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RECENT LEGAL DEVELOPMENTS AND LEGISLATIVE TRENDS IN FEDERAL PREFERENCE POWER MARKETING

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I. INTRODUCTION

The marketing of federal hydroelectric and thermal generated "preference" power[1] has become one of the most contentious topics in the electric utility industry.[2] At the epicenter of the political and legal storm are the Depart-

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The authors are deeply grateful for the invaluable guidance provided by L. Clifford Adams, Jr., General Counsel for the Municipal Electric Authority of Georgia, with whom author Vince has tried many of the cases discussed in this article, and Richard K. Pelz, former Deputy Assistant General Counsel for Power Marketing of the Department of Energy, and for the assistance provided by Sherry A. Quirk, Esq., Frances C. DeLaurentis, Esq., and Rex E. Reese, Esq., in the preparation of this article.

1. Surplus power generated at federally-owned reclamation and flood control projects is marketed under a variety of federal statutes, *e.g.*, section 5 of the Flood Control Act of 1944, 16 U.S.C.A. §825s (1985); section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C.A. § 485h(c) (1985); section 4(a) of the Bonneville Project Act of 1937, 16 U.S.C.A. § 832c(a) (1985). *See also* section 1(b) of the Niagara Redevelopment Act, 16 U.S.C.A. § 836(b) (1985), governing the marketing of power from the Niagara projects licensed to the Power Authority of the State of New York. These statutes grant a preference in the sale of the power to municipalities, public bodies and rural electric cooperatives, commonly known as preference customers.

2. Preference power is frequently found on the agenda of the legal seminars and national conferences

ment of Energy and its regional federal power marketing agencies (PMA's)[3]; preference entities such as electric cooperatives, municipalities and other political subdivisions of states, and other public bodies; an assortment of investor-owned utilities; and trade associations representing a variety of industry interests.[4] While the issues involved are remarkably complex, the primary reason for the "preference" controversy can be stated succinctly: federal preference power is so much less expensive than traditional sources of electricity that the demand far outstrips the available supply.

This maxim is so pervasive that in most instances, the PMA's are unable to take any substantive action that does not come under close scrutiny or legal challenge by competing regional preference interests. For example, disputes over the power allocation and ratemaking practices of the PMA's have produced no less than thirteen federal court decisions[5] (including one by the United States Supreme Court)[6], and one major decision by the Federal Energy Regulatory Commission[7] in the past two years alone. For each issue that can

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sponsored by the American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) and was one of the key subjects covered at the 1985 Electricity Policy Conference. The marketing of federal preference power has also been the subject of numerous lawsuits, several of President Reagan's proposed budget-cutting devices, and frequent Congressional debate.

3. The federal PMA's include the Bonneville Power Administration, the Western Area Power Administration, the Southwestern Power Administration, the Southeastern Power Administration, and the Alaska Power Administration. *See* 42 U.S.C.A. § 7152 (1983). This article focuses on the activities of, and litigation involving, these agencies, and, where pertinent, the Power Authority of the State of New York, which has responsibility for marketing power under the Niagara Redevelopment Act, 16 U.S.C.A. §§ 836-836a (1985). The power marketing activities of the Tennessee Valley Authority, which operates pursuant to its own enabling Act, 16 U.S.C.A. §§ 831-831dd (1985), are outside the scope of this article.

4. National organizations representing the interests of preference entities include the American Public Power Association to which many of the country's municipally-owned electric utilities belong, and the National Rural Electric Cooperative Association, representing the nation's rural electric cooperatives. A variety of organizations represent cooperatives and public power systems at the regional and local level. One association representing the interests of many of the nation's private utilities is the Edison Electric Institute.

5. Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist., 104 S. Ct. 2472 (1984); Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985); United States v. City of Fulton, 751 F.2d 1255 (Fed. Cir. 1985), *cert. granted*, No. 84-1725, 53 U.S.L.W. 3911 (July 1, 1985); ElectriCities of N.C., Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985); ElectriCities of N.C. Inc. v. Southeastern Power Admin., No. 84-2152 (4th Cir. Mar. 19, 1985); Central Lincoln Peoples' Util. Dist. v. Johnson, 735 F.2d 1101 (9th Cir. 1984); Power Authority of N.Y. v. FERC, 743 F.2d 93 (2d Cir. 1984); ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. 84-625-CIV-5 (E.D.N.C. June 18, 1985), *vacated*, No. 85-1919 (4th Cir. Nov. 18, 1985); ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. C-C-85-384-P (W.D.N.C. Oct. 30, 1985); City of S. Sioux City v. Western Area Power Admin., No. 82-L-107 (D. Neb. May 20, 1985), *appeal docketed*, No. 85-1757 NE (8th Cir. June 7, 1985); Arvin-Edison Water Storage Dist. v. Hodel, No. 82-2466 (D.D.C. Mar. 28, 1985); Trinity County Pub. Util. Dist. v. Hodel, No. 84-0850 (E.D. Cal. Feb. 22, 1985), *appeal docketed*, No. 85-1874 (9th Cir. May 9, 1985); Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., No. W84CA101 (W.D. Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986). At the time of this writing, two additional preference lawsuits are pending in federal district court, Power Authority of N.Y. v. Municipal Electric Utils. Ass'n of N.Y. State, No. 83-6584 JES (S.D.N.Y. filed Sept. 6, 1983); and Allegheny Elec. Coop. v. Power Authority of N.Y., No. 85-5081 RLC (S.D.N.Y. filed July 1, 1985). As many of the preference decisions recently rendered are presently on appeal, events may unfold between the preparation of this article and its publication that of necessity will go unreported herein.

6. Aluminum Co. of Am. v. Central Lincoln People's Util. Dist., 104 S. Ct. 2472 (1984).

7. Massachusetts Mun. Wholesale Elec. Co. v. Power Authority of N.Y., Docket No. EL80-19, 30 FERC ¶ 61,323 (1985), *clarified*, 32 FERC ¶ 61,194 (1985), *appeal docketed sub nom.*, Metropolitan

safely be said to have been laid to rest, creative plaintiffs seeking ways to secure allocations of this valuable resource have devised new legal challenges to hurl at the PMA's, existing preference power recipients, and, in some cases, the regional private utility companies providing essential services in support of the government's programs.

Although the legal battles have involved issues of serious import, these battles pale in comparison to the major legislative hurdles now faced by all preference entities. The entire concept of a preference (in the relicensing of hydroelectric projects and in federal power marketing at large) is currently under legislative and political attack by private utilities, and little support for the concept can be found in the present Administration. In the past three years, numerous legislative proposals have been advanced by private interests and the Reagan Administration that would undermine or destroy the concept of preference.[8] Most extreme is the President's fiscal year 1987 budget proposal to sell off the federal power facilities[9], which threatens to eliminate existing preference marketing programs in their entirety.

The lawsuits brought both by non-preference[10] and preference entities over the past ten years have helped to clarify the application of the preference laws, defining the rights[11] and characteristics[12] of preference entities, the type of projects and sales to which the statutes apply[13], the procedural ground rules for PMA decisionmaking[14], the scope of discretion enjoyed by the PMA's in determining how to allocate federal power,[15] the extent to which judicial review of PMA decisions will be allowed,[16] the types of remedies available to liti-

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Transit Auth. v. FERC, No. 85-4115 (2d Cir. Aug. 2, 1985).

8. These proposals include, *inter alia*, H.R. 4402, 98th Cong., 1st Sess. (1983), a bill to eliminate the municipal preference in hydroelectric relicensing proceedings, now being considered by Congress as S. 426, 99th Cong., 1st Sess. (1985) and H.R. 44, 99th Cong., 1st Sess. (1985); an amendment offered by Rep. Boxer during the debate over the Hoover Power Plant Act of 1984 that would have required power produced at the project to be sold at "market" rates (*see* 130 CONG. REC. H3319 (1984)); President Reagan's fiscal year 1986 budget proposal to increase PMA interest rates (*see* Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1986, p. 2-13); and H.R. 1827, 99th Cong., 1st Sess. (1985), a bill that proposes a "user fee" on all sales of electric power by the PMA's, which would substantially increase the rates charged to PMA customers.

9. *See* Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1987, p. 5-35.

10. Non-preference entities include investor-owned utilities and industrial customers of the federal PMA's.

11. *See, e.g.*, City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

12. *E.g.*, City of Portland v. Munro, No. 77-928 (D. Or. dismissed March 19, 1981).

13. *E.g.*, Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

14. *E.g.*, City of South Sioux City v. Western Area Power Admin., No. 82-L-107 (D. Neb. May 20, 1985), *appeal docketed*, No. 85-1757 NE (8th Cir. June 7, 1985).

15. *E.g.*, Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985); ElectriCities of N.C. Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985); City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978); Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

16. *See, e.g.*, Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985); ElectriCities of N.C., Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985); City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

gants,[17] and the roles that non-preference entities may play in the "firming"[18] and transmission of federal power.[19] A question now being considered in federal court is whether a municipality or political subdivision lacking an electric distribution system (and commitment to "utility responsibility")[20] can obtain a preference allocation to be distributed to consumers through a "lease" arrangement with the local private utility.[21]

The authority of the PMA's to establish rates, and the mechanisms by which those rates are approved, have also sparked controversy in recent years. In addition to questioning the procedures used for the approval of rates,[22] some preference customers have claimed an entitlement to a "preferred" rate.[23] The Supreme Court has granted certiorari in one case which presents the question whether the Secretary of Energy has authority to implement an interim rate increase.[24]

While not yet the subject of any lawsuits, the recently instituted federal program to finance new hydroelectric projects with funds advanced by non-federal sources[25] raises some intriguing questions regarding the selection of pro-

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17. *E.g.*, ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. 84-2152 (4th Cir. Mar. 19, 1985); Greenwood Utilities Commission v. Hodel, 764 F.2d 1459 (11th Cir. 1985); City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

18. As the availability of hydroelectric power fluctuates with the availability of the water from which the power is generated, hydro projects are typically operated in conjunction with thermal generating units to provide a firm or steady source of electricity. This practice is often referred to as "firming". *See* Greenwood Utils. Comm'n v. Schlesinger, 515 F. Supp. 653, 656 n.2 (M.D. Ga. 1981).

19. *E.g.*, ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. C-C-85-384-D (W.D.N.C. Oct. 30, 1985); Brazos Elec. Power Coop., Inc. v. Southwestern Area Power Admin., No. W84CA101 (W.D. Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986).

