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

B-210929

August 2, 1983



The Honorable James Weaver
Chairman, Subcommittee on Mining,
Forest Management and Bonneville
Power Administration
Committee on Interior and Insular
Affairs
House of Representatives

Dear Mr. Chairman:

Your letter of February 16, 1983, requests our views concerning the Bonneville Power Administration's (BPA) authority to finance, from BPA's ratepayer revenues, the completion of construction of the Washington Public Power Supply System (WPPSS) Projects 2 and 3. We have limited our discussion to Project 2 since BPA presently proposes to fund completion of construction only for this project. However, we recognize that the legal issues are not unique to Project 2.

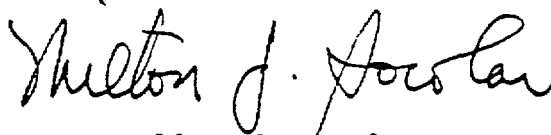
BPA has agreed to pay, through net billing or by direct disbursements from the BPA Fund, for the remaining Project 2 construction costs as they are incurred. We conclude that such payments are within BPA's broad statutory authority. In our view, the 1971 Public Works Appropriation Act, when read in conjunction with BPA's contracting and expenditure authority in the Bonneville Project Act, 16 U.S.C. § 832a(f), the Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. § 839f(a), and the Federal Columbia River Transmission Systems Act, 16 U.S.C. § 838i(b), authorizes these payments. The appropriation act provided express congressional recognition of BPA's authority to acquire, and to pay for by net billing, the generating capability of WPPSS Project Nos. 1, 2, and 3. Moreover, the appropriation act's legislative history indicates that direct BPA disbursements to project participants were recognized as a possible means to satisfy BPA's obligations under the Net Billing Agreements. BPA's broad contract and expenditure authority permits the Administrator to determine the scope of his activities and the means necessary to accomplish them, so long as such activities are reasonably consistent with the purposes for which the Administrator may act. B-149016, B-149003, July 16, 1982; B-114858, July 10, 1979.

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While direct construction payments by BPA represent a departure from the bond financing arrangement originally presented to the Congress, this departure does not materially undercut the basis for congressional approval. Under the financing arrangement originally contemplated, BPA would ultimately finance the full cost of constructing the Project, plus interest, by paying debt service on WPPSS bonds. Direct payments by BPA merely accomplish directly what the Congress expressly authorized BPA to do indirectly. In our view, the Congress' fundamental intent was that the Project be financed by BPA ratepayers, not by Federal taxpayers through general fund appropriations. Accordingly, since BPA's use of its ratepayer revenues to complete construction of Project No. 2 is reasonably consistent with its statutory authority to acquire the project's generating capability, and in the absence of a specific limitation in an appropriation or other act of Congress, we would not under the present circumstances question such payments, either by net billing or by direct disbursement from the BPA Fund.

Enclosed is a more detailed analysis of the question you presented. By letter dated July 14, 1983, Senators McClure, Jackson, Hatfield, Gorton, Baucus, Symms and Packwood wrote us expressing interest in our analysis of this issue. Accordingly, we are also sending copies of our analysis to them.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure

ENCLOSURE

BONNEVILLE POWER ADMINISTRATION'S AUTHORITY TO PAY
CONSTRUCTION COSTS OF WASHINGTON PUBLIC POWER SUPPLY
SYSTEM PROJECT NO. 2

I.

The Bonneville Power Administration (BPA) entered into agreements with its preference customers and the Washington Public Power Supply System (WPPSS) whereby BPA would acquire the entire capability of two nuclear power plants (WPPSS Project Nos. 1 and 2), and 70 percent of a third plant (WPPSS Project No. 3). All plants were to be constructed, owned, and operated by WPPSS. WPPSS was to obtain construction funds for the projects by issuing bonds. In essence, BPA agreed to reimburse WPPSS for all costs of ownership of the projects, including debt service on the WPPSS bonds. This was to be accomplished by use of BPA's ratepayer revenues from its preference customers through a process known as "net billing."^{1/}

BPA advises that construction of WPPSS Project No. 2 has proceeded under the above financing arrangement to the point that it is now 98 percent completed; however, WPPSS apparently is unable to obtain bond financing for the remaining 2 percent. As a result, BPA has agreed to pay WPPSS in accordance with the Net Billing Agreements for the remaining construction costs as they are incurred. Such payments are to be made by net billing or by direct disbursements from BPA's ratepayer revenue account.

