

*Report of the Committee on
Federal Power Marketing Agency Ratemaking*

I. INTRODUCTION TO POWER MARKETING ADMINISTRATIONS AND RATEMAKING PROCESS

A. *Power Marketing Administrations*

Power Marketing Administrations (PMAs) are the regional power marketing arms of the federal government. Their essential function is to develop and implement marketing plans to dispose of surplus electric power generated by federal projects which are located throughout the country and are run by the Army Corps of Engineers (Corps) or the Bureau of Reclamation (Bureau). The PMAs market power deemed by the Corps or Bureau to be in excess of the amount needed for use by the project.¹ PMAs have the additional function of developing the power rates for the power that they market. One of the PMAs, the Bonneville Power Administration, has the additional authority to acquire additional power resources, if necessary, to serve its customers.

There are currently five PMAs. Four, the Alaska Power Administration (APA), the Bonneville Power Administration (BPA), the Southeastern Power Administration (SEPA), and the Southwestern Power Administration (SWPA), were created independently of each other and were originally the responsibility of the Department of the Interior. In 1977, they were transferred to the Department of Energy (DOE),² and simultaneously a fifth PMA, the Western Area Power Administration (WAPA), was created by Congress and assigned the power marketing functions previously performed by the Secretary of the Interior under federal reclamation laws.³ Although the PMAs derive their authority from different statutory provisions, the statutes have been interpreted to be in *pari materia* and thus, with the exception of BPA, the ratemaking process and standards for PMAs are identical. BPA differs due to a relatively recent statutory change which subjects it to different statutory requirements.

B. *The PMA Ratemaking Process*

1. *General PMA Ratemaking*

The statutory provision governing the ratemaking process for PMAs is found at Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, except for WAPA, which is found in Section 9(c) of the Reclamation Act of 1939, 43 U.S.C. § 485h(c). Under these sections, the Secretary of Energy sets the rates according to specific standards, and additionally is given the authority to confirm and approve those rates. The statutory scheme of allowing the Secretary of Energy to confirm and approve the rates that he is also responsible for setting was enacted at the same time that the DOE was created. Such a scheme was a departure from the process which

¹See e.g., Flood Control Act of 1944 § 5, 16 U.S.C. § 825s.

²42 U.S.C. § 7152(a)(1)(A)-(D).

³42 U.S.C. § 715(a)(3).

existed prior to that time, when PMA rates were created by the PMA Administrator and then reviewed by the independent Federal Power Commission for compliance with the statutory standards. The Commission, in reviewing a PMA's rates prior to the creation of the DOE, did not see its role as strictly appellate in nature, but rather exercised its independent judgment in determining whether the rates it reviewed were in compliance with the statutes. This review included an examination of a PMA's rate design. *See, e.g. U.S. Department of the Interior, Bonneville Power Administration*, 34 F.P.C. 1462 (1965); *U.S. Department of the Interior, Bonneville Power Administration*, 54 F.P.C. 808 (1975).

A year after the creation of the DOE, the Secretary of Energy delegated away the statutory authority to set, implement, and approve PMA rates. *Department of Energy, Power Marketing Rates, Delegation Order for Confirmation and Approval*, 43 *Fed. Reg.* 60,636 (1978); 1 FERC ¶ 9907 (1978). The delegation order created a ratemaking process which, although recently modified as to the scope of review,⁴ is still in place.⁵ Under the delegation order, a trifurcated procedure exists for the approval of PMA rates. First, the Administrator of a PMA develops rates, certifying that they are consistent with the applicable statutory standards. Second, the Deputy Secretary of the DOE confirms and approves the rates and implements them on an interim basis. Finally, the Federal Energy Regulatory Commission (Commission) reviews the rates and either gives final approval or disapproves the rates and remands them. Although this trifurcated procedure is not specifically spelled out by any statute, it has been upheld in court. *See, e.g., United States v. Tex-La. Electric Cooperative, Inc.*, 693 F.2d 392 (5th Cir. 1982); *Colorado River Energy Distributors Association v. Lewis*, 516 F.Supp. 926 (D.D.C. 1981).

2. Bonneville Power Administration

Until 1980, BPA's rates were confirmed under the general PMA ratemaking process discussed above. The passage that year of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839 *et seq.* (Northwest Power Act, or Act), created a separate set of procedures for BPA's ratemaking. Under Section 7 of the Northwest Power Act, 16 U.S.C. § 839e, the BPA Administrator has the responsibility to develop BPA's rates. The procedures to be followed in developing the rates are set out in Section 7(i) of the Act, and include an opportunity for public participation in a trial type hearing before BPA. The Northwest Power Act provides for interim approval of rates, but gives the power to grant interim approval to the Commission instead of DOE. Northwest Power Act § 7(i)(6). The Commission is also given the power to grant final approval of BPA's rates.

There are two different procedures to be followed for the final approval of BPA's rates, depending on the customer class served by the rate. For rates to

⁴*Department of Energy, Delegation Order for Approval of Power Marketing Administration Power and Transmission Rates*, 1 FERC ¶ 9910 (1983); 48 *Fed. Reg.* 55,664 (1983).