20. In 1978, in response to a request by the City of Needles, California, Department of Energy General Counsel Lynn Coleman issued an opinion stating that preference entities, to be eligible for allocations of federal power, must have "utility responsibility" and must be "ready, willing and able" to take and distribute the federal power. *See* Department of Energy General Counsel, *Request of City of Needles for Reinstatement of Sales of Federal Power for Benefit of Its Citizens* 4 (Nov. 21, 1978). "Utility responsibility" requires the preference entity to assume the responsibility for providing reliable service at reasonable rates, for meeting load growth of customers, and to make arrangements for meter reading, billing and other services of a utility. *Id. See also* discussion of preference customer eligibility requirements, *infra*.

21. *See* Power Authority of N.Y. v. Municipal Elec. Utils. Ass'n of N.Y., No. 83-6584 JES (S.D.N.Y. filed Sept. 6, 1983). Additionally, during the proceeding leading to the development of marketing criteria for the Western Area Power Administration's Salt Lake City Area Projects, Utah Power & Light (UP&L) submitted a request that it be permitted to act as "agent" for 143 Utah cities and towns lacking electric distribution systems. UP&L proposed that the power be allocated to cities and towns for which it would then distribute the electricity "at cost". Western rejected UP&L's proposal. *See* Revised Proposed General Power Marketing Criteria and Allocation Criteria, 49 Fed. Reg. 34,900 (1984); *see also* Post-1989 General Power Marketing and Allocation Criteria, 51 Fed. Reg. 4844 (1986).

22. *See, e.g.*, United States v. Tex-La Elec. Coop., Inc., 693 F.2d 392 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 997 (1984); Colorado River Energy Distribs. Ass'n v. Lewis, 516 F. Supp. 926 (D.D.C. 1981); Pacific Power & Light Co. v. Duncan, 499 F. Supp. 672 (D. Or. 1980).

23. *See, e.g.*, Trinity County Pub. Util. Dist. v. Hodel, No. 84-0850 (E.D. Cal. Feb. 22, 1985), *appeal docketed*, No. 85-1874 (9th Cir. May 9, 1985); Arvin-Edison Water Storage Dist. v. Hodel, No. 82-2466 (D.D.C. dismissed Mar. 28, 1985).

24. United States v. City of Fulton, 751 F.2d 1255 (Fed. Cir. 1985), *cert. granted*, No. 84-1725, 53 U.S.L.W. 3911 (July 1, 1985).

25. *See, e.g.*, Western Area Power Administration, Spring Canyon Pumped-Storage Project, Arizona; Non-Federal Participation in Proposed Planning Investigation and Expression of Peaking Power Needs, 50 Fed. Reg. 7403 (1985); Southwestern Power Administration, Federal Hydroelectric Power—Proposed Power

ject sponsors and the marketing of power produced at such projects.

In this article, the authors present an overview of the burgeoning political and legislative fray over the preference laws, as well as a more in-depth examination of the court decisions and pending lawsuits that have shaped the allocation and ratemaking practices of the PMA's. Additionally, the "non-federally funded" hydroelectric development programs are discussed. To place these legislative and legal trends in context, it may be helpful first to present a background discussion of the PMA's and their allocation and contracting procedures, the characteristics of preference customers, and the statutes governing PMA activities.

II. Overview of Federal Power Marketing

A. *The Federal Power Marketing Administrations and Their Statutory Authority*

The task of marketing power from federally-owned hydroelectric and certain thermal generation projects is vested in the Secretary of Energy[26], who is to perform these functions acting by and through the administrators of the five regional marketing agencies[27]: the Alaska Power Administration, Bonneville Power Administration (Bonneville), Southwestern Power Administration (Southwestern), Southeastern Power Administration (SEPA), and Western Area Power Administration (Western).[28] Each PMA has responsibility for marketing power generated at dams and other federal generation facilities within its region.[29]

The projects from which the PMA's market power were constructed and are operated by the U.S. Army Corps of Engineers or the Bureau of Reclamation.[30] The primary purpose of the projects is typically reclamation (i.e., irrigation) or flood control, but a number of the projects have additional purposes such as water supply[31], recreation[32] or navigation.[33] The power marketed by

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Allocation Policy, 50 Fed. Reg. 25,316 (1985).

26. 42 U.S.C.A. § 7152 (1983).

27. *Id.*

28. Prior to the creation of the Department of Energy in 1977, the four PMA's other than Western operated under the auspices of the Secretary of the Interior. The Department of Energy Organization Act, 42 U.S.C.A. §§ 7101, *et seq.* (1983) transferred the four pre-existing agencies to the Department of Energy and provided for creation of a fifth agency (Western) to assume the power marketing functions previously administered by the Bureau of Reclamation. *See id.* at § 7152. The Department of Energy Organization Act additionally imposed the "notice and comment" rulemaking requirements of the Administrative Procedure Act, 5 U.S.C.A. §§ 551 *et seq.* (1977 & Supp. 1985), on the PMA's. *See* 42 U.S.C.A. § 7191 (1983). By using this more systematic method of public involvement in the allocation process, PMA's are less likely to be exposed to claims of denial of due process, which had been encountered in the days of "ad hoc" power allocations. *See* Greenwood Utils. Comm'n v. Schlesinger, 515 F. Supp. 653 (M.D. Ga. 1981); City of Lamar v. Andrus, Nos. 75-C-216-C & 76-C-374-C (D. Okla. dismissed May 2, 1977).

29. *See generally*, Kendell, *Federal Electric Power*, Electric Power Quarterly (Jan.-March 1985).

30. *Id.*; *see also* 16 U.S.C.A. § 825s (1985); 16 U.S.C.A. § 832 (1985); 43 U.S.C.A. §§ 485a(c), 485h(c) (1964); 42 U.S.C.A. § 7152 (1983).

31. *See, e.g.*, Pub. L. No. 75-161, 52 Stat. 1215 (1938), which authorized construction of the Denison Reservoir on the Texas/Oklahoma border. (The lake formed by the dam later was designated "Lake Texoma." *See* Pub. L. No. 454, 58 Stat. 764 (1944)). Subsequently, the Chief of Engineers was authorized to

the PMA's is that determined by the Corps or the Bureau to be in excess of the power needed to operate the project.[34] Power generation frequently must take a "back seat" to other specified uses of the project. It is not an unusual occurrence for a preference power recipient to find itself at odds with a municipality seeking additional sources of water supply[35] or recreational interests seeking to restrict the use of a dam[36]—interests which can affect the amount of water available for hydropower production and which may place operational constraints on the generation of electricity.

The primary function of the PMA is to develop, implement and administer programs for disposing of this "surplus" power in accordance with statutes governing specific projects[37] or generally pertaining to the PMA's responsibilities.[38] A corollary responsibility is to develop power rates sufficient to repay the government's capital investment in the facilities over time.[39]

There are literally hundreds of flood control and reclamation laws pertaining to federal generation facilities.[40] Fortunately, there are a few primary statutes which govern the marketing of this power by the federal PMA's. These include the Reclamation Project Act of 1939,[41] the Flood Control Act of 1944,[42] and the Bonneville Project Act,[43] along with the more recent Pacific Northwest

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contract with the City of Denison, Texas for water supply from Lake Texoma. *See* Pub. L. No. 273, 67 Stat. 563 (1953).

32. *See, e.g.*, Report of the Board of Engineers for Rivers and Harbors, Corps of Engineers, U.S. Army to Chief of Engineers, Department of the Army (Jan. 26, 1962) regarding the purposes of the Truman Dam Project.

33. *See, e.g.*, Bonneville Project Act § 1, 16 U.S.C.A. § 832 (1985).

34. *See, e.g.*, 16 U.S.C.A. § 825s (1985); 16 U.S.C.A. § 832 (1985); 43 U.S.C.A. § 485h(c) (1964).

35. While the issue of competing claims of right to the water at federal dams is not within the scope of this article, it should be noted that this is a likely area of controversy in the future. A conflict between water and power users at Lake Texoma on the Texas/Oklahoma border recently required the intervention of Congress to resolve the dispute. A Corps of Engineers' proposal to reallocate 300,000 acre-feet of water storage from hydropower production to water supply threatened to reduce the value of the project to preference customers which had contracted for the power output of Denison Dam at the Lake. A settlement providing for unprecedented compensation to the preference customers for their loss of low-cost hydropower was negotiated and included in the 1985 House omnibus water bill, H.R. 6, 99th Cong., 1st Sess. § 751 (1985).

36. An example of such a controversy is brewing over the operation of the Harry S. Truman Dam & Reservoir due to complaints by environmental and recreation interests that full operation of the project would endanger fish and create potential problems for recreation users. At present, the Corps of Engineers is proposing to reduce the output of the project from its authorized 160 megawatts of capacity to 29 megawatts without corresponding rate relief for affected preference customers. *See* U.S. Army Corps of Engineers, "A Report on the Future Direction of Hydropower, Harry S. Truman Dam and Reservoir" (June 1985). Congress and the courts may well be involved in this conflict before it can be resolved.

37. *See, e.g.*, the Boulder Canyon Project Act, 43 U.S.C.A. §§ 627 *et seq.* (1964), which governs the disposition of power from the Hoover Dam.

38. *See, e.g.*, section 5 of the Flood Control Act of 1944, 16 U.S.C.A. § 825s (1985).

39. *See* discussion of PMA ratemaking procedures, *infra*.

40. A compilation and annotation of many of these laws is contained in a three volume work by the Deputy Assistant General Counsel for Power Marketing of the Department of Energy. *See* FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED (R.K. Pelz, ed. 1972). *See also* Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 ENVTL. L. 601 (1979).

41. 43 U.S.C.A. §§ 485 *et seq.* (1964 & Supp. 1985).

42. 16 U.S.C.A. § 825s (1985).

43. 16 U.S.C.A. §§ 832 *et seq.* (1985).

Electric Power Planning and Conservation Act.[44] The Power Authority of the State of New York markets power pursuant to the Niagara Redevelopment Act.[45] Although these statutes at first glance appear to be similar, and it has been said that the preference laws should be read *in pari materia*[46], in litigation involving a PMA, the precise language of the preference clause and the other statutes governing the PMA's activities generally will govern, as a matter of statutory construction.