^{1/} The net billing arrangement is a package of agreements between WPPSS, BPA's preference customers, and BPA. Under the arrangement, BPA's customers purchase part of a project's capability and sell it to BPA. BPA pays the customer by crediting the customer's monthly bill for the energy and services received from BPA. The customer uses the amount credited to pay WPPSS for the capability it purchased and assigned to BPA. BPA's promises represent the security behind the WPPSS bonds issued to fund construction of the projects.

BPA's legal authority to pay construction costs in this manner to complete WPPSS Project No. 2 has been challenged.^{2/} The basic contention is that making direct payments for construction costs exceeds the authority Congress granted BPA to acquire the capability of Project No. 2 through net billing. It is argued that such payments violate prohibitions against construction, ownership, and operation of power plants by BPA, and against Federal financing of the WPPSS projects. Finally, we are urged to read the contractual arrangements between BPA and WPPSS as precluding direct payments by BPA for construction costs.

For the reasons discussed below, we conclude that the payments at issue are consistent with the purposes of the 1971 Public Works Appropriation Act and with BPA's broad contract and expenditure authority. While direct construction payments by BPA may represent a departure from the bond financing arrangement originally presented to Congress, this departure does not materially undercut the basis of congressional approval. As BPA points out, under the original arrangement, it would ultimately finance the full cost of constructing the plant (plus interest) through payment of WPPSS Project No. 2's debt service. The new method merely results in BPA paying directly what it was already paying indirectly with clear congressional recognition and approval. The Congress' fundamental intent was that BPA ratepayers finance construction of the plants, not the Federal taxpayers through general fund appropriations. The BPA construction payments are consistent with this intent; thus they do not constitute Federal financing of construction.

Likewise, the payments do not constitute construction, ownership, or operation of WPPSS Project No. 2 by BPA. Even if they were viewed as having this effect in some indirect sense, this would be no more true than under the original financing method which Congress clearly approved. Finally, we do not believe that the net billing arrangements between BPA and WPPSS preclude direct payments for construction.

^{2/} Since BPA presently proposes to fund completion of construction only for Project No. 2, our opinion specifically addresses this project. We recognize, however, that the basic legal issues are not unique to Project No. 2.

II.

The genesis of the present controversy may be traced to the late 1960's when BPA and the public and private utilities of the Pacific Northwest developed a hydro-thermal power program to meet the projected energy needs of that Region. Under this program BPA would develop, construct, and operate a regional high voltage transmission system, while the Region's utilities would construct, own, and operate the thermal power plants feeding the Region's electrical energy needs. From BPA's perspective, the acquisition of the capability of the thermal projects, including WPPSS Project No. 2, would help provide additional firm power to its customers at the lowest practical rate by permitting BPA to meld its hydroelectric capability with the projects' thermal capability.

To facilitate the Region's expansion of its thermal generating capability, BPA agreed to participate in paying for the thermal power plants through a net-billing arrangement. Under this arrangement, BPA's preference customers (participants) purchase a portion of a particular project's capability, which is then assigned to and purchased by BPA under a Net Billing Agreement. Section 5(a, b) of the Net Billing Agreement. Pursuant to the Net Billing Agreement, BPA agreed from a date certain to credit the participant's monthly bill for energy and other services it receives from BPA with an amount equal to the participant's share of the monthly costs of the thermal plants. Section 7 of the Net Billing Agreement. The participant in turn pays this amount to WPPSS, the Washington State municipal corporation and joint operating agency charged with the construction, operation, and ownership of the thermal plants. Sections 5, 6, and 7 of the Net Billing Agreement. BPA's obligation to bill participants for all project costs included by WPPSS in its Annual Budget exists whether or not the projects are ever operable. Section 5(b) of the Net Billing Agreement.

WPPSS responsibilities to construct each project are detailed in a Project Agreement between WPPSS and BPA. Among other things, WPPSS must prepare and submit to BPA for its approval a Construction Budget setting forth an estimated schedule of construction expenditures and itemizing all costs related to ownership, construction, and financing of the project. Section 6(a) and 1(c) of the Project Agreement. Apart from defining BPA's role for monitoring and approving

certain aspects of project construction, the Project Agreement reflects WPPSS's agreement to use its best efforts to issue and sell bonds to finance project construction. Section 5(a) of the Project Agreement.