⁵*See* section II.A., *infra.*, for a more detailed discussion of the scope of Commission review under the current delegation order.

customers within the statutorily defined Pacific Northwest Region,⁶ Commission review is limited to a determination that the rates (1) are sufficient to recover operating costs and assure repayment of the federal investment; (2) are based upon total system costs; and (3) equitably allocate the costs of the Federal transmission system between federal and non-federal use of the system.⁷ Northwest Power Act § 7(a)(2).

As for nonfirm rates for nonregional customers, Commission review, carried out under Section 7(k) of the Act, is more extensive. Although the exact scope of Commission review of these rates is currently being litigated, see Part II.B.1, *infra*, Section 7(k) allows for an additional hearing at the Commission in accordance with the procedures established for ratemaking under the Federal Power Act. Section 7(k) also provides for Commission review of nonregional nonfirm rates under the standards that applied to all of BPA's rates before the passage of the Northwest Power Act.⁸

II. DEVELOPMENTS IN 1984

For PMAs other than BPA, the major development of the year was the effect on review of PMA rates caused by the new delegation order issued in December of 1983. This order severely restricted Commission review and even allowed PMAs to implement short term rates without subjecting those rates to review.

Most PMA rate changes other than BPA's were approved by the Commission without opposition. As for BPA, there were considerable developments as both the courts and the Commission rendered decisions interpreting the Northwest Power Act. Many of the PMA disputes revolve around the issue of who is going to pay for

⁶The Northwest Power Act defines the Pacific Northwest Region as:

- (A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and
- (B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on the effective date of this Act which has a distribution system from which it serves both within and without such region.

Northwest Power Act, § 3(14); 16 U.S.C. § 839a(14).

⁷Between federal transmission associated with BPA sales and nonfederal wheeling of power over BPA's transmission facilities.

⁸The Commission has summarized the standards that it will apply to Section 7(k) rates as follows:

1. Having regard to the recovery of the cost of generation and transmission of such electric energy;
2. So as to encourage the most widespread use of Bonneville power;
3. To provide the lowest possible rates to consumers consistent with sound business principles; and
4. In a manner which protects the interests of the United States in amortizing its investment in the projects within a reasonable period.

27 FERC ¶ 61,251 (1984). These are the standards applied by the Commission to all of BPA's rates before the enactment of the Northwest Power Act. 13 FERC ¶ 61,157 (1980).

sharply increasing costs associated with the addition of thermal generation to the hydro generation which traditionally has produced PMA power. Finally, on the horizon there appears to be another attempt to increase PMA rates in order to provide additional revenues to the U.S. Treasury.

A. *Delegation Order No. 0204-108*

On December 14, 1983, the Secretary of Energy issued Delegation Order No. 0204-108 ("Delegation Order" or "Order"), 1 FERC ¶ 9910 (1983).⁹ Although the Order did not specifically state so, it in effect superseded Delegation Order No. 0204-33, 1 FERC ¶ 9907 (1983), which had delegated to the Commission the authority to grant final approval to PMA rates. The Delegation Order, although not taking away this authority, differs from the prior order in two significant ways.

First, Part 3 of the Delegation Order explicitly limits Commission review to three inquiries:

- (a) whether the rates are the lowest possible to customers consistent with sound business principles;
- (b) whether the revenue levels generated by the rates are sufficient to recover the costs of producing and transmitting electric energy including the repayment, within the period of cost recovery permitted by law, of the capital investment allocated to power and costs assigned by Acts of Congress to power for repayment; and
- (c) the assumptions and projections used in developing the rate components that are subject to Commission review.

Part 3 also states that the decisions implementing the rates shall be rejected only if the Commission finds them to be arbitrary, capricious, or in violation of the law.

The narrow appellate-type review allowed by Part 3 contrasts with the equivalent section of the superseded delegation order, which simply delegated to the Commission the authority to approve or reject rates, without stating the standard of review. The Commission had interpreted that delegation order as allowing the same type of review that it had carried out prior to the DOE Act, when it had the statutory responsibility to review PMA rates. *U.S. Secretary of Energy, Bonneville Power Administration*, 20 FERC ¶ 61,291 (1982). Before the DOE Act, the Commission conducted a broad review of PMA rates, including an independent judgment as to whether the PMA rates should be approved and a review of the rate design. See *U.S. Department of the Interior, Bonneville Power Administration*, 34 F.P.C. 1462 (1965); *U.S. Department of the Interior, Bonneville Power Administration*, 54 F.P.C. 808 (1975); *U.S. Department of Energy, Bonneville Power Administration*, 20 FERC ¶ 61,291 (1982).

Under the new delegation order, however, the Commission may no longer exercise its independent judgment, but rather is limited to a determination of whether the rate decisions are arbitrary and capricious. Nor may the Commission any longer review rate design, as its review is limited to the three specific inquiries.

⁹48 Fed. Reg. 55,664 (1983). This delegation order applies to all PMAs except BPA, whose rate review is described in section I.B.2., *supra*.