The Reclamation Project Act of 1939[47] provides a comprehensive plan for the repayment of U.S. reclamation projects[48] and applies to all reclamation or irrigation projects authorized by federal law.[49] Many of the projects from which Western markets power fall within this category. Section 9(c) of the Act permits the Secretary of Interior (now Secretary of Energy) to sell or lease electric power provided that:

> in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof. . . . No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.[50]

Section 5 of the Flood Control Act of 1944[51], in turn, applies to all U.S. Army Corps of Engineers reservoir projects and governs the power marketing activities of Southwestern and SEPA. Its preference provision reads as follows:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of Energy, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles. . . . Preference in the sale of such power and energy shall be given to public bodies and cooperatives.[52]

This deceptively simple statute has provoked a great deal of litigation.[53] Southwestern and SEPA have the unenviable task of juggling the requirements that they market federal hydroelectric power on a widespread basis while maintaining the lowest possible rates for consumers in keeping with sound business principles. It is understandable why the PMA's have argued, and courts generally have agreed[54], that the interpretation of this statute and implementation of

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44. 16 U.S.C.A. §§ 839 *et seq.* (1985).

45. 16 U.S.C.A. §§ 836-836a (1985).

46. *See, e.g.*, Disposition of Surplus Power Generated at Clark Hill Reservoir Project, 41 Op. Att'y Gen. 236, 245 (1955).

47. 43 U.S.C.A. §§ 485 *et seq.* (1964 & Supp. 1985).

48. *Id.* § 485.

49. *Id.* § 485a(c).

50. 43 U.S.C.A. § 485h(c) (1964).

51. 16 U.S.C.A. § 825s (1985).

52. *Id.*

53. This preference clause has been the subject of the *Greenwood*, *ElectriCities*, and *Brazos* cases, *supra* note 5.

54. *See, e.g.*, Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459, 1461 (11th Cir. 1985); ElectriCities

programs pursuant to it, are best left to the agencies' discretion.[55]

The preference provision of the Bonneville Project Act[56] contains similar language to that of the Flood Control Act, although with an additional statement of purpose:

> In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.[57]

In this Act, "public bodies" and "cooperatives" are defined terms.[58] The Pacific Northwest Electric Power Planning and Conservation Act expressly retained the preference provisions of the Bonneville Act.[59]

The Niagara Redevelopment Act[60], echoes this statement of intent to benefit domestic and rural consumers:

> In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance.[61]

The Act also requires that contracts with private utilities provide for the withdrawal of power to meet the "reasonably foreseeable needs of preference customers,"[62] and that a portion of the power be made available for use in neighboring States.[63] These provisions have recently been interpreted by the FERC and the U.S. Court of Appeals for the Second Circuit.[64]

Other than their status as sister agencies within the Department of Energy, there is little similarity among the PMA's. The nature of the resources from which they sell power, the extent of facilities owned, the type of customers served and the size of the staff employed by the agencies varies widely. For

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of N.C., Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985); City of Santa Clara v. Andrus, 572 F.2d 660, 667 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

55. *See* Adams, Vince & Robbins, *Federal Electric Preference Power Marketing in the 1980's: Developing Legal Trends*, 4 ENERGY L.J. 1, 9 (1983).

56. 16 U.S.C.A. §§ 832 *et seq.* (1985).

57. *Id.* § 832c(a).

58. *See id.* § 832b: " 'public body' . . . means States, public power districts, counties and municipalities, including agencies or subdivisions of any thereof"; " 'cooperative' . . . means any form of non-profit-making organization or organizations of citizens supplying, or which may be created to supply, members with any kind of goods, commodities or services, as nearly as possible at cost."

59. *See* 16 U.S.C.A. § 839c(a) (1985).

60. 16 U.S.C.A. §§ 836-836a (1985).

61. *Id.* § 836(b)(1).

62. *Id.*

63. *Id.* § 836(b)(2).

64. *See* Municipal Elec. Utils. Ass'n v. Power Auth. of N.Y., Docket No. EL78-24, 21 F.E.R.C. ¶ 61,021 (1982), *modified*, 23 F.E.R.C. ¶ 61,031 (1983), *modified*, Power Auth. of N.Y. v. FERC, 743 F.2d 93 (2d Cir. 1984); Massachusetts Mun. Wholesale Elec. Co. v. Power Auth. F.E.R.C. of N.Y., Docket No. EL80-19, 30 F.E.R.C. ¶ 61,323 (1985), *clarified*, 32 F.E.R.C. ¶ 61,194 (1985), *appeal docketed sub nom.*, Metropolitan Transit Auth. v. FERC, No. 85-4115 (2d Cir. Aug. 2, 1985).

example, Bonneville markets power from resources totalling 19,398 megawatts of capacity, while Southwestern has only 1,986 megawatts of capacity available to it.[65] Western owns 16,128 miles of transmission lines; SEPA has none.[66] Bonneville has 3,297 full-time staff positions, while SEPA has only thirty-nine; Southwestern, 159.[67] Western, unlike the other PMA's, markets power from federally-owned thermal generating facilities.[68] This diversity arises from the unique organization history and statutory authority of each agency. In apparent recognition of this individuality, Congress directed that the PMA's "be preserved as separate and distinct organizational entities within the Department [of Energy]."[69]

With the possible exception of Bonneville, the PMA's do not have general public utility responsibility.[70] The PMA's (again excepting Bonneville) typically serve only a small portion of their customers' loads. The hydroelectric projects from which PMA's market power are most useful in meeting customers' peak demands[71], and must be integrated with other generation by the PMA's or their customers. In the Southeast, owing to the lack of federally-owned transmission lines, SEPA is entirely dependent upon regional utilities for delivering the federal hydroelectric power to preference customers.[72] Transmission and integration of the power is accomplished through contractual arrangements with area utilities pursuant to which all the capacity and energy of the projects is turned over to the utilities, and the preference customers are deemed to receive a portion of their total power purchases (equivalent to the amount of capacity and energy allocated to them by SEPA) at the lower cost of the federal power.[73] A similar "accounting" mechanism is used by Southwestern and its customers in the electrically isolated portion of Texas where Southwestern owns no transmission lines.[74]

Bonneville functions under a far different statutory scheme than the other PMA's. One feature of its marketing program is a residential exchange program pursuant to which Bonneville purchases power from regional utilities at their average system cost and sells power to them in the same quantities to serve their residential and small farm loads.[75] The power is sold by Bonneville to the utilities at the "preference price,"[76] resulting in lower-cost energy being

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65. R.K. Pelz, *Preference in Federal Power Marketing—Some Practical Aspects* at Table 1, (presented at the Electricity Policy Conference, Washington, D.C., Sept. 19-20, 1985) [hereinafter cited as Pelz]. The authors extend their appreciation to Mr. Pelz for his permission to refer to this paper.

66. *Id.*

67. *Id.*

68. Kendell, *Federal Electric Power*, ELEC. POWER Q., Table T2 (Jan.-March 1985).

69. 42 U.S.C.A. § 7152(a)(2) (1983).

70. Bonneville is required upon request to sell power to preference customers and private utilities to meet their load growth. *See* 16 U.S.C.A. § 839c(b).

71. *See, e.g.*, Southwestern Power Administration, Preliminary Power Allocations (1980-1988), 44 Fed. Reg. 45,468 (1979); Southeastern Power Administration, Power Marketing Policy, Georgia-Alabama System of Projects, 45 Fed. Reg. 65,140, 65,141 (1980).

72. *See* Greenwood Utils. Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1488 (5th Cir. 1985).

73. *Id.* at 1490.

74. *See* Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., No. W84CA101 (W.D. Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986).

75. 16 U.S.C.A. § 839c(c) (1985).

76. *Id.* § 839e(b).

available for these consumers. Bonneville is also directed by Congress to sell power directly to industries, with a portion of the power sold on an interruptible basis.[77] The power sold to these industries is sold at a higher rate than to other customers.[78] This increase pays for the costs of power sold pursuant to the residential exchange program.[79] In addition, the Pacific Northwest Power Act guarantees that preference customer rates will not increase more than they would have without the Act.[80]

B. The Preference Customers

In granting a preference in the disposition of surplus federal power to public bodies and rural electric cooperatives, it was the congressional aim to establish these public entities as viable distributors of electricity against which the rates of investor-owned utilities could be measured.[81] Whether or not this "yardstick"[82] approach is still required today (a controversy which is examined later in this article) municipalities, electrical and irrigation districts, and rural electric cooperatives remain the customers to whom the bulk of the federal preference power is sold.

It is noteworthy, though, that the characteristics of many of these public bodies and cooperatives have undergone a transformation since the early days of federal power marketing. Until recently, most public bodies and cooperatives in the utility business looked to private utilities for their power supply needs in excess of their federal power allocations. Now, with the advent of joint action agencies[83] and large generation and transmission cooperatives[84], preference entities have begun to enjoy much greater independence. By acting on behalf of numerous electric distribution systems, these non-profit umbrella organizations have been able to make far more economical wholesale power purchases on behalf of their constituents. In addition, a number of these organizations now own generation and transmission facilities or have entered into joint participation arrangements for large-scale generation facilities with other utilities.[85] The organizations also act on behalf of their constituents in agency proceedings and litigation, giving each member a greater voice than would otherwise be possible.[86] While the relatively isolated city, town or rural electric cooperative may

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77. *Id.* at § 839c(d).

78. *See* Blumm, *The Northwest's Hydroelectric Heritage: Prologue To The Pacific Northwest Electric Power Planning And Conservation Act*, 58 WASH. L. REV. 175, 231 (1981).

79. *Id.*

80. *Id.*; *see also* 16 U.S.C.A. §§839 e(b)(2) (1985).

81. *See* L.C. White, The Public's First Right to Federally Generated Power: An Analysis of the Preference Clause, July 1985, at p. 7 (available from the American Public Power Association, Washington, D.C.) This report, first presented in 1979 by Lee White, former chairman of the Federal Power Commission, contains an excellent discussion of the history and purpose of the preference laws and the arguments for and against their continuation.

82. *Id.*

83. There are presently 57 joint action agencies in the United States. *See* American Public Power Association, 1986 Directory, D66-69 (1986).

84. There are approximately 67 such cooperatives at present in the United States.

85. *See, e.g.*, American Public Power Association, 1986 Directory, at D66-69.

86. The three *ElectriCities* lawsuits (*supra* note 5) have all been brought by a North Carolina joint municipal assistance agency acting on behalf of 54 cities and towns in that state. In the first two of these

still be the archetypical preference customer, the advent of these large-scale, thriving organizations has brought about a new era in federal power marketing.[87]

C. *Other PMA Customers*

In light of the high preference customer demand for federal power, it may be somewhat surprising that a sizeable amount of the power marketed by the PMA's is not sold to preference entities, but to private utilities and, in the Pacific Northwest, to industrial customers. The reasons for these sales vary from region to region.