Congressional approval of BPA's participation in the hydroelectric power program was provided in the Public Works Appropriation Acts, 1970 and 1971, Pub. L. 91-144, 83 Stat. 333 (1969) and Pub. L. 91-439, 84 Stat. 899 (1970), respectively. The 1971 Public Works Appropriation Act approved BPA's acquisition of the thermal generating capability of WPPSS Project Nos. 1, 2, and 3 in the following language:

"For construction and acquisition of transmission lines, substations, and appurtenant facilities, as authorized by law, \$91,600,000, to remain available until expended: Provided, That not more than \$150,000 of the funds appropriated herein shall be available for preliminary engineering required by the Bonneville Power Administration in connection with the proposed agreements relating to three non-federally financed generating plants proposed under the hydro-thermal program to be sponsored jointly or severally by the Washington Public Power Supply System, Seattle City Light, Tacoma City Light, Snohomish County PUD and the Puget Sound Power and Light Company, pursuant to which the Bonneville Power Administration will acquire from preference customers and pay by net billing for generating capability from non-federally financed thermal generating plants in the manner described in the committee report." (Emphasis added.)

The House Appropriations Committee described the manner of acquisition as follows:

"Last year the Administration approved a 10-year hydrothermal power program for the Pacific Northwest, and the Congress approved initiating its implementation through proposed agreements between Bonneville Power Administration, Portland

General Electric Co., and the Eugene Water & Electric Board.

"The program includes the construction of seven thermal generating plants between 1971 and 1981. None will be federally constructed, financed or owned. The committee approves implementation of the remainder of the program by the use of net billing as the means of affecting payment by the Bonneville Power Administration for part or all of the generating capacity of nonfederally financed thermal plants, under suitable agreements between Bonneville Power Administration and preference customers to accomplish this purpose. Such agreements would provide that the Bonneville Power Administration will acquire from a date certain, on a cost basis, the preference customers' rights to the generating capability of nonfederally financed plants whether or not they are operable. Any costs or losses to the Bonneville Power Administration under these agreements will be borne by Bonneville Power Administration rate payers through rate adjustments if necessary. The Committee requests that the proposed agreements be submitted to the House and Senate Appropriations Committees at least 60 days prior to their execution by the Administrator."

H. Rep. No. 91-1219 at 90 (1970); see also S. Rep. No. 91-1118 at 56 (1970).

III.

BPA is presently confronted with the risk of a project failure. Because there is no market for WPPSS bonds, WPPSS is unable to obtain bond financing to complete construction of WPPSS Project No. 2. As a result, BPA has agreed to pay, either by net billing or by direct disbursement, for the remaining construction costs as they are incurred.

It is BPA's position that there exists both implied and express authority to pay for construction costs from

ratepayer revenues. Apart from the 1971 Public Works Appropriation Act, Pub. L. 91-439, 84 Stat. 899, BPA asserts that independent statutory authority to pay for the costs of completing construction of WPPSS Project No. 2 exists in the various power marketing statutes. BPA maintains that this authority, coupled with its broad contract and expenditure authority contained in section 2(f) of the Bonneville Power Act, 16 U.S.C. 832a(f), as reaffirmed in section 9(a) of the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act), 16 U.S.C. 839f(a), and section 11(b) of the Federal Columbia River Transmission Act (Transmission Act), 16 U.S.C. 838i(b),^{3/} supports its decision to finance directly the cost of construction completion. The net-billing agreements as presently structured do not preclude such payments, but rather provide an available mechanism to pay the costs of construction of WPPSS Project No. 2 as such costs are incurred by WPPSS.

The opposing argument is that the sole source of BPA's authority to participate in the development of WPPSS Project No. 2 is contained in the 1971 Public Works Appropriation Act as further explained in the House and Senate Appropriations Committee reports. 129 Cong. Rec. at H4493, 4494 (daily ed., June 27, 1983) (remarks of Mr. Weaver). In this regard, Congress' approval of BPA's acquisition of the generating capability of the "non-federally financed" WPPSS projects contemplated privately financed, constructed, and owned projects. Id. at H4493-94. It is further suggested that the net-billing agreements submitted to the House and Senate Appropriations Committees authorized BPA to do no more than to pay amounts based solely on the project's annual budget, which does not include construction costs. Id. at H4493. In short, Congress' action with respect to the 1971 Public Works Appropriation Act and the net-billing agreements submitted to the House and Senate Appropriations Committees approved BPA's payment of debt service for the bonds issued by WPPSS to construct Project No. 2, "but it certainly did not authorize BPA to provide the construction funds itself." Id. at H4494. Hence, BPA's present plan to pay for the construction costs of WPPSS Project No. 2, either through net-billing or direct payment to WPPSS, violates Congress' grant of authority.