As a result, Commission review under the new delegation order has been greatly restricted. See, e.g., *U.S. Secretary of Energy, Alaska Power Administration*, 27 FERC ¶ 61,011 (1984); *U.S. Secretary of Energy, Western Area Power Administration*, 26 FERC ¶ 61,217 (1984).

Additionally, Part 5 of the Delegation Order creates a previously nonexistent exemption from the trifurcated ratemaking process. Under Part 5, PMA Administrators are given the authority to implement rates for short term sales (defined as sales that last no longer than one year) without those rates being subject to review by either the Deputy Secretary of Energy or by the Commission. Thus, rates for sales of under one year can now be implemented without any independent FERC review.

B. Bonneville Power Administration

Much of the litigation surrounding PMAs concerns BPA. There are many reasons for this. First, BPA is by far the major supplier of electricity in the Pacific Northwest, providing large amounts of power to utilities in that region. Not only does BPA dominate the Pacific Northwest, but also BPA recently has had large amounts of surplus secondary energy available, some of which has been sold to utilities in California, who use it to displace higher cost sources. Thus the entire West Coast region has a stake in BPA rates.

Second, BPA has acquired the entire output of two of the Washington Public Power Supply System nuclear facilities, and seventy percent of a third. Two of the plants have been mothballed and all three have vastly exceeded early cost estimates. As a result, BPA must recover the extremely high costs of these facilities in its rates. There has been, therefore, considerable dispute among BPA and its customer classes as to who has to pay for the expensive new power sources.

Most importantly, however, BPA, unlike other PMAs, is governed by the Northwest Power Act, an act which is not only extremely complicated, but also creates many additional procedural safeguards which allow a greater opportunity to litigate adverse decisions.

Whatever the reasons, since the enactment of the Northwest Power Act, it has taken an extremely long time for BPA's rates to receive final approval. BPA's 1981 and 1982 rates, which were consolidated by the Commission into one review proceeding, were approved in 1983, except for the nonregional nonfirm rates, which are undergoing separate Commission review under Section 7(k) of the Northwest Power Act. These nonregional nonfirm rates were disapproved in an Initial Decision issued November 27, 1984, which awaits final Commission review. The 1983 rates have all been approved on an interim basis, but none has received final approval. Finally, BPA has begun the process of setting its 1985 rates. Several of these rates also have been appealed, at some stage of their implementation, to the Ninth Circuit.

1. 1981 and 1982 Rates

a. Central Lincoln II

The first judicial review of BPA's rates under the Northwest Power Act was carried out in *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101 (9th Cir.

1984) (*Central Lincoln II*). Practically every provision of BPA's 1981 rates was appealed to the Ninth Circuit¹⁰ by various regional and nonregional customers of BPA.¹¹

The court first settled jurisdictional questions, stating that it could only review rates which had received final approval by the Commission. As BPA's nonregional rates still have not received final Commission approval, all appeals concerning those rates were dismissed. The court next settled disputes over the standards of Commission review of BPA's rates. The court contrasted the limited review of BPA's regional rates, consisting only of determining that the rates comply with the specific statutory standards, with the Commission's broader review of nonregional rates. 735 F.2d at 1110-1116. See Section I.B.2., *supra*. The Court also detailed the standard of review that it would apply in reviewing BPA's regional rates. 735 F.2d at 1116.

Having resolved these issues, the court upheld BPA's 1981 regional rates against each of the challenges raised. The court held that each of BPA's challenged actions were supported by both the Act and by the record, and thus upheld all of BPA's regional rates. The resolution of each of the challenges is as follows:

(1) Preference customers are not entitled to pursue refunds pursuant to *Central Lincoln I* pending its review by the Supreme Court.¹² 735 F.2d at 1120.

(2) BPA's repayment study was not unreasonable nor was it unsupported by the record. 735 F.2d at 1120-21.

(3) BPA's Direction of Effort Study was not improperly biased. 735 F.2d at 1121.

(4) BPA's use of the Long Run Incremental Cost Study (LRIC) to classify costs between energy and capacity was proper. 735 F.2d at 1121-23.

(5) BPA's use of a separate rate pool for the Direct Service Industrial customers ("DSIs") and the IOUs was proper. 735 F.2d at 1123.

(6) BPA's allocation of fish and wildlife costs to all of its regional customers was proper. 735 F.2d at 1123-24.

(7) BPA's inclusion of Saturday as a peak period was supported by the record. 735 F.2d at 1124.

(8) BPA's equalization of the demand charge among its customer classes was proper, given the small differences in capacity costs between those classes. 735 F.2d at 1124.

(9) Allocation of less expensive, secondary energy to non-preference customers does not violate the preference clause because the preference clause does not create a preference in the price of power. 735 F.2d at 1125.

(10) BPA's use of the FELCC shift to serve the top quartile of DSI loads is proper. 735 F.2d at 1125-26.

(11) BPA's valuation of the DSI Reserves was supported by the record. 735 F.2d at 1126-27.