Bonneville operates under a unique statutory scheme[88] which requires it to sell power to private utilities and direct service industrial customers.[89] In 1984, these sales constituted fifty-seven percent of its total capacity and sixty-one percent of its total energy sales.[90] Western's sales to non-preference entities, which accounted for twenty percent of its total 1984 energy sales[91], largely result from statutory rights granted to utilities pursuant to the Boulder Canyon Project Act[92] or circumstances under which preference customers were unable to take power at the time offered, and contracts were entered into with private utilities in their place.[93] Western also sells energy from its Central Valley Project to a utility pursuant to a "bank account" arrangement under which the utility can be called upon to return energy to the agency.[94]

In 1984, SEPA sold approximately twenty-three percent of its capacity,

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proceedings, seven Virginia towns (under the auspices of the Virginia Municipal Electric Association No. 1), and two South Carolina cities joined in as plaintiffs.

87. For example, preference entities in the southeast with generation and transmission facilities of their own questioned SEPA's continued dependence on area private utilities during the administrative proceeding leading to the promulgation of SEPA's Final Power Marketing Policy for the Georgia-Alabama System of Projects, 45 Fed. Reg. 65,140 (1980). In comments submitted to the agency, ElectriCities of North Carolina, Inc. proposed that its members displace private utilities in the provision of firming and scheduling services where possible. *See* Complaint, Exhibit D, ElectriCities of N.C., Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985). In Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., No. W84CA101 (W.D. Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986), the plaintiff, a large Texas generation and transmission cooperative, argued that it should have been permitted to perform the transmission, firming, and scheduling services now performed by a private utility for two other Texas "umbrella" cooperatives. *See* Amended Complaint ¶¶ 49-50.

88. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C.A. §§ 839 *et seq.* (1985).

89. *Id.* § 839c. The sales to these "DSI's" were the subject of Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 104 S. Ct. 2472 (1984).

90. Pelz, *supra* note 65, at Table 3.

91. *Id.*

92. 43 U.S.C.A. § 617d (1964).

93. Pursuant to the Colorado River Basin Project Act, 43 U.S.C.A. § 1523, the Secretary of Interior was given one year to arrange for the sale of power from the proposed Navajo facility of the Central Arizona Project. Due to the severe time constraints, the Secretary was unable to locate preference entities willing to take all the power and, therefore, entered into contracts for some of the power with private utilities. This decision was upheld by the Ninth Circuit in City of Anaheim v. Kleppe, 590 F.2d 285 (9th Cir. 1978) and City of Anaheim v. Duncan, 658 F.2d 1326 (9th Cir. 1981).

94. This arrangement with Pacific Gas & Electric Company was scrutinized in City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

but less than one-half of one percent of its energy, to private utilities.[95] This "capacity without energy"[96] has been marketed by SEPA to area utilities for a number of years as its regional preference customers were unable to make use of the resource on an economic basis.[97] The sales to the utility companies have offset part of the cost of transmission services performed by those utilities, thus lowering the transmission rates for many of SEPA's preference customers.[98] SEPA's current contracts provide for the phasing-out of these sales, and by 1991, SEPA's preference customers will purchase all its capacity, with the exception of a small quantity held as reserves for the utilities transmitting the power to the preference customers.[99]

Southwestern sold approximately thirty-seven percent of its energy to non-preference customers in 1984.[100] Additionally, some of its customers have exchange arrangements with private utilities as they are unable to make direct use of the "peaking" power sold by Southwestern. One of these arrangements was the subject of the *Brazos*[101] lawsuit.

All the PMA's frequently have non-firm energy for sale. If preference customers are unable or unwilling to utilize this energy, it is sold to private utilities or other non-preference customers.[102]

D. PMA Allocation Procedures

Prior to the passage of the Department of Energy Organization Act,[103] power was allocated by the federal PMA's on largely an *ad hoc* basis.[104] No specific procedures were required by statute or Interior Department policies. Generally, when new power became available, it was offered first to existing customers to cover their requirements before being offered to new customers.[105] The individual PMA's followed varied procedures in soliciting customers for the power and determining how best to use the federal power to meet the cus-

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95. Pelz, *supra* note 65, at Table 3.

96. This term was utilized by the plaintiff in ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. C-C-85-384-P (W.D.N.C. Oct. 30, 1985) (*see* Complaint, ¶ 14m) to describe hydroelectric capacity marketed without its share of energy expected to be available in an average year. As explained by ElectriCities, to make use of capacity without energy, a utility with other generation resources uses the hydro facility, producing energy with water allocated to another entity, and then "repays" that other entity with electric energy from its other sources of generation. Typically, this allows a utility to use the hydroelectric capacity on peak while repaying the energy at non-peak periods with base load generation. *Id.*

97. Power Marketing Policy, Georgia-Alabama System of Projects, 45 Fed. Reg. 65,140, 65,142 (1980).

98. ElectriCities of North Carolina, Inc. v. Southeastern Power Administration, No. C-C-85-384-P, slip op. at 11 (W.D.N.C. Oct. 30, 1985).

99. *Id.*

100. Pelz, *supra* note 65 at Table 3.

101. Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., No. W84CA101 (W.D. Tex Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986).

102. Pelz, *supra* note 65, at pp. 16, 33.

103. 42 U.S.C.A. §§ 7101 *et seq.* (1983 & Supp. 1985).

104. *See, e.g.*, explanatory statement by SEPA in its Power Marketing Policy, Georgia-Alabama System, 45 Fed. Reg. 65,140 (1980).

105. *See* June 20, 1956 letter from Assistant Secretary of Interior Fred G. Aandahl in response to an inquiry from the Chairman of the House Subcommittee on Public Works and Resources.

tomers' needs.[106] Public participation in planning, although on an informal basis, was a key element of each agency's program.[107]

In the Department of Energy Organization Act (DOEOA),[108] Congress extended the notice and comment rulemaking requirements of the Administrative Procedure Act[109] to PMA allocation proceedings.[110] In addition, the DOEOA requires the publication of a proposed "rule, regulation or order" in the Federal Register[111] and requires the agency to use "other effective means of publicity" to notify affected persons of the rule.[112] The public notices must include "a statement of the research, analysis, and other available information in support of the need for, and the probable effect of, any such proposed rule, regulation or order."[113] The DOEOA further supplements the Administrative Procedure Act by requiring an opportunity for oral presentations if the order is likely "to have a substantial impact on the nation's economy or large numbers of individuals or businesses," and requiring that a transcript of the oral proceeding be kept.[114] The DOEOA also requires that a final rule be accompanied by a written explanation responding to the major comments, criticisms, and alternatives offered during the comment period.[115]

A number of these notice and comment procedures have now been utilized by the PMA's to allocate power from the projects subject to their responsibility. Southwestern conducted a proceeding in 1979 and 1980 for the allocation of all power becoming available from its projects from 1980 through 1988.[116] Bonneville conducts public proceedings to carry out its marketing responsibility under the Pacific Northwest Power Act.[117] SEPA conducted separate proceedings for each of its "systems".[118] Western also has allocated by groups of projects.[119] While some of the PMA's specify the quantity of power to be allocated to each customer in the Federal Register notices,[120] others merely indicate the formula

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106. *See* Memorandum, Director, Office of Power Marketing Coordination, "Power Allocation Policy — Past Allocation Practices," (June 12, 1979).

107. *Id.* at Summation, p. 1.

108. 42 U.S.C.A. §§ 7101 *et seq.* (1983 & Supp. 1985).

109. 5 U.S.C.A. §§ 551 *et seq.* (1977 & Supp. 1985).

110. *See* 42 U.S.C.A. §§ 7191(a)(1), 7191(b)(3) (1983). However, SEPA began its development of an allocation procedure as early as 1977, and published its Final Procedure for Public Participation in the Formulation of Marketing Policy on July 6, 1978. *See* 43 Fed. Reg. 29,186.

111. 42 U.S.C.A. § 7191(b)(1) (1983). Power marketing policies have been referred to by courts as agency "rules." *See, e.g.*, City of South Sioux City v. Western Area Power Admin., No. CV-82-L-107, slip op. at 5-6 (D. Neb. Jan. 31, 1983); ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. 82-888-CIV-5, slip op. at 12 (E.D.N.C. June 27, 1983).

112. 42 U.S.C.A. § 7191(b)(1) (1983).

113. *Id.*

114. *Id.* § 7191(c).

115. *Id.* § 7191(d).

116. *E.g.*, Final Power Allocations (1980-1988), 45 Fed. Reg. 19,032 (1980).

117. Final Action Concerning Power Sales and Residential Contracts Required by Pacific Northwest Electric Power Planning and Conservation Act, 46 Fed. Reg. 44,380 (1981).

118. Power Marketing Policy, Georgia - Alabama System of Projects, 45 Fed. Reg. 65,140 (1980); Power Marketing Policy, Cumberland System of Projects, 48 Fed. Reg. 11,148 (1983); Power Marketing Policy, Kerr Philpott System of Projects, 50 Fed. Reg. 30,751 (1985).

119. *See, e.g.*, Post-1989 General Power Marketing and Allocation Criteria, 51 Fed. Reg. 4844 (1986).

120. *See, e.g.*, Southwestern Power Administration, Final Power Allocations (1980-1988), 45 Fed.

to be used to determine each customer's allocation.[121]

After the allocation decisions are made, contracts are negotiated with the individual preference customers and, if necessary (as in SEPA's case), with any utilities providing essential services such as transmission and scheduling of power. No court has ever held that the contract practices of the PMA's are within the purview of the public notice and comment procedures, although a claim that such a procedure is required was made in the *Brazos*[122] lawsuit.

III. The Looming Political and Legislative Battle—Can Preference Survive?

A. *Preference Challenged at Every Turn*

Since the inception of the federal power marketing programs, the laws establishing preference rights have periodically come under attack by a variety of interests seeking to secure greater access to this valuable source of power.[123] In recent years, a number of measures have been proposed to Congress that would eliminate the benefits of the preference laws for PMA customers.[124] To date, such measures have been defeated, although renewed attempts are expected in the coming months.

Additionally, a vigorous campaign to alter the current laws governing the relicensing of hydroelectric projects under Part I of the Federal Power Act[125] has been undertaken by private utility interests.[126] At the time of this writing, it appears that the effort to eliminate preference in hydroelectric relicensing proceedings is succeeding. The status and background of these challenges to the

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Reg. 19,032 at 19,037-41 (1980).

121. *See, e.g.*, Southeastern Power Administration, Power Marketing Policy, Georgia - Alabama System of Projects, 45 Fed. Reg. 65,140 at 65,143-44 (1980).