^{3/} These statutory provisions are discussed in detail hereafter.

IV.

We conclude that BPA's position is correct. In our view the 1971 Public Works Appropriation Act, particularly when read in conjunction with other BPA statutory authorities, authorizes BPA to pay, either by net billing or by direct payment, the costs of completing construction of WPPSS Project No. 2.

The 1971 Public Works Appropriation Act, above, provided express Congressional recognition of BPA's authority to acquire and pay by net billing for the generating capability of WPPSS Project Nos. 1, 2, and 3. Such Congressional recognition was not, however, in derogation of any other existing authority BPA may have to acquire the generating capability of the three thermal plants. In particular, the reason BPA requested the inclusion of the above language in the 1971 Public Works Appropriation Act was not to obtain an

independent grant of authority, but rather to assuage the concerns of bond counsel and banks underwriting WPPSS bond issues.^{4/}

4/ BPA so advised the House Appropriations Committee in the following exchange between Chairman Whitten and BPA's former General Counsel:

"MR. WHITTEN. As BPA has used this net billing procedure since 1961, why is the language considered necessary in the appropriation bill?

* * * * *

"MR. KASEBERG. The authority for Bonneville to acquire thermal power is implied from other provisions of the Federal power marketing laws. There is no express authority authorizing these purchases to which you can point your finger and say Congress expressly said you could do this. These net billing agreements are part of the security behind the bonds that the public agencies will issue to supply the funds with which to build these plants. Since these bond issues involve such substantial amounts of money, the bond counsel and the underwriting bankers have requested that Congress give express recognition to this existing implied authority to acquire the power. This goes back to the question you asked earlier, Mr. Chairman.

"MR. WHITTEN. Thank you. I thought that a very fine answer. * * *"

Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Bill, 1971: Hearings on H.R. 18127 Before the Subcommittee on Public Works of the House Committee on Appropriations, 91st Cong., 2d Sess. 867-868 (1970) (1971 House Appropriations Hearings).

Apart from whatever implied authority BPA may have had to acquire thermal power, it is apparently agreed by all that the 1971 Public Works Appropriation Act can be viewed as providing BPA with the express authority to acquire and pay for by net billing the thermal generating capability of WPPSS Project No. 2. If this much is conceded, and we think it must be, the essential point of controversy revolves around the method of payment. Specifically, can BPA only pay the debt service on the bonds issued by WPPSS to finance construction, or can it also pay the costs of completing construction of WPPSS Project No. 2 as such costs are incurred by WPPSS?

A.

As an initial matter, we observe that the Net Billing Agreements appear to provide a ready mechanism to pay such costs as they are incurred by WPPSS. Under the Net Billing Agreements, a participant must pay WPPSS each contract year the amount specified in its billing statement. Section 6 of the Net Billing Agreement. BPA in turn pays each participant "an amount equal to that set forth in the Billing Statement for that Contract Year." Section 7(a) of the Net Billing Agreement. If the amount of a participant's Billing Statement exceeds its obligations to BPA for power and other services, the balance that cannot be net billed "shall be paid in cash to the participant by the [BPA] Administrator, subject to the availability of appropriations for such purposes."^{5/} Section 7(c) of the Net Billing Agreement. Amounts received by the participant, whether by net billing or in cash, are paid to WPPSS.

^{5/} Under the circumstances extant at the time of execution of the Net Billing Agreement, BPA operations were funded through annual appropriations. However, in 1974, Congress enacted the Transmission Act, discussed in more detail below, that established the Bonneville Power Administration Fund which is available to pay BPA's obligations. 16 U.S.C. § 838i. This is a revolving fund which includes BPA's ratepayer revenues and is available for use by BPA without further appropriation action, subject to the conditions and limitations specified in any appropriation acts. 16 U.S.C. 838i(b).