¹⁰Under Section 9(e)(5) of the Northwest Power Act, 16 U.S.C. § 839f(e)(5), the Ninth Circuit has exclusive jurisdiction for appeals of final actions taken under that Act.

¹¹BPA's 1982 regional rates were also appealed to the Ninth Circuit. *Kaiser Aluminum and Chemical Corp. v. BPA*, Nos. 82-7521, *et al.* (9th Cir.). The proceedings in that case have been held in abeyance until April of 1985.

¹²The Supreme Court subsequently reversed the Ninth Circuit's *Central Lincoln I* decision. *Aluminum Company of America v. Central Lincoln Peoples' Utility District*, _____ U.S. _____, 104 S.Ct. 1272 (1984). See part 4 of this section, *infra*.

(12) BPA's elimination of its transformation charges will not be remanded because BPA stated that it will consider the applications of all parties who relied to their detriment on the continuation of the transformation charge. 735 F.2d at 1127-28.

(13) It is proper for BPA to treat its General Rate Schedule Provisions as rates, which are subject to the same review as all other of its rates. 735 F.2d at 1128.

(14) BPA's transmission rates were not too imprecisely defined and its transmission costs were properly allocated between its customer groups. 735 F.2d at 1128-29.

b. Commission Proceedings

The only BPA 1981-82 rates which had not received final Commission approval by 1984 were BPA's nonfirm rates. The reason for the delay in the approval of the nonfirm rates is that the Commission set the nonfirm rates for a separate hearing pursuant to Section 7(k) of the Northwest Power Act.

On November 27, 1984, an Initial Decision was issued on BPA's 1981 and 1982 nonregional nonfirm rates. *U.S. Department of Energy, Bonneville Power Administration*, 29 FERC ¶ 63,039 (1984). The Initial Decision rejected BPA's 1981 and 1982 rates as being too low. The Initial Decision held that:

- (1) BPA is not mandated to set Section 7(k) rates on a cost-of-service basis, but, absent a showing that that approach should not be taken, it is a fair method and consistent with the statutory standards.¹³ 29 FERC at pp. 65,077-81.
- (2) It is fair for BPA to include capacity costs in the cost-of-service associated with both hydroelectric and thermal generating facilities on an unweighted basis. Costs associated with nuclear plants which were not operating should also be included; however, there is no basis for assigning thermal capacity costs to nonfirm energy for more than about 3,300 MW of thermal capacity. 29 FERC at pp. 65,083-094.
- (3) It is also appropriate to include a proportional share of the following costs in the nonfirm energy cost-of-service:
 - the subsidy given to Pacific Northwest customers under the Sec. 5(c) residential exchange program;¹⁴
 - fish and wildlife costs,
 - deferred interest payments,
 - thermal energy costs,
 - costs of nonhydro energy relied on to establish Energy Content and Variable Energy Content Curves, and
 - transmission costs. 29 FERC at pp. 65,094-98, 65,113-116.

¹³The presiding Administration Law Judge stated that a cost basis for Section 7(k) rates is mandated absent a showing that cost-based rates "would not be the way to get the most out of [BPA's] resources." 29 FERC at p. 65,081.

¹⁴Under Section 5(c) of the Northwest Power Act, BPA is required to exchange its power with more expensive power generated by IOUs, the resulting savings to be passed on to residential and farm customers of the IOUs. This exchange is in effect a subsidy from BPA to those customers, the costs of which must be made up by BPA.

- (4) Although there are a number of factors other than cost-of-service which BPA could consider under the applicable statutory standards in arriving at Section 7(k) rates, it did not significantly rely on those factors in deciding upon the NF-1 and NF-2 rates and therefore evidence as to the value of the nonfirm energy, either from the standpoint of the Pacific Northwest or the Pacific Southwest, is not particularly relevant. 29 FERC at pp. 65,100-105.

If BPA had collected all of the costs in its rates that the Initial Decision held it should have, the rate would have been 20 mills/Kwh instead of the 8 mills/Kwh average rate that BPA charged during the 1981 rate period and the 10 mills/Kwh average charged during the 1982 rate period. 29 FERC at pp. 65,121-122. The Initial Decision is currently before the Commission on exceptions.

2. 1983 Rates

None of BPA's 1983 rates received final Commission approval in 1984. Significant events that occurred concerning the 1983 rates included:

- a. The Commission granted interim approval to BPA's transmission rates, which had been rejected in 1983 due to the failure of BPA to file a separate accounting of its transmission costs, 25 FERC ¶ 61,140 (1983). The Commission first granted interim approval for a four-month period, 26 FERC ¶ 61,096 (1984), and then extended that approval indefinitely, until such time as final approval is granted. 28 FERC ¶ 61,325 (1984).

- b. BPA's nonregional, nonfirm rates were set for a Section 7(k) proceeding despite arguments that the 1981/82 proceeding would resolve all issues relevant to the 1983 rates. The Commission agreed that common issues would be resolved by the 1981/82 proceeding, but stated that new issues, principally relating to implementation criteria of BPA's rates, had been raised and were properly set for hearing. 27 FERC ¶ 61,251 (1984). The Commission's Section 7(k) hearing on the 1983 nonregional nonfirm rates is currently scheduled to begin in June, 1985.