122. No. W84CA101 (W.D. Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986). A similar allegation was raised in ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. C-C-384-P (W.D.N.C. Oct. 30, 1985), dismissed by the court on grounds of lack of standing. *See* Complaint ¶¶ 43-44.

123. For example, in the 1950's, the House Committee on Government Operations conducted an investigation into the acts and policies of the Department of the Interior and the Rural Electrification Administration with regard to municipal electric systems and rural electric cooperatives. The Committee believed that the agencies were "pursuing a course of administrative conduct designed to undermine and destroy the objectives of the laws enacted by Congress to establish and govern the Federal power program," and concluded that the Administration has followed a "carefully devised plan . . . to coerce these nonprofit community power systems into dependence upon the privately owned power companies in their area." H.R. Rep. No. 2279, 84th Cong. 2d Sess. (1956).

124. These measures include a proposal by Rep. Boxer to have the power produced at the Hoover Dam sold at market rates (*see* 130 Cong. Rec. H 3319 (1984)); and a recommendation in President Reagan's fiscal year 1986 budget proposals that the rates charged by the PMA's to preference customers be increased. *See* Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1986, at p. 2-13.

125. 16 U.S.C.A. §§ 791-823 (1985).

126. *See* S. Rep. No. 161, 99th Cong., 1st Sess. (1985); and Opening Statement of the Honorable Edward J. Markey at the mark-up at H.R. 44, 99th Cong., 1st Sess. (1985) before the House Subcommittee on Energy Conservation and Power, Nov. 21, 1985. *See also* Edison Electric Institute, In the Public Interest: The Fair and Equitable Relicensing of Hydroelectric Projects (1985) (available from Edison Electric Institute, Washington, D.C.); Poirier & Hardin, *Public Preference and the Relicensing of Hydroelectric Projects*, 21 Harv. J. on Legis. 459 (1984).

preference laws are discussed in this section.

1. Relicensing of Privately-Developed Hydroelectric Projects

Pursuant to Part I of the Federal Power Act, licenses may be granted to public or private interests to develop hydroelectric projects on waterways under federal jurisdiction.[127] Beginning in the 1920s, a large number of such projects was licensed to privately-owned utilities since public entities lacked the ability to undertake the development. As licenses are generally granted for a 50-year term,[128] many of these projects are now or soon will be subject to relicensing proceedings before the Federal Energy Regulatory Commission (FERC).[129]

In relicensing proceedings, the Federal Power Act requires the FERC to:

> give preference to applications . . . by States and municipalities, provided the plans for the same are deemed by the Commission equally well-adapted, or shall within a reasonable time to be fixed by the Commission be made equally well-adapted, to conserve and utilize in the public interest the water resources of the region. . . .[130]

In the *City of Bountiful*[131] proceeding before the FERC in 1980, the question was raised whether this preference provision would allow municipalities to prevail over all license applicants, including the original licensee. The FERC held (and the Eleventh Circuit affirmed) that the proper construction of the statute was to provide municipal applicants with such a preference.[132]

Two years later, however, the Commission changed its mind in *Pacific Power & Light Co.*[133] (the "*Merwin*" decision). Stating that it was not bound by its former "erroneous" interpretation in *Bountiful*, the Commission held that municipalities may prevail only over applicants other than the original licensee.[134]

On October 22, 1985, the U.S. Court of Appeals for the D.C. Circuit issued a strongly worded opinion reversing the Commission's "*Merwin*" decision.[135] Finding "disturbing . . . the Commission's suggestion that it is free to reinterpret statues in any way it pleases without regard for precedent and equally disturbing the hint that the Commission does not think itself in any way bound by actions of prior Commissions,"[136] the court held that the doc-

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127. 16 U.S.C.A. § 797(e).

128. "Licenses . . . shall be issued for a period not exceeding fifty years." *Id.* § 799.

129. *Id.* § 797(e).

130. *Id.* § 800. (For convenience, the preference for States and municipalities shall be referred to hereinafter as a "municipal" preference.) This preference applies only if the federal government has decided not to take over the project itself. *See id.* §§ 807-808.

131. 11 F.E.R.C. ¶ 61,336, *aff'd sub nom.*, Alabama Power Co. v. FERC, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983).

132. 11 F.E.R.C. at 61,735.

133. 25 F.E.R.C. ¶ 61,052 (1983), *rev'd*, Clark-Cowlitz Joint Operating Agency v. FERC, 775 F.2d 366 (D.C. Cir. 1985). In the interim between the two proceedings, the composition of the Commission had substantially changed. 775 F.2d at 369. The "new" Commission also attempted to have the *Bountiful* case remanded to it by the Supreme Court so that it could reverse the previous Commission's position. *Id.* at 370. Instead, the Supreme Court denied *certiorari*. 463 U.S. 1230 (1983).

134. 25 F.E.R.C. at 61,176-77.

135. Clark-Cowlitz Joint Operating Agency v. FERC, 775 F.2d 366 (D.C. Cir. 1985), *reh'g granted en banc*, No. 83-2231 (D.C. Cir. Jan. 16, 1986).

136. *Id.* at 375-76.

trines of *res judicata* and collateral estoppel prohibit reversal of the *Bountiful* decision.[137]

The court also conducted its own review of the legislative history of the Federal Power Act preference provision and concluded that the history "removes any shadow of doubt as to what Congress wanted to happen when relicensing time arrived. The municipal preference applies to all relicensing including those involving an incumbent licensee."[138] On January 16, 1986, the full court granted rehearing *en banc*; accordingly, the final outcome of this dispute is, at the time of this writing, unresolved.

While the court appeal of the Commission's "*Merwin*" decision was pending, legislation was introduced in Congress seeking to eliminate the municipal preference in hydro relicensing proceedings, substituting therefor a preference for the original licensee.[139] Proponents of the legislation asserted that a clarification of current law was needed.[140] However, the primary argument advanced by those favoring a reversal of the municipal preference has been a claim that the private licensee's consumers would suffer severe economic impact if the projects change hands.[141]

In reply, preference interests have argued that there is no ambiguity in current law on the issue of municipal preference in relicensing (as evidenced now by the appellate decision in "*Merwin*"), and that, in reality, few of the privately-held licenses would change hands.[142] Additionally, claims of economic harm to consumers are said to have been greatly exaggerated, as hydroelectric capacity represents a relatively small percentage of the licensees' total capacity.[143] Preference advocates also have maintained that any harm to the private licensee's consumers would be offset by the benefit to the consumers of the municipal utility taking over the license.[144]

The Senate version of a bill eliminating municipal preference in hydroelectric relicensing proceedings[145] was passed by the Committee on Energy and Natural Resources by a vote of 16-1 on October 2, 1985.[146] Senate Bill 426 would amend Section 7(a) of the Federal Power Act to provide that municipal

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137. *Id.*

138. *Id.* at 379. The court cited legislative history clearly demonstrating that the private utilities were aware that the legislation contemplated the projects could be taken away from them at the end of the 50-year period. *Id.* at 377-79.

139. H.R. 4402, 98th Cong., 1st Sess. (1983).

140. *See, e.g. Hearings on S. 426 Before the Subcomm. on Water and Power of the Senate Comm. on Energy and Natural Resources*, 99th Cong., 1st Sess. 72 (1985) (statement of Sen. Jeremiah Denton).

141. *Id.* at 77.

142. *Id.* at 413 (statement of Alex Radin, Executive Director of American Public Power Association). Indeed, of the 130 relicensing proceedings considered by FERC as of June, 1985, only 11 involved competing applications by municipalities. *Id.* at 417. *See also* S. REP. NO. 161, 99th Cong., 1st Sess. 161-65 (1985).

143. *See, e.g., Hearings on S. 1219 Before the Subcomm. on Water and Power of the Senate Comm. on Energy and Natural Resources*, 99th Cong., 1st Sess. 676 (1985) (testimony of Gordon Hoyt, General Manager Dept. of Public Utilities, Anaheim, Cal.).

144. *See Clark-Cowlitz*, 775 F.2d at 381.

145. S. 426, 99th Cong., 1st Sess. (1985).

146. S. REP. NO. 161, 99th Cong., 1st Sess. 7 (1985). However, on November 22, 1985, after the issuance of the D.C. Circuit's "*Merwin*" decision, 12 Senators sent a letter to Senate Majority Leader Robert Dole, stating their intent to oppose S.426 unless it was modified to accomodate concerns of public power interests.

preference would not apply in relicensing proceedings.[147] Section 15(a) of the Federal Power Act also would be amended so that the existing licensee would be granted the renewal license unless the Commission determined that the plans of another applicant are "better adapted to serve the public interest."[148] In making this determination, the Commission would be required to consider, *inter alia*:

> the relative economic impact upon customers served by each applicant upon the failure of such applicant to receive the license, including an assessment of the economic impact upon the customers of an applicant that is the existing licensee that would result from the difference between the compensation to be paid under subsection (c) of this section and the cost of replacement power. . .[149]

As there would always be some negative economic impact on the original licensee's customers, municipal applicants would have little hope of prevailing in a relicensing proceeding. Perpetual use of the resource by the original licensee would be assured.

The House version of the relicensing legislation[150] was approved by the Energy and Commerce Committee on February 6, 1986. Although the original bill echoed the Senate version, the legislation as passed by the House committee would render the relicensing process competitively neutral, favoring neither the original licensee nor municipal applicants.[151] Additionally, the bill "grandfathers" the proceeding pending before the FERC involving the Merwin Dam since sufficient members of the committee believed that a change in the law should not affect that proceeding, unless adequate compensation is provided to those applicants. Attempts to "grandfather" all pending hydroelectric relicensing proceedings have not met with success.[152]

In light of the relatively minor impact that passage of this legislation would have on existing hydroelectric projects (*i.e.*, few licenses are expected to be challenged by municipal applicants), the amount of controversy generated by the relicensing proposals is staggering. Privately-owned utilities allegedly have spent millions of dollars in support of their lobbying efforts.[153] Public power interests and rural electric cooperatives, while lacking the funds to match these expenditures, also have directed significant efforts to defeat the legislation or neutralize its impact. The reason for this unusual level of interest in legislation of purportedly modest import is that both sides view the relicensing legislation as the forerunner of a far more serious issue: the potential elimination of what

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147. S. 426, § 2.

148. *Id.* § 4.

149. *Id.*

150. H.R. 44, 99th Cong., 1st Sess. (1985).

151. *Id.* § 4.