Each participant's Billing Statement thus reflects no more than its pro rata share of the project's annual costs as reflected in the Annual Budget WPPSS must submit to BPA. As described in the Net Billing and Project Agreement,

"'Annual Budget' means the budget adopted by Supply System not less than 45 days prior to the beginning of each Contract Year which itemizes the projected costs of the project applicable to such Contract Year, or, in the case of an amended Annual Budget, applicable to the remainder of such Contract Year. The Annual Budget, as amended from time to time, shall make provision for all of Supply System's costs, including accruals and amortizations, resulting from the ownership, operation (including cost of fuel), and maintenance of the Project and repairs, renewals, replacements, and additions to the Project, including, but not limited to, the amounts which Supply System is required under Project Bond Resolution to pay in each Contract Year into the various funds provided for in the Project Bond Resolution for debt service and all other purposes * * *."

Section 1(a) of the Net Billing Agreement and the Project Agreement. (Emphasis added.)

The plain language of the above description of "Annual Budget" is inclusive, i.e., the Annual Budget shall include "all" WPPSS costs resulting from project ownership. In the absence of a specific prohibition or limitation to the contrary in the Net Billing Agreement, we see no reason why under the Agreement WPPSS's construction costs could not be included in the Annual Budget and net billed or paid in cash, in appropriate cases.^{6/}

^{6/} This, of course, assumes that the Administrator, BPA, determines that the payment of construction costs as such costs are incurred is consistent with prudent utility practice as such concept is described in the Project Agreement. See sections 1(k), 6(b), 10(b) of the Project Agreement.

It is argued, however, that since the term "Annual Budget" does not specifically refer to construction costs as appropriate for inclusion in the Annual Budget, and since WPPSS has instead included such costs in the Construction Budget, as defined in the Project Agreement, construction costs may not be net billed or paid in cash under the Net Billing Agreement. See 129 Cong. Rec. H4493, H4494 (daily ed., June 27, 1983) (remarks of Mr. Weaver). The flaw in this argument is that there is no indication in the Project Agreement that the inclusion of construction costs in the Construction Budget excludes by implication inclusion of such costs in the Annual Budget. Indeed, the plain language of the above description of the "Annual Budget," as read by the parties to the agreement, suggests the contrary. Moreover, to date, there has been no need to include such costs directly in the Annual Budget since construction has previously been financed by bond proceeds; which, in any event, have been included in the Annual Budget in the form of debt service.

B.

The essential question, however, is whether BPA has the statutory authority to pay, by net billing or by direct cash disbursement, for the costs of completing WPPSS Project No. 2 as such costs are incurred. In our view, Congress was aware at the time of enactment of the 1971 Public Works Appropriation that in order to satisfy net billing deficiencies, BPA might have to undertake to advance funds to project participants. At that time, BPA contemplated that any such advances would be preceded by an appropriation from Congress. However, in the 1974 Transmission Act, Congress vitiated this understanding by establishing BPA as a revolving fund agency. Under the BPA revolving fund, BPA can expend funds for the previously authorized acquisition of electric generating capability without further appropriation action, so long as the expenditure is contained in BPA's annual budget submitted to Congress and subject to any limitations specified in appropriation acts. 16 U.S.C. § 838i(b)(6)(ii).

A review of the 1971 Public Works Appropriation Act's legislative history indicates that Congress was made aware that under certain circumstances, BPA would wish to advance funds to project participants. BPA explained to the Appropriations Subcommittee on Public Works, House Appropriations Committee, during hearings on the 1971 appropriation bill,

that cash payments to project participants may be required to satisfy a participant's net billing deficiency:

"MR. WHITTEN. In connection with the proposed contracts, under what conditions will the Administration be required to seek appropriations for cash payments to the participants?

"MR. RICHMOND. We do not anticipate that we will. The only thing that could cause us to do that would be if our load forecasts were grossly overestimated with the result that we would have insufficient net billing capability to provide for the deficiency. That would cause us to seek appropriations to pay for the power."

1971 House Appropriations Hearings at 871.

By way of elaboration, BPA detailed the specific steps that would be taken before BPA would have to request an appropriation to fund cash payments:

"MR. KASEBERG. There is a several-step procedure on the method of payment. First, this net billing transaction between Bonneville and the public agency which assigns the share of the power to Bonneville will normally take care of the payment. To make sure that that will be the case, we estimate the net billing capability of the customer at 15 percent below what we anticipate his actual indebtedness to Bonneville would be.