3. 1985 Rates

On September 12, 1984, BPA published its proposed 1985 rates, which under the proposal will be in effect for 27 months, from July 1985 through the end of 1987. This rate proceeding is important, as 1985 is a threshold year under the Northwest Power Act for several different rate provisions. For example, under Section 7(b)(2), BPA is to determine a rate cap for its preference customers equal to the rate they would have paid if the Act had not been passed. Any costs that the Act otherwise would allocate to preference customer rates above the Section 7(b)(2) rate cap are to be allocated to all other BPA customers. In addition, under Section 7(c), a complicated new methodology must be created for setting rates for DSI customers. Included in that methodology is the determination of a floor rate below which DSI rates may not be set. Thus, the 1985 rate proceeding is extremely important to BPA's preference customers and to the DSIs, as well as to all other customers, who may have to pick up costs not allocated to those customers. Final BPA determination of these rates is currently scheduled for the spring of 1985.

4. *Aluminum Company of America v. Central Lincoln Peoples' Utility District*

The first Supreme Court decision interpreting the Act was issued in June of 1984. *Aluminum Company of America v. Central Lincoln Peoples' Utility District*, ____ U.S. ____, 104 S.Ct. 2472 (1984), concerns the relationship between provisions in the Northwest Power Act requiring that certain contracts be offered to DSIs¹⁵ and the traditional preference provisions of PMA statutes. In 1975, prior to the passage of the Northwest Power Act, BPA had signed contracts with the DSIs which contained a provision that one fourth of the power provided under the contract could be interrupted "at any time," a provision which BPA used to interrupt sales to the DSIs in order to sell nonfirm energy to preference customers. After the passage of the Act, BPA was required to offer new contracts to the DSIs, and these contracts allowed the "top quartile," as the interruptible one fourth of the contracts was termed, to be interrupted only when necessary to preserve BPA's firm loads.

Preference customers appealed BPA's decision to offer these new contracts, claiming that the contracts were in violation both of the preference provision of the Bonneville Project Act, which gave preference rights for power to certain customers, and the Northwest Power Act, which required that the contracts be for the same amount of power as the old ones. Although the Ninth Circuit invalidated the contracts in *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708 (1982) (*Central Lincoln I*), on each of these grounds, that ruling was overturned in *Aluminum Company*.

The Supreme Court first ruled that the same amount of power provision referred only to the number of kilowatts, not to the quality of service. Therefore the new contracts were for the same amount of power, and not in violation of the Northwest Power Act. The Court then went on to hold that because Congress mandated that BPA offer the contracts to the DSIs, those sales were not at the discretion of BPA and thus were not subject to the preference laws. The Court stated that Congress had intended to allocate power in a manner different from the preference provisions, concluding that "preference was the perceived problem, not the chosen solution." 104 S.Ct at 2482.

5. *The Near Term Intertie Access Policy*

Another action taken by BPA which may have an effect on its rates is the Near Term Intertie Access Policy (NTIAP). 49 *Fed. Reg.* 44232 (1984). The NTIAP changes the way that BPA allocates Pacific Northwest utility access to its portion of the Pacific Intertie. The NTIAP has been challenged by California customers of BPA both before the Commission, *Public Utilities Commission of the State of California*, Docket No. EL85-006, and in the 9th Circuit, *California Energy Commission v. Johnson*, No. 84-7836 (9th Cir.); *Los Angeles Department of Water and Power v. Johnson*, No. 84-7618 (9th Cir.). The essence of these challenges is the claim that, because of the method of allocating access to the Intertie, competition among BPA and Pacific Northwest utilities and Canadian utilities for sales to California will be reduced.

¹⁵Section 5(d)(1)(B) of the Northwest Power Act, 16 U.S.C. § 839c(d)(1)(B).

C. Other Power Marketing Administrations

Most of the rate increases filed by the four other PMAs at the Commission in 1984 were not opposed, and those that were faced only minor opposition.¹⁶ There were, however, court actions which have raised important issues for PMAs.

1. Southeastern Power Administration

One important issue for PMAs that has been subject to continuing dispute is the question of priority among preference customers.¹⁷ This issue was addressed in *Electricities of North Carolina, Inc. v. Southeastern Power Administration*, No. 82-888-Civ.-5 (E.D. N.C. Oct. 16, 1984), where the plaintiff preference customers essentially argued that SEPA improperly excluded them from its planned distribution of power for its Georgia-Alabama System of Projects.

The court in *Electricities* granted summary judgment dismissing this claim, based on two grounds. First, the court held that the preference clause found in Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, does not provide law to apply to SEPA's allocation of power among preference customers. The court went on to hold that even if it could review SEPA's marketing policy, that policy was not arbitrary and capricious. The court accepted SEPA's justification for not including the plaintiffs in its plan, which was that to include the plaintiffs would spread its resources so thinly as to constitute an unsound business principle.