152. Public power interests and rural electric cooperatives, while opposing S. 426 and H.R. 44, lobbied hard for a number of amendments that would make the legislation more palatable if passed by Congress. These included a proposal that licensees be required to "wheel" (*i.e.*, transmit) power over any of their facilities as a condition of the license grant; a requirement that the FERC conduct an antitrust review of the licensee's operations and condition the license to remedy any anticompetitive behavior found; and a proposal that the law governing new licensing proceedings be amended to include a preference for rural electric cooperatives. While these proposals slowed down the movement of the hydroelectric relicensing legislation through Congress, none have received sufficient support for passage.

153. *National Journal*, Jan. 25, 1986, p. 215.

has often been referred to as the preference "birthright"[154] granted to public bodies and rural electric cooperatives in the marketing of power by the federal government.

2. The Threat to Marketing Preference

Although the preference granted to municipalities, other public entities and cooperatives in federal power marketing is entirely distinct from the municipal preference in hydroelectric relicensing proceedings, both reflect the principle that the nation's water resources are a public resource that should remain in public hands wherever possible. Thus, it is feared that a reversal of the municipal preference in relicensing through passage of pending legislation would signal Congressional abandonment of the preference principle, opening the door to an attack on the preference in federal power marketing. At least one utility, Utah Power & Light Co., has publicly indicated its intent to wage war on preference marketing.[155]

Preference interests have responded to this threat with public relations campaigns of their own. In 1984, the APPA initiated a million dollar task force, supported by contributions from its members, for the purpose of increasing public awareness of the significance and purpose of the preference laws.[156] The APPA and NRECA have planned regional programs for preference customers and consumers beginning in the spring of 1986. The aim of this campaign is to counter the massive effort already initiated by many private utility companies and their consumers.[157] Extensive involvement by a broad cross-section of consumers is expected on both sides of this fight.

3. The Privatization Proposal

The most immediate legislative threat to preference interests is contained in the President's fiscal year 1987 budget proposals. The budget documents recommend that the federal facilities from which the PMA's market power be sold off as a revenue-raising measure.[158] The stated rationale for the sale is that competition by the government with the private sector is inappropriate and inefficient,[159] although the budget documents also assert the PMA's have "rou-

154. *See* Brief of Plaintiffs in Error to the Supreme Court of the State of Colorado, Western Colo. Power Co. v. Public Utils. Comm'n of Colo., No. 21136 at 16, 20-21 (Colo. filed April 15, 1964); Colorado River Energy Distributors Association, Defending the Public's Right to Public Power: A Response of Consumer-Owned Utilities to Utah Power and Light's Application for Colorado River Storage Project Power, 1 (Oct. 1983).

155. *See* PUB. POWER WEEKLY, Sept. 23, 1985, at 3.

156. *See* PUB. POWER WEEKLY, Nov. 12, 1984, at 5.

157. *See* PUB. POWER WEEKLY, Dec. 16, 1985, at 2.

158. The government would retain ownership and control over the dams and the authority to regulate streamflow. Only the transmission and power generation facilities would be sold. Executive Office of the President, Office of Management and Budget, Major Policy Initiatives, Fiscal Year 1987, at p. 26. A separate measure to sell Bonneville's facilities to a regional authority has been proposed by Rep. Weaver of Oregon. *See* H.R. 3215, 99th Cong. 1st Sess. (1985).

159. Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1987, at 3-12 - 3-13.

tinely failed to make planned repayments" of the federal investment.[160]

The President's budget does not contain a specific plan for the sale of the PMA facilities, other than an intent to "privatize" Bonneville and Southwestern by 1988 and the other three PMA's by 1991.[161] The Administration plans to pursue privatization:

> through an open, competitive process working with the congressional committees, State and local officials, current customers and all interested parties. The objectives of the process are to obtain a fair return to the Federal Government while recognizing and providing appropriate protection for the interests of customers and employees, and to promote efficient use of scarce and valuable energy resources.[162]

While no sale price for the federal power facilities is stated in the budget documents, many preference customers fear that in order to raise the greatest revenues from the sale, the facilities would be sold to the highest bidders, which would in most instances be private utilities due to their greater financial resources. Although the sale of these facilities has the potential of raising sixteen billion dollars in federal revenues,[163] it can be predicted that opponents of the measure will produce figures showing a corresponding loss in tax revenues and increased unemployment costs, owing to the higher electric rates that would be incurred in many regions of the country.[164] Additionally, many municipal utilities and rural electric cooperatives that traditionally have relied upon blending federal power with more expensive sources of generation would find themselves at a competitive disadvantage with respect to adjacent private utilities. The outcry from beneficiaries of the federal power marketing programs is expected to be enormous.[165]

Privatization of the federal power facilities was earlier proposed by the President's Private Sector Survey on Cost Control (often referred to as the "Grace Commission"). This commission, chaired by W.R. Grace & Co. Presi-

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160. Executive Office of the President, Office of Management and Budget, Major Policy Initiatives, Fiscal Year 1987, at 25. The primary example cited in support of this statement is Bonneville.

161. Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1987, at 5-35.

162. *Id.*

163. *See* NEWSWEEK, Dec. 30, 1985, at 18. The Administration asserts that the government's power marketing programs are subsidized by federal taxpayers. Executive Office of the President, Office of Management and Budget, Major Policy Initiatives, Fiscal Year 1987, at 26. Preference customers have countered that they (and their consumers) are charged rates which repay with interest (albeit at favorable levels) the federal investment in the facilities and the costs of operation and maintenance. Thus, while the sale of the PMA facilities may provide an immediate infusion of revenues, ultimately revenues will be lost. As asserted by APPA Executive Director Alex Radin, the plan is equivalent to "selling the hen that lays the eggs." PUB. POWER WEEKLY, Feb. 10, 1986, at 2.

164. Such arguments were raised when President Reagan's fiscal year 1986 budget proposed an increase in PMA interest rates, discussed *infra*.

165. Additionally, several Congressmen have already voiced opposition to the plan. *See* CONG. REC. at E247-248 (daily ed. Feb. 5, 1986) (remarks of Rep. Daschle of South Dakota in which he stated that the proposal is "clearly short-sighted" since the federal power facilities become more valuable to the government each year as the debt is repaid. Additionally, the PMA's "actually return revenue to the Federal Government every single year, helping to reduce the Federal deficit." Congressman Daschle asserted that the sale would have a "devasting economic effect on consumers of Federal power.") In a speech to the APPA, Rep. Markey of Massachusetts also questioned the wisdom of the proposal, stating it was "an idea whose time has not come and whose time may never come." PUB. POWER WEEKLY, Feb. 10, 1986, at 4.

dent J. Peter Grace, was appointed by President Reagan to study ways of increasing efficiency and reducing costs in the federal government.[166] The commission's task force on privatization recommended that the government "begin immediately an orderly process of disengagement from participation in the commercial enterprise of electric power marketing,"[167] and ranked the sale of these federal assets as its highest priority.[168]

The Grace Commission's privatization proposal has been criticized for overstating potential cost savings and ignoring political realities.[169] In a report to the Senate Committee on Governmental Affairs, the General Accounting Office (GAO) pointed out that many federal hydroelectric facilities are multipurpose projects, and that "[d]etailed negotiations and comprehensive contracts would be required to ensure that all interests are adequately protected."[170] The GAO also questioned the accuracy of many of the Commission's cost savings estimates, and saw major political obstacles in implementing the recommendations.[171] Despite these drawbacks, the Administration is attempting to implement the privatization concept as part of its current budget proposal.

4. Increasing PMA Rates

One proposal that has appeared in several forms and at various times before Congress has been the suggestion that the rates charged by PMA's to preference customers, by law restricted to repayment of the federal investment in facilities,[172] be raised. For example, during debate over the Hoover Power Plant Act of 1984, Representative Boxer offered an amendment which would have required the power produced at the Hoover Dam to be sold at market rates.[173] Arguing against the amendment, Rep. Udall stated that it would "destroy 50 years of public power development, 50 years of having hydropower play a part in our national energy mix, 50 years of the idea that cities and local communities that want to own their electrical distribution system can do so."[174] The Boxer Amendment, now frequently referred to by preference power interests as the "Boxer Rebellion", was defeated.[175]

In a variation on this theme, President Reagan's fiscal year 1986 budget

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166. President's Private Sector Survey on Cost Control, A Report to the President, Vol. I, at I-1.

167. President's Private Sector Survey on Cost Control, Report on Privatization, at 52.

168. *Id.* at 12. The commission also recommended that the government charge a "user fee" for the use of falling water at water resource projects, and that all future hydroelectric power development be financed from non-federal sources. *Id.* at 53. The task force which reviewed the Department of Energy programs further recommended that PMA ratemaking procedures be altered to assure full cost recovery and repayment of the federal investment in the shortest reasonable time, including the use of straight-line amortization of the federal investment, and adjustment of interest rates to current levels. *See* President's Private Sector Survey on Cost Control, Report on the Department of Energy, the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission, at 137-38.

169. Washington Post, Jan. 29, 1985, at A-3, col. 1.

170. G.A.O., Report to the Chairman, Senate Committee on Governmental Affairs, Feb. 19, 1985, Vol. II, at 657.

171. *Id.* at 658.

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

173. 130 CONG. REC. H3319 (1984).

174. *Id.* at H3311.

175. *Id.* at H3333.

proposed that the interest which is charged to PMA customers as part of the amortized cost of the federal investment be raised to current levels, and that fixed schedules for repayment be established.[176] The proposal encountered severe opposition, particularly from the Pacific Northwest region, and was eventually defeated from the congressionally-approved budget.

Under current practice, PMA customers are charged interest rates generally pegged to the cost of borrowing at the time of construction of the project. In some instances, for example, projects governed by the Flood Control Act of 1944,[177] no interest rate is prescribed by law; the administrative practice had been to charge the weighted average rate of interest paid on all money borrowed by the government during construction of the project.[178] Other statutes governing federal electric projects have prescribed a particular rate, either by stating a minimum rate to be applied[179] or by reference to a formula.[180] For projects constructed from the mid-1930s through the mid-1960s, the interest rate rarely exceeded two and one-half to three percent.[181] By Department of Energy order, the interest rate to be charged for all new projects is equivalent to the average yield on long-term government bonds.[182]

Once established, the interest rates charged to the PMA customers for a particular project have not been altered.[183] However, with the exception of the projects governed by statutes prescribing the use of a specific or fomulary rate, there is no statutory bar to an administrative adjustment of the interest rates.[184] In any event, Congress could pass legislation changing current law and administrative practice.