"Second, if for some reason the net billing capability of that customer is not sufficient to permit payment, the contract provides for a voluntary assignment, the Administrator will attempt to assign that excess share to some other customer who does have the ability to net bill it. If such a voluntary assignment does not work, we move to the third step.

"The third step in the chain is that the participants in the contract for that particular plant are then required to accept such an assignment up to 25 percent of their original purchases. It is only after all three of those conditions fail that Bonneville is obligated to come to Congress and request appropriations for payment in cash. That contractual provision provides for payment subject to availability of appropriations * * *.

We think it is apparent from the foregoing that in 1971 Congress was aware that under limited circumstances, BPA would advance funds to project participants provided BPA sought and obtained an appropriation.^{7/} Indeed, the fact that project participants did not have a right to cash payments, absent an available appropriation, was one of the reasons we did not question the net billing agreements executed pursuant to the 1970 Public Works Appropriation Act, above, or future net billing agreements executed pursuant to the 1971 appropriation act. B-170878, October 21, 1970.

Although the 1971 appropriation act envisioned that BPA would obtain an appropriation before making cash payments, an appropriation is no longer required. In 1971 BPA's operations were financed by general fund appropriations. As noted earlier, Congress in 1974 enacted the Transmission Act which transformed BPA to a revolving fund agency. 16 U.S.C. § 838i. The BPA Fund established by the Transmission Act includes all BPA receipts and revenues and permits the Administrator to:

"* * * make expenditures from the fund, which shall have been included in his annual budget submitted to Congress, without further appropriation and without fiscal year limitation, but within such specific directives or limitations as may be included in appropriation acts, for any

^{7/} For this reason, the Net Billing Agreements provided that net billing deficiencies "shall be paid in cash to the participant by the Administrator, subject to the availability of appropriations for such purposes."

purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law, including but not limited to--

"(6) purchase of electric power (including the entitlement of electric plant capability) * * * (ii) if such purchase has been previously authorized * * *."

16 U.S.C. § 838i(b)(6)(ii).

In effect, section 11(b) of the Transmission Act, quoted above, vitiated the financing system in effect at the time of enactment of the 1971 Public Works Appropriation Act to control BPA advances of funds to project participants. As previously explained, before BPA could make any advances to project participants, Congress was to approve by appropriating the necessary funds. The Transmission Act revised the process to permit BPA to advance funds in accordance with the terms of the Net Billing Agreements without the necessity of obtaining an appropriation so long as the conditions of section 11(b) are satisfied.

C.

We also find support for BPA's payment of the cost of completing WPPSS Project No. 2 in the broad contract and expenditure authority contained in section 2(f) of the Bonneville Project Act, 16 U.S.C. 832a(f), as reaffirmed in section 9(a) of the Regional Act, 16 U.S.C. 839f(a).^{8/} Section 2(f) reads as follows:

"Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and

^{8/} Section 9(a) of the Regional Act provides that "[s]ubject to the provisions of [the Regional Act], the Administrator is authorized to contract in accordance with section 2(f) of the Bonneville Project Act. Other provisions of law applicable to such contracts on the effective date of this Act shall continue to be applicable." 16 U.S.C. 839f(a).

arrangements * * * and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary."

As our previous decisions have recognized, this "unique authority" permits BPA "to conduct [its] business with a freedom similar to that which has been conferred on public corporations carrying on similar or comparable activities." B-105397, September 21, 1951. For essentially this reason, we did not object to BPA's agreement to assume the financial risk of the WPPSS Hanford Steam Plant notwithstanding certain statutory limitations otherwise applicable to most Federal agencies. B-149016, B-149003, July 16, 1962. Similarly, we concluded that the absence of express statutory authority did not prevent BPA from engaging in certain energy conservation measures since such conservation measures were otherwise consistent with BPA's enabling legislation. B-114858, July 10, 1979. In both instances, we construed section 2(f)'s broad authority as permitting the Administrator, BPA, to determine both the scope of the activities and the means necessary to accomplish the same so long as such activities were reasonably consistent with the purposes for which the Administrator, BPA, may act. See also 46 Comp. Gen. 349, 355-56 (1966); B-105397, September 21, 1951; B-137458, September 13, 1974.