2. Western Area Power Administration

There are presently two suits pending in the United States district courts challenging the rates set by WAPA for wholesale power from the Central Valley Project (CVP) in California. As in most of the litigation surrounding BPA's rates, both suits challenge the inclusion of certain cost components other than the costs of operating the project in the rates charged to particular classes of customers. In each of the lawsuits discussed below, plaintiffs challenge primarily the inclusion in their rates of costs attributable to WAPA's substantial purchases of power from the Pacific Northwest. Partly in response to a Congressional directive and partly of its own accord, WAPA has contracted to supply load-growth service to a number of California municipalities, thereby necessitating Northwest power purchases to supplement the supply of CVP-generated hydropower. These purchases are the most significant cause of the market increase in CVP rates, and hence have served as a catalyst for the present litigation.

a. *Arvin-Edison Water Storage District, et al. v. Hodel, et al.*, Civ. Action No. 83-0232 (D.D.C., filed January 27, 1983)

This suit for declaratory, mandatory and injunctive relief was brought by eleven irrigation and water districts in California that purchase electricity from CVP for

¹⁶For a list of all PMA rate approvals, both on an interim and a final basis, see Appendix A.

¹⁷For a more detailed discussion of the issues surrounding preference customers of PMAs, see Adams, Vince and Robbins, *Federal Electric Preference Power Marketing in the 1980's: Developing Legal Trends*, 4 Energy L.J. 1 (1983).

irrigation pumping purposes. CVP power is marketed by WAPA under Section 9(c) of the Reclamation Project Act of 1939¹⁸ and Section 302(a)(1)(E) of the Department of Energy Organization Act.¹⁹

The plaintiff districts contend that recent increases in the rates for CVP wholesale power are unlawful as applied to irrigators. The districts argue that the primary purpose of the CVP was the irrigation and reclamation of arid lands, and that in authorizing the project, Congress intended irrigators to receive benefits not only in the form of water supplies but also in the form of low-cost pumping power produced at project reservoirs. They claim that the rates charged to the districts following WAPA's two most recent CVP rate increases include cost components which are not properly charged to irrigators. The main objection is to the costs of supplemental, non-federally produced power purchased by WAPA in order to serve municipal load-growth.

The districts ask the court to declare that as applied to them the rate increases are inconsistent with reclamation law and the particular laws authorizing the CVP.²⁰ They ask that the court order WAPA to restructure the CVP power rates in accordance with such laws, and to refund all moneys paid by the districts in excess of the lawful rate.

WAPA, joined in defense of the suit by intervenors Northern California Power Agency (NCPA) and Sacramento Municipal Utility District (SMUD), contends that the districts are in effect seeking a superpreference to CVP power which is nowhere conferred by statute. The defendants argue that Congress intended for irrigators to be treated the same as any other preference customer under Section 9(c) of the Reclamation Project Act, and had the legislature intended irrigators to receive a special preference in power allocations or rates, it would have specifically so provided. WAPA additionally argues that its actions are totally discretionary and therefore unreviewable.

Oral argument on the parties' cross-motions for summary judgment was heard by U.S. District Judge Harold H. Greene on October 4, 1984. A decision had not yet been rendered as of this writing.

b. Trinity County Public Utility District, et al. v. Hodel, et al., Civ. Action No. 84-0850 EJG (E.D. Cal., filed June, 1984)

This action was brought by a group of four public utility districts and joint power agencies located in Trinity, Calaveras, and Toulumne Counties, California. The plaintiffs have statutory "first preference" rights to a certain percentage of power produced by the Trinity River Division and the New Melones unit of the CVP.

The Trinity River Division and the New Melones unit are the two most recent additions to the massive CVP. In authorizing hydroelectric power facilities at Trinity River Division dams in 1955, Congress provided that preference customers in Trinity County were to receive a "first preference" to twenty-five percent of the

¹⁸43 U.S.C. § 485h(c).

¹⁹43 U.S.C. § 7152(a)(1)(E).

²⁰Rivers and Harbors Act of 1937, § 2, 50 Stat. 844, 850; River and Harbors Act of 1940, § 2, 54 Stat. 1198, 1199; Sacramento Valley Canals Act of 1950, § 1, 64 Stat. 1036; Act of August 12, 1955, 69 Stat. 719; Rivers and Harbors — Flood Control Act of 1962, 76 Stat. 1173.

additional power made available to the CVP System as a result of the construction of such facilities.²¹ Similarly, in authorizing the New Melones unit in 1962, Congress specified that preference customers in Calaveras and Toulumne Counties would have a "first preference" of up to twenty-five percent of the additional power made available by construction of hydroelectric facilities at that unit.²² The plaintiff agencies all assert that they are qualified to take advantage of the first preference rights accorded by one or the other of these authorizations.