The interest rate increase proposed in the fiscal year 1986 budget plan generated strong opposition from PMA customers, particularly those purchasing power from the Bonneville Power Administration. Raising the interest rates to current levels would have increased PMA rates in the Pacific Northwest by between fifty and eighty percent.[185] Such massive increases were believed to have the potential for shutting down that region's aluminum industry.[186] The

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176. Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1986, at 2-13. Under current practice, straight-line amortization of the investment is not required. Although repayment periods are set at 50 years, PMA administrators have flexibility to defer repayment in low water years or times of poor economic conditions.

177. 16 U.S.C.A. §825s (1985).

178. Department of Energy, Office of Power Marketing Coordination, Law and Practice on Amortization Period and Interest Rate for Amortization of Federal Power Investment, A Report to the Office of Management and Budget, at 13.

179. *E.g.*, Reclamation Project Act of 1939, 43 U.S.C.A. §485h(c) (not less than 3%).

180. *E.g.*, Colorado River Storage Project Act, 43 U.S.C.A. § 620d(f) (1964) (interest rate to be based on average interest rate payable on long-term government bonds).

181. Law and Practice on Amortization Period and Interest Rates, *supra* note 178, at 2-3 and Attachment J.

182. Department of Energy Order No. RA6120.2 (Sept. 20, 1979) *as amended*, 48 Fed. Reg. 45,827 (1983).

183. Law and Practice on Amortization Period and Interest Rates, *supra* note 178, at 4.

184. The Department of Energy Office of Power Marketing Coordination suggests that a unilateral administrative change to this long-standing practice could not withstand a court challenge. *Id.* at 15-16.

185. ELEC. UTIL. WEEK, Jan. 14, 1985, at 5. Other estimates ranged to a purported 190% increase. *See* PUB. POWER WEEKLY, Feb. 25, 1985, at 4.

186. *Appropriations Related to Northwest Power: Hearings before Subcomm. on Energy & Water*

additional revenues allegedly would be offset by an increase in unemployment rates and loss of tax revenues and would jeopardize repayment of the federal investment in power facilities.[187]

Alteration of the PMA repayment programs to require straight-line amortization has been proposed anew in the Administration's Fiscal Year 1987 budget plan[188] and was raised during House debate over the Water Resources Conservation, Development, and Infrastructure Approvement and Rehabilitation Act of 1985.[189] Rep. Petri offered an amendment to this omnibus water resources bill that would have required repayment on Corps of Engineers projects to be conducted under a straight-line amortization schedule beginning in fiscal year 1988.[190] Vigorous opposition to the measure was voiced by representatives from Oregon, Washington, and California, where the impact of the proposal was expected to be the greatest. Representative Petri withdrew the amendment upon Representative Miller's promise that he would ask the Interior and Insular Affairs Water and Power Subcommittee to conduct hearings on the matter.[191]

B. Should Preference Survive?

The battle cry heard most frequently when disputes arise over the continued existence of the preference laws is that the preference "birthright" is an outmoded concept, utilized originally to encourage the development of utility systems in underserved rural areas and small towns, and is no longer viable today. Many privately-owned utilities and their supporters argue that all consumers of electric power, not just those served by municipal utilities and rural electric cooperatives, should benefit from the nation's water resources.[192] In at

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Development of the House Comm. on Appropriations, 99th Cong., 1st Sess. 3 (1985) (Testimony of Representative Jim Weaver, Chairman, Subcomm. on General Oversight, Northwest Power and Forest Management of the House Comm. on Interior and Insular Affairs).

187. *Energy and Water Development Appropriations for 1986: Hearings before Subcomm. on Energy and Water Development of the House Comm. on Appropriations*, 99th Cong., 1st Sess. 3090-91 (1985) (Joint Paper prepared on behalf of Public Power Council and the Direct Service Industries); *DOE's Fiscal Year 1986 Budget: Hearings before Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 30-32 (1985) (Statement of Representative Ron Wyden, Member Subcomm. on Energy Conservation and Power).

188. Executive Office of the President, Office of Management and Budget, Appendix to the Budget for Fiscal Year 1987, at I-J22 - I-J32. This measure is expected to generate additional revenues (with a corresponding increase in rates) of $737,000 from the Alaska Power Administration, $139,000,000 from Bonneville, $12,772,000 from SEPA, and $9,200,000 from Southwestern in 1987. Western is exempted from the proposal since its repayment of debt already meets the straight-line amortization criteria. *Id.*

189. H.R. 6, 99th Cong., 1st Sess. (1985).

190. 131 CONG. REC. H9815 (Nov. 6, 1985).

191. *Id.* at H9821-22.

192. One highly publicized presentation by interests opposed to the preference clause is contained in the April 15, 1983 comments of Utah Power & Light Co. in response to a request by the Western Area Power Administration for applicant profile data for development of the post-1989 Marketing Plan for Colorado River Storage Project power, 48 Fed. Reg. 5303 (1983). UP&L asserted that it was unconstitutional for Western to refuse to sell power to public bodies lacking an electric distribution system and proposed that it be permitted to act as the agent for such cities in the distribution of preference power to consumers. This view was rejected by Western. *See* Revised Proposed General Power Marketing Criteria and Allocation Criteria for Salt Lake City Area Projects, 49 Fed. Reg. 34,900 (1984). *See also* New York Times, Aug. 3, 1981, at

least one instance, this grant of benefits to certain electric consumers was alleged to be unconstitutional, on the grounds that it fails to provide equal protection of the laws to all citizens.[193]

Opponents of the preference concept further argue that power sold by the PMA's is unfairly subsidized[194] and that private utilities' rates are adequately regulated by federal, state and local commissions so there is little need for the "yardstick competition"[195] created by the existence of not-for-profit utilities. Additionally, private utilities have contended that some preference entities unfairly engage in the brokering of preference power by reselling it at a profit to private utilities.[196]

In counterargument,[197] preference advocates have taken the position that Congress rarely has permitted the use of public resources for private gain, unless a much larger public purpose is to be served.[198] It is also contended that there is little reason to allow privately-owned utilities and their shareholders to benefit from the use of the nation's power resources, where the electric power generated at federal projects can be distributed efficiently by public and nonprofit entities.[199] Additionally, preference customers point out that their rates are not in fact subsidized, since the federal investment in the facilities is returned to the federal treasury by PMA customers.

Advocates of the preference principle also point out that the fact that private utilities are subjected to more regulation today than at the time many of the preference laws were passed is not a persuasive reason for elimination of the beneficial effects of competition between preference utilities and private companies. Regulation is claimed to be an "imperfect substitute" for competition.[200] It is further argued that many publicly-owned utilities and rural electric cooperatives are able to compete with utilities only by virtue of having federal preference power to mix with more expensive sources of generation and

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193. *Id.*

194. Executive Office of the President, Office of Management and Budget, Major Policy Initiatives, Fiscal Year 1987, at 26.

195. *See* L.C. WHITE, THE PUBLIC'S FIRST RIGHT TO FEDERALLY GENERATED POWER: AN ANALYSIS OF THE PREFERENCE CLAUSE, July, 1985 at 7 (available from the American Public Power Association, Washington, D.C.) [hereinafter cited as L.C. WHITE].

196. *See* Wall Street Transcript, TWST CEO Forum: Pacific Gas & Electric Company, Dec. 1985; *see also* Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist., 104 S. Ct. 2472, 2479 n. 7 (1984).

197. While the authors have attempted to present a balanced discussion of this issue, it should be emphasized that the authors' private sentiments are strongly on the side of the survival of the preference laws.

198. L. C. WHITE *supra* note 195 at 22.

199. The sentiments in favor of public use of public resources run strong, as evidenced by the colorful statements of Congressman Weideman of Michigan during a debate over the Tennesee Valley Authority Act:

> I am also interested in removing the tentacles of the Power Trust from the natural resources of the country; and knowing this to be a step in that direction, I shall vote for it. . . .
>
> I am not so interested in what becomes of the Alabama Power Co. or any other power company. . . . We have been under the control and domination of the Power Trust . . . for too long a time. Now is the time to remove those shackles of control from our Government so that the people will benefit from the operation of Muscle Shoals and other natural resources, rather than a few coupon clippers on Wall Street.

77 CONG. REC. 2280 (1933).

200. L.C. WHITE, *supra* note 195 at 25.

that elimination of the preference laws would undermine the viability of many of these utilities, thereby destroying the benefits of the side-by-side competition between public and private utilities that has existed in many regions of the country for the past fifty years.

An additional argument advanced in favor of the continuation of the preference principle is that preference power is an extremely limited resource that has value only when marketed in meaningful quantities in order to have some impact on preference customer rates.[201] Thus, it has been estimated that if all federal power had been marketed instead to private utilities, total electric operating expenses of the private companies would be reduced by only one or two percent,[202] a relatively minute amount, considering the economic disruption that elimination of this presently successful federal program would engender.

Whether "preference" is now an anachronism or remains a viable concept in today's economy is an issue Congress is likely to face in the coming months in its consideration of the Fiscal Year 1987 Budget and other legislative measures affecting federal power marketing.

IV. PREFERENCE POWER ALLOCATION DISPUTES OF THE 1970's and 1980's

Legal disputes pertaining to the allocation of federal preference power have been no less hotly contested than the proposed legislative measures dealing with preference rights. There have been thirteen federal court decisions in preference lawsuits in the past two years alone.[203] Although each of these decisions has influenced general principles of federal power marketing, there also has been a regional significance that cannot be ignored: in many instances, the result reached by the court has turned on statutory directives overriding the preference clause[204] or the peculiarities of the power marketing program under scrutiny.[205] Thus, while certain trends in the legal framework for preference cases can be discerned, it must be emphasized that in each new preference dispute the particular factual setting and the pertinent implementing statute are of critical significance.[206]

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201. In 1980, the Southeastern Power Administration refused to expand the marketing territory for its Georgia-Alabama System of Projects since the addition of new customers would have unreasonably "diluted" the benefits of the preference allocations. *See* Final Power Marketing Policy for the Georgia-Alabama System of Projects, 45 Fed. Reg. 65,140 (1980), upheld in ElectriCities of N.C., Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985).

202. L.C. WHITE, *supra* note 195, at 33.

203. While the majority of these cases (*see supra* note 5) have involved disputes over the allocation of power by the PMA's, several have involved PMA ratemaking practices, discussed *infra*.

204. *E.g.*, City of Anaheim v. Duncan, 658 F.2d 1326 (9th Cir. 1981) (which held that the government lawfully contracted with private utilities for the sale of federal power when to do otherwise would have interfered with the reclamation purposes of the federal statute containing the preference clause).