As already mentioned, section 11(b) of the Transmission Act, 16 U.S.C. § 838i(b), authorizes the Administrator, BPA, to make expenditures from the Bonneville Power Fund for any purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law. Section 11(b)(6)(ii) contemplates that necessary and appropriate expenditures to carry out the Administrator's duties may be made to purchase "electric power (including the entitlement of electric plant capability) * * * if such purchase has been heretofore authorized * * *." 16 U.S.C. § 838i(b)(6)(ii). As noted earlier, the purchase of the electric power capability of WPPSS Project No. 2 had been previously authorized by the 1971 Public Works Appropriation Act.

Although section 11(b) of the Transmission Act, above, like section 2(f) of the Bonneville Project Act, 16 U.S.C. 832a(f), confers broad discretion on the Administrator, BPA, such discretion must be exercised reasonably in furtherance

of, and subject to, the purposes of BPA's enabling legislation. B-114858, July 10, 1979. In this regard, the Administrator, BPA, has determined that it is necessary and prudent to net bill or pay directly out of the BPA Fund the costs of completing construction of WPPSS Project No. 2 and has so advised the House and Senate Appropriations Committees in a June 27, 1983, Revised Budget Program for 1983.

In our view, although direct construction payments by BPA may represent a departure from the financing arrangement originally presented to the Congress, this departure does not materially undercut the basis for congressional approval. As BPA points out, it would ultimately finance the full cost of constructing WPPSS Project No. 2, plus interest, under the original financing arrangement. BPA's proposed payment method merely does directly what Congress otherwise authorized it to do indirectly in order to complete construction. Accordingly, since BPA's use of its ratepayer revenues to complete construction of WPPSS Project No. 2 is reasonably consistent with its statutory authority to acquire such project's thermal generating capability, we would not question under the present circumstances such payments, either by net billing or by direct disbursement, in the absence of a specific directive or limitation in an appropriation or other act of Congress. 16 U.S.C. 832a(f); 838i.

D.

It is urged that such use of the ratepayer revenues is inconsistent with the limitations in the 1971 Public Work Appropriation Act. Congress did not authorize BPA to "federally finance," construct, or own the WPPSS power plants.

BPA's payment of the cost of construction is not tantamount to construction of the power plant. Such responsibility remains with WPPSS. Nor does BPA's payment of construction costs, as opposed to the debt service on the construction costs, give it ownership of the project. BPA's interest in WPPSS Project No. 2 is limited to the Project's power capability; plant ownership remains with WPPSS.

Likewise, we do not regard BPA's payment of the cost of completing WPPSS Project No. 2 as "federal" financing of construction, as that term was used in the 1971 Public Works Appropriation Act and explained to the House and Senate Appropriations Committees. Based on our review of the legislative history of the 1971 Public Works Appropriation Act, we

conclude that Congress only intended to preclude the use of general Federal taxpayer funds as opposed to BPA ratepayer funds. Both the House and Senate Appropriations Committees state that "[a]ny costs or losses to the [BPA] under these [net billing] agreements will be borne by Bonneville Power Administration rate payers through rate adjustments if necessary." S. Rep. No. 91-1118 at 56 (1970); see H.R. Rep. No. 91-1219 at 90 (1970), quoted above.

Additional support for this reading of "federal" financing can be found in the House hearings. The following discussion between Congressman Whitten and Robison and the then BPA Administrator indicate that the cost of construction would be a charge on BPA ratepayers, not the Federal taxpayer:

"MR. RICHMOND. * * * The most important point I might make on this is that under this total plan the acquisition of thermal power by Bonneville is a matter of a burden upon the ratepayers of the area through rate adjustments and not upon the Federal Treasury.

"MR. ROBISON. Do you want to repeat that for me?

"MR. RICHMOND. Yes, sir I would be glad to. At present, Congressman, we get all of our power from federally owned and built hydroplants, 26 in operation and five under construction. As we forecast our loads into the 1970's and the 1980's, we will not have enough energy supply from those sources simply because the sites have been used up. There are just not any more. So to serve our customers, both industrial and preference customers, we have to have a regular input of additional increments of power.

"We proposed to obtain that power on a net billing basis where the power will be paid for out of Bonneville revenues. To the extent that the Bonneville revenues do not increase sufficiently to cover all

of the costs, our rates will be adjusted upward.

"The point is, no appropriations are required under this approach.