The plaintiff agencies contend that the rates charged to them for CVP power are unlawful because they contain cost components — particularly the cost of purchased, imported power — that are not properly allocated to first preference customers. They allege that under the two units' authorizing legislation, the rates for power sold to first preference customers are to be based solely on costs attributable to construction and operation of the Trinity River Division and the New Melones unit, respectively. The agencies also allege that Section 9(c) of the Reclamation Project Act of 1939²³ prohibits the government from charging first preference customers rates which include any costs not attributable to the CVP, including the cost of purchased power imported from the Northwest.

Like the irrigators in the *Arvin-Edison* suit, the plaintiff agencies ask the court for declaratory, mandatory and injunctive relief, including an order that WAPA restructure the CVP wholesale power rate as applied to the "first preference" customers in Trinity, Calaveras, and Toulumne Counties. They further request that the court order a refund of any moneys paid by the plaintiffs in excess of the lawful rate.

The government defendants, again joined by intervenors NCPA and SMUD, contend that there is nothing in any of the legislation cited by plaintiffs which mandates special rate treatment for first preference customers in the three counties. All that is required, defendants allege, is that up to twenty-five percent of the additional power made available to the CVP by the Trinity River Division and the New Melones unit be reserved for sale to those customers. Charging plaintiffs the unitary rate charged to all CVP customers does not violate any provision of law, according to the defendants and intervenors.

Oral argument on the parties' cross-motions for summary judgment was scheduled for late February, 1985, before U.S. District Judge Ernesto J. Garcia.

D. Other Developments

1. *Review by the President's Private Sector Survey (PPSS) on Cost Control Regarding Waste and Abuse by Power Marketing Administrations*

On January 14, 1984, the President's Private Sector Survey (PPSS) on Cost Control submitted a report to the Executive Committee identifying and suggesting remedies for waste and abuse in the Federal Government. This Commission, directed by a 161-member Executive Committee and headed by J. Peter Grace, is

²¹Act of August 12, 1955, 69 Stat. 719.

²²Rivers and Harbors — Flood Control Act of 1962, 76 Stat. 1173.

²³43 U.S.C. § 485h(c).

commonly referred to as the Grace Commission. The PPSS Survey Management Office created 36 Task Forces to study specific areas of abuse, including the issue of waste associated with Power Marketing Administrations (PMAs).

The report specifically states that Federal PMAs subsidize power at a rate equal to approximately one-third of the national wholesale rate charged by non-federal utilities (1¢/kwh vs. 3.3±¢/kwh). The Grace Commission concludes that if federal power were priced at “market rates” instead of “at cost,” there would be, over a three year period, a \$4.5 billion increase in revenues. The report alleges that areas served by the PMAs are receiving a government benefit because the PMA ratemaking process includes an improper allocation of capital cost.

The PPSS recommends that the PMAs be sold and privatized. It explains, however, that because privatization will take a long time, in the interim rates should be brought in line with the rates charged in the private sector.²⁴ The report notes that the government, by directly producing services which could be produced in the private sector, creates a separate, uncompetitive market with no pressure to control cost. As an example, the report states that the Bonneville Power Administration has generated cash deficits of between \$500 million and \$1 billion over the last 5 years because the rate making process does not reflect the cost of producing and transmitting electricity, including the amortization of the capital investment. The report alleges that taxpayers across the country, in effect, subsidize the two-thirds lower rate charged by the PMAs. The Task Force recommended a revised and more business-like approach to amortization of the portion of the Federal Government's capitalized investment allocated to power production and further advocated increased fees to recover from the PMAs the full cost of the government's investment.²⁵

2. Increased Repayment of Federal Investment in PMA Projects

In addition to the attempts to change PMA ratemaking from “cost based” to “market based” rates, the Reagan Administration is attempting to raise PMA rates by increasing the repayment of federal investment in PMA projects. The FY 1986 budget proposal calls for increasing the repayment in two ways. First, the interest rate used to determine federal investment in federal projects will be increased to current interest rates — presently about 11 percent. Second, the budget proposal

²⁴In recent years, however, Congress has specifically denied funds for

purposes of conducting any studies relating or leading to the possibility of changing from the currently required “at cost” to a “market rate” or any other non-cost-based method for the pricing of hydroelectric power by the six Federal public power authorities, or other agencies or authorities of the Federal Government, except as may be specifically authorized by Act of Congress hereafter enacted.

Section 506, Public Law 98-50, 97 Stat. 261 (1983).

²⁵On August 17, 1984, Congress passed the Hoover Power Plant Act of 1984, Pub. L. 98-381, 98 Stat. 1333 (Aug. 17, 1984) (hereinafter “Act”) which, *inter alia*, affirmed the use of “cost-based” pricing for power as opposed “market-based” pricing. While there was some debate on the floor of Congress regarding whether to replace “cost-based” charges with “market-based” charges, the Act as passed continues the historic practice of setting a “cost-based” rate for power generated from a Federal Power Project.

contemplates accelerating the repayment schedule for PMA projects, which means that the PMAs will have to make larger yearly payments to the government. These proposed changes in repayment, if implemented, could result in substantial PMA rate increases.²⁶

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²⁶Office of the Controller, U.S. Department of Energy, FY 1986 Budget Highlights 33-35 (1985), 1985 Electric Utility Week 5 (January 14, 1985), 1-2 (January 21, 1985).

