicable not only to the Bonneville Project but also to the four dams on the lower Snake River and to the McNary Dam. Act of March 2, 1945, Pub. L. No. 79-14, 59 Stat. 10, 22. Other Corps of Engineers' projects for which BPA is the marketing agency are subject to section 5 of the Flood Control Act of 1944, supra, which directs the Secretary of the Interior to dispose of power from those projects "in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers, consistent with sound business principles." In your March 7, 1979, letter to the Administrator, you quoted from page II-6 of the BPA Draft Role Environmental Impact Statement as follows:

> "BPA considers conservation policies and programs to be consonant with the widest possible use of electric energy. The promotion of efficient energy use, reduction of waste, and attempts to increase production of energy, all come under the widespread use objective of the Act."

Section 5 of the Flood Control Act, however, not only directs that Federal hydro-power be disposed of in such a manner as to encourage its most widespread use, but also mandates its disposition "at the lowest possible rates to consumers consistent with sound business principles." As our Crossroads Report pointed out, low prices for Federal power do not encourage conservation investments because they fail to reflect true costs and because they increase the period for payback of conservation investments. Also, as we have pointed out in previous reports, marketing Federal power at low rates is inconsistent with principles in the Administration's "National Energy Plan" to (1) price energy at a level that reflects replacement costs, (2) encourage conservation, and (3) vigorously expand the use of renewable resources.

To the extent that the Administrator interprets the "lowest possible rates" mandate to require marketing of power at rates which are not conducive to conservation, conservation measures which result in increased rates would be inconsistent with BPA's statutory mandate. In this connection, the Administrator says that--

> "* * * Bonneville is limited to collecting only that amount of revenue which is sufficient to meet its repayment requirements. This limitation precludes BPA from employing the unconstrained marginal cost rates which have occasionally been suggested as a method by which Bonneville could encourage conservation."

The interpretation by an agency of the statutes it is charged with administering is entitled to great weight and generally should not be overturned unless unreasonable, arbitrary, or capricious. The Administrator has determined that conservation measures and policies are consonant with his statutory responsibility to encourage the widespread use of federally generated power, but that there are limits on the extent to which he may pursue such programs and policies. The Administrator has traditionally taken a broad view of his legislative mandate, a view for which, as we noted above, there is certainly support. Although there is room for disagreement over the extent to which BPA may undertake conservation activity, we conclude that it is authorized, but not required, to engage in conservation measures, as it reports that it is now doing, and that its authority to do so is not unlimited under present law.

4. Is BPA mandated to stipulate retail conservation rates by contract with its wholesale utility customers?

With respect to contracts for the sale of electricity from the dams falling within the purview of the 1937 Act, 16 U.S.C. § 832d(a) provides that--

> "Contracts entered into with any utility engaged in the sale of electric energy to the general public shall contain such terms and conditions, including among other things stipulations concerning resale and resale rates by any such utility, as the administrator may deem necessary, desirable or appropriate to effectuate the purposes of this chapter and to insure that resale by such utility to the ultimate consumer shall be at rates which are reasonable and nondiscriminatory."

Your March 7 letter suggests that this provision, read together with the provisions allowing BPA to establish rates encouraging widest diversified use and recovering costs, constitutes a mandate to BPA "to stipulate by contract retail conservation rates by its utility customers." We find no mandate in the terms of these provisions.

Although BPA, in the Administrator's April 12 letter to you, expresses some doubt about its authority in this regard, the above provision, and the Administrator's broad contracting authority granted by 16 U.S.C. § 832a(f), supra, do provide, in our opinion, authority for him to stipulate retail rates by contract with BPA's wholesale utility customers. However, as discussed in connection with question 3, the rate-stipulating power must be exercised in order "to effectuate the purposes" of the Act, which do not expressly include conservation. In his April 12 letter to you, the Administrator discusses some of the limitations on his use of wholesale rate-setting as a conservation measure and indicates that he has taken some steps in this direction. We cannot say, as a matter of law, that he is required to do more.

We trust that the above is responsive to your inquiry.

Sincerely yours,

Comptroller General
of the United States

Enclosures