"MR. ROBISON. Federal moneys are to be used in some indirect fashion toward the cost of construction of these privately-owned, privately constructed facilities?

"MR. RICHMOND. No, sir.

"MR. ROBISON. They will not?

"MR. RICHMOND. That is correct.

"MR. ROBISON. It is rather, then, like a guarantee to ease the investment problems of the private utilities?

"MR. RICHMOND. In the case of the Trojan plant, to use that as an example, we will guarantee to purchase 30 percent of the output of the plant. One of the problems we have out there, which this whole approach is designed to overcome, is there are not any individual utilities large enough to finance and build one of these enormous plants that cost some \$270 million all on their own, so that you have multiple ownership. You have part of the output of the plant going to the private system and you have part of the output going to Bonneville through this net billing process.

"The contracts that we would sign with the builders of the Trojan plant would guarantee that BPA would pay for the power out of revenues, and the covenant we have with this committee and the rate-payers of the region is to the extent these costs are inadequate, we will raise our rates."

1971 House Appropriation Hearings at 863.

Even if Congress only intended to preclude BPA's use of general taxpayer funds, it is argued that BPA's planned use of \$64 million for WPPSS Project No. 2 construction during fiscal year (FY) 1983 will be derived from general taxpayer revenues in the form of increased deferrals of interest on appropriated debt owed the Federal Treasury.^{9/} Moreover, an allegedly short-run inelasticity of demand for BPA power, when combined with projected levels of WPPSS construction funding for 1984, undermine BPA's ability to raise revenues to the level necessary to become current on interest and amortization payments to the Treasury.

In other words, we are asked to conclude that because of BPA's need to "borrow" from the Treasury to help fund all of its operations, BPA construction outlays for WPPSS No. 2 will be financed by some indivisible portion of funds derived from the Federal taxpayer, not by BPA ratepayers. The fact remains, however, that the Administrator must set rates for sale of electricity and services at levels to recover BPA's costs including principal and interest on outstanding indebtedness. See 16 U.S.C. 838g, 838h, 838i, 838k, 839e. The deferral of interest payments due the Treasury does not alter BPA's obligation to ultimately make such payments. Indeed, BPA apparently plans to set its 1984 and 1985 rates at levels that they project will permit them to become current on deferred interest payments to the Treasury. And finally, although BPA can apparently "borrow" from the Treasury by deferring interest payments in anticipation of rate increases, we think that Congress would not consider this to be federal financing of WPPSS Project No. 2 any more than it does the payment of the costs for completing construction by net billing or by direct disbursement. Of course, under any

^{9/} As explained in BPA's June 27, 1983, revised FY 1983 budget submission to the House and Senate Appropriations Committee, BPA will have at the end of fiscal year 1983 a cumulative interest deferral of \$271 million. BPA further advised the House and Senate Appropriations Committees of its plan to repay deferred interest plus currently scheduled interest and amortization payments during FY 1984 and FY 1985. See Letter to Senator Mark O. Hatfield, Chairman, Senate Appropriations Committee from BPA Administrator Peter T. Johnson dated June 22, 1983.

of these methods, BPA must honor its "covenant" with Congress to recover its costs through rate increases.

We also believe that it is important to point out that under the payment priority scheme established by sections 11 and 13 of the Transmission Act, 16 U.S.C. 838k, 838i, BPA is directed to use its revenues to pay for its operation, maintenance, and acquisition costs, including any previously authorized acquisition of electric generating capability such as the WPPSS projects, before paying the principal and interest on bonds issued to the Treasury. 16 U.S.C. 838k(a,b). By necessary implication, Congress expected that repayment of the principal and interest on the appropriated debt resulting from the Federal investment in BPA's power generating and transmitting facilities also would be deferred if BPA's revenues are not sufficient to meet its priority payments including payments for previously authorized acquisitions of electric generating capability. 16 U.S.C. 838k(b), 838i(6)(ii), 838i(10). The financial flexibility that such deferrals represent was apparently acceptable to Congress because of BPA's obligation to set its rates at levels adequate to repay its indebtedness.

Thus, the risk of failure as well as the benefits of success for Project No. 2 are to fall on BPA's ratepayers, and not the taxpayers of the United States. No general fund appropriations were anticipated since, as the then-Administrator Richmond emphasized, if existing BPA revenues did not cover all costs of acquiring the thermal generating capability, BPA's rates would be adjusted to absorb the balance.