Appendix A
PMA Actions in 1984

Alaska Power Administration

a. Final Commission Approval

U.S. Secretary of Energy, Alaska Power Administration, Power and Wheeling Rates, Eklutna Project, Order Confirming and Approving Rate Schedules, 29 FERC ¶ 62,379 (1984).

U.S. Secretary of Energy, Alaska Power Administration, Snettisham Project, Order Confirming and Approving Rates, 27 FERC ¶ 61,011 (1984).

b. Interim Approval

Alaska Power Administration, Eklutna Project, Order Confirming, Approving, and Placing Increased Power Rates in Effect on an Interim Basis, 49 Fed. Reg. 39,204 (1984).

Bonneville Power Administration

U.S. Department of Energy, Bonneville Power Administration, Order Extending Prior Confirmation of Wholesale Power and Transmission Rates in Part, and Consolidating Rates for Review, 29 FERC ¶ 61,122 (1984).

U.S. Department of Energy, Bonneville Power Administration, Order Extending Interim Approval, 28 FERC ¶ 61,325 (1984).

U.S. Department of Energy, Bonneville Power Administration, Order Setting Matters for Hearing and Establishing Procedures, 27 FERC ¶ 61,251 (1984).

U.S. Department of Energy, Bonneville Power Administration, Order Granting Request for Temporary Interim Rates, 26 FERC ¶ 61,096 (1984).

Southeastern Power Administration

a. Final Commission Approval

U.S. Secretary of Energy, Southeastern Power Administration, Cumberland Basin System of Projects, Order Confirming and Approving Rate Schedules, 29 FERC ¶ 62,378 (1984).

U.S. Secretary of Energy, Southeastern Power Administration, Georgia-Alabama System of Projects, Order Confirming and Approving Rate Schedules, 26 FERC ¶ 62,199 (1984).

b. Interim Approval

Southeastern Power Administration, Georgia-Alabama Projects, Order Confirming and Approving Rates on an Interim Basis, 49 Fed. Reg. 39,227 (1984).

Southeastern Power Administration, Cumberland Basin Projects, Order Confirming and Approving Rates on an Interim Basis, 49 Fed. Reg. 26,792 (1984).

Southwestern Power Administration

a. Final Commission Approval

U.S. Secretary of Energy, Southwestern Power Administration, System Power Rates, Order Confirming and Approving Rate Schedules, 29 FERC ¶ 62,203 (1984).

U.S. Secretary of Energy, Southwestern Power Administration, Sam Rayburn Dam Project, Order Confirming and Approving an Extension of Rates, 29 FERC ¶ 62,123 (1984).

U.S. Secretary of Energy, Southwestern Power Administration, System Transmission Rates, Order Confirming and Approving Rate Schedules, 26 FERC ¶ 62,200 (1984).

b. Interim Approval

Southwestern Power Administration, Order Confirming and Approving Extension of Integrated System Power Rates on an Interim Basis, 49 Fed. Reg. 36,146 (1984).

Southwestern Power Administration, Order Confirming and Approving Extension of Sam Rayburn Dam Power Rate on an Interim Basis, 49 Fed. Reg. 24,772 (1984).

Southwestern Power Administration, Order Confirming and Placing Into Effect Contract Rates to Tex-La on an Interim Basis, 49 Fed. Reg. 22,705 (1984).

Western Area Power Administration

a. Final Commission Approval

U.S. Secretary of Energy, Western Area Power Administration, Third Party Transmission, Central Valley Project, Order Confirming and Approving Rate Schedules, Docket No. EF84-5141-000 (Nov. 30, 1984).

U.S. Secretary of Energy, Western Area Power Administration, Parker Davis Project, Order Confirming and Approving Rate Schedules, 28 FERC ¶ 62,086 (1984).

U.S. Secretary of Energy, Western Area Power Administration, Colorado River Storage Project, Order Confirming and Approving Rates for a Limited Period, Granting Intervention, Finding Moot Motion to Strike, and Terminating Docket, 27 FERC ¶ 61,249 (1984).

U.S. Secretary of Energy, Western Area Power Administration, Pick-Sloan Project, Order Confirming and Approving Rate Schedules, Noting Interventions, and Denying Request for Hearing, 26 FERC ¶ 61,217 (1984).

b. Interim Approval

Western Area Power Administration, Pick-Sloan Missouri Basin Program, Order Confirming, Approving and Placing into Effect the Rate Adjustment on an Interim Basis, 49 Fed. Reg. 47,974 (1984).

Western Area Power Administration, Rio Grande Project, Order Confirming, Approving and Placing Increased Power Rates in Effect on an Interim Basis, 49 Fed. Reg. 35,237 (1984).

Western Area Power Administration, Central Valley Project, Order Confirming, Approving and Placing Transmission Rates in Effect on an Interim Basis, 49 Fed. Reg. 22,126 (1984).