205. *Compare* City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978) (finding a power sales "banking" arrangement between the government and a private utility to be inconsistent with the preference laws) *with* Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985) (holding that exchange arrangements with a private utility whereby power is received as payment for services are acceptable).

206. *See generally* Redman, *Preference and Other Clauses in Federal Power Marketing Acts*, 13 ENVTL. LAW 773 (1982).

Preference power lawsuits typically involve a number of highly charged competing interest groups: preference entities intent on securing or increasing their share of the federal power; existing customers striving to preserve the agency's programs so as to prevent any dilution of their own allocations; the PMA's, concerned with upholding the integrity of their marketing decisions; and private utility companies, which have appeared as defendants,[207] as defendant-intervenors,[208] and (in at least one instance) as a counter-claimant.[209] The parties to a preference power lawsuit can number into the hundreds,[210] and litigation has taken as long as eight years.[211] The issues, typically, are complex.

While the earliest known legal opinion involving a preference statute was issued in 1913,[212] preference litigation was sporadic until the 1970's when it sharply increased as federal power became more and more favorably priced in comparison to other traditional sources of generation. Many of the early preference cases examined the question of whether the preference clause applied to the particular sale of federal power at hand.[213] These decisions counsel that while preference customers must be given an opportunity to purchase federal power ahead of nonpreference customers, that "right" is not absolute, and there may be circumstances where the sale of power to a nonpreference entity better fulfills statutory objectives.[214]

More recent preference lawsuits have involved, to a large extent, internecine warfare among preference entities. Municipal utilities and electric cooperatives lacking federal power allocations or dissatisfied with the size of their

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207. *E.g.* Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). Also, in ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. C-C-85-384-P (W.D.N.C. Oct. 30, 1985), the Southern Company and its four operating subsidiaries were sued on a state law tort claim ancillary to the preference power dispute.

208. For example, in Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985) and Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., No. W84CA101 (W.D. Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986), Georgia Power Company and the Texas Utilities Electric Company, respectively, intervened in support of the existing programs.

209. Pacific Gas & Electric Company was permitted to intervene on a counterclaim for funds being held in escrow in City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

210. In ElectriCities of N.C., Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985), over 100 municipal and cooperative preference customers intervened, many acting on behalf of multiple parties (*e.g.*, the Municipal Electric Authority of Georgia, which is comprised of 47 political subdivisions of the state of Georgia that own and operate electrical distribution systems.) Additionally, the plaintiffs represented 54 cities and towns in North Carolina and seven towns in Virginia.

211. The Greenwood lawsuit was first filed in 1977. Partial summary judgment was rendered in 1981 (Greenwood Utils. Comm'n v. Schlesinger, 515 F. Supp. 653 (M.D.Ga. 1981)); the remainder of the case was declared moot by the trial court in 1983 (Greenwood Utils. Comm'n v. Edwards, No. 77-179-MAC (M.D.Ga. Oct. 21, 1983)); and the affirmance by the appellate court was issued in 1985. *See* Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985).

212. *See* Pacific Gas & Electric Co. - Validity of Contract, 30 Op. Att'y Gen. 197 (1913) (examining the validity of a contract for the "lease" of power by the government to Pacific Gas & Electric Company in light of the provisions of the Act of April 16, 1906, 34 Stat. 116, which directed a preference for "municipal purposes"). The Attorney General concluded that the contract with the company did not violate the preference provisions of the Act, particularly since at the time the contract was made there was no competing offer to lease the power for municipal purposes. *Id.* at 202-03. One of the earliest court opinions pertaining to a "preference" law is United States v. City and County of San Francisco, 310 U.S. 16 (1940), discussed *infra*.

213. The issue of the applicability of the preference clause is also presented in the more recent Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist., 104 S. Ct. 2472 (1984).

214. *E.g., id.*; *see also* City of Anaheim v. Duncan 658 F.2d 1326 (9th Cir. 1981).

allocations have attempted to secure greater access to this limited federal resource and in so doing have come directly into conflict with the interests of existing preference customers.[215] Virtually every federal court[216] faced with one of these internecine disputes has determined that it has no jurisdiction to review the substance of a PMA decision allocating power among preference customers.[217] Enroute to this determination, however, courts have been presented with, and have disposed of, a number of ancillary issues, such as whether a PMA must issue a power marketing policy within a specified period of time[218], which preference customers have standing to challenge a PMA's decisions,[219] and what remedies will be made available to a successful preference litigant.[220]

The issues presented by preference power litigants have become increasingly complex. A number of the more recent lawsuits against the PMAs have called into question the role of private utilities in the power marketing programs—particularly, in the transmission and scheduling of power for preference recipients,[221] and in the distribution of power to ultimate consumers.[222] Thus, courts are now being asked to determine the characteristics of a proper preference entity, *i.e.*, the nature and extent of the facilities and services preference customers must have available to qualify as preference power recipients.

A. Establishing the Preference "Right"

It is significant that the laws establishing the priority of public bodies and cooperatives to surplus power generated at federal reclamation and flood control projects are often no more than a "clause" in a larger statutory scheme.[223] Although the preference clause establishes the right of a preference entity to purchase power ahead of a nonpreference entity, courts are often reluctant to grant preference bodies an absolute right to federal power, particularly if to do so would disrupt existing power supply programs, disturb other uses of the

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215. *See, e.g.*, the three *ElectriCities* lawsuits, *supra* note 5. One of the more insightful observations regarding the in-fighting among preference customers over federal power allocations was provided by L. Clifford Adams, Jr., co-author of Adams, Vince & Robbins, *Federal Electric Preference Power Marketing in the 1980's: Developing Legal Trends*, 4 ENERGY L. J. (1983). Mr. Adams noted that from a customer's perspective, the only difference between a good marketing plan and a bad one is that a good plan makes preference power available to your system and a bad plan does not. *Id.* at 37.

216. The one known exception is the U.S. District Court for the Middle District of Georgia in Greenwood Utils. Comm'n v. Schlesinger, 515 F. Supp. 653 (M.D.Ga. 1981), whose opinion on this issue was reversed by the 11th Circuit in Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985).

217. *See* cases discussed in part B. of this section.

218. *E.g.*, ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. 84-625-CIV-5 (E.D.N.C. June 18, 1985), *vacated*, No. 85-1919 (4th Cir. Nov. 18, 1985).

219. *E.g.*, ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. C-C-85-284-P (W.D.N.C. Oct. 30, 1985).

220. *E.g.*, City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978); Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985).

221. *See, e.g.*, Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985); Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., No. W84CA101 (W.D. Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986).

222. *See, e.g.*, Power Auth. of N.Y. v. Municipal Elec. Utils. Ass'n of N.Y., No. 83-6584 JES (S.D.N.Y. filed Sept. 6, 1983).

223. *See* Redman, *Preference and Other Clauses in Federal Power Marketing Acts*, 13 ENVTL. LAW 773, 784 (1982).

project at which the power is generated, or conflict with other statutory purposes.

1. The *"Clark Hill"* Opinion

Interestingly, one of the most respected pronouncements on the subject of preference rights came not from the judiciary, but from the U.S. Attorney General. In the *Clark Hill* opinion,[224] which has been frequently quoted by federal and district appellate courts,[225] Attorney General Brownell was asked to determine the legality of the Secretary of Interior's plan for disposing of power from a federal hydroelectric project through a direct sale to private utilities. The Attorney General's opinion highlights the principle that preference rights are mandatory and cannot be circumvented through arrangements claimed to achieve the same effect.

In 1955, the Secretary of the Interior, through the Southeastern Power Administration, desired to sell power from the Clark Hill Reservoir Project to Georgia Power Company pursuant to a contract that would require the company to sell power to SEPA's preference customers at rates that would include the cost of "carrying, transforming and delivering the energy."[226] Georgia Power owned the only transmission lines to the project.[227] The Georgia Electric Membership Corporation (a rural electric cooperative) objected to the sale, requesting that it be sold the power at the point of generation.[228] The cooperative proposed to contract with Georgia Power for transmission of the power or to apply to the Federal Power Commission for a "wheeling" order if the company refused to contract with it.[229] The Attorney General determined that the proposed sale to Georgia Power in the face of the cooperative's offer would violate Section 5 of the Flood Control Act[230], stating:

> [W]hen the Secretary of the Interior has before him two competing offers to purchase power, one by a preference customer and the other by a non-preference customer, and the former does not have at the time the physical means to take and distribute the power, he must contract with the preference customer on condition that such customer will, within a reasonable time to be fixed by the Secretary, obtain the means for taking and delivering the power. If within the fixed period the preference customer does not do so, the Secretary is then free to contract with the non-preference customer.[231]

The Attorney General also suggested that the Secretary could contract with a

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224. Disposition of Surplus Power Generated at Clark Hill Reservoir Project, 41 Op. Att'y Gen. 236 (1955).

225. *See, e.g.*, City of Anaheim v. Duncan, 658 F.2d 1326 (9th Cir. 1981); City of Anaheim v. Kleppe, 590 F.2d 285 (9th Cir. 1978); City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978); Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

226. Clark Hill, 41 Op. Att'y Gen. at 238.

227. *Id.*

228. *Id.* at 239.

229. *Id.*

230. 16 U.S.C.A. § 825s.

231. 41 Op. Att'y Gen. at 243-44. In so ruling, the Attorney General looked to the provisions of other federal power statutes, such as the Bonneville Project Act, 16 U.S.C.A. Section 832c(a), and the Boulder Canyon Project Act, 43 U.S.C.A. Section 617d(c), which require "reasonable time" to be granted to public bodies and cooperatives to acquire electric distribution systems. *Id.* at 242-43.

private company if the contract contained adequate provisions enabling the Secretary to serve the preference customer in the event that it later developed the ability to take the power.[232]

In addition to asserting that the preference provisions of the Flood Control Act are "mandatory",[233] and that preference customers must be permitted reasonable time to acquire the ability to take the power, the Attorney General criticized the nature of the proposed arrangement with Georgia Power:

> Nor, in the circumstances here present, does the Secretary, in my judgment, discharge his statutory duty of giving a preference in "the sale" of power to public bodies and cooperatives by disposition to a private company under an arrangement whereby the latter obligates itself to sell an equivalent amount of power to preference customers to be designated by the Secretary.[234]

As a result of the Attorney General's opinion, SEPA entered into power sales contracts directly with its preference customers and entered into arrangements with Georgia Power Company to transmit and firm the allocations for the preference customers.[235]

2. *Arizona Power Pooling Association v. Morton*

The rights of preference customers arose anew in *Arizona Power Pooling Association v. Morton*,[236] which established in federal court the proposition that preference customers must be given the opportunity to purchase power ahead of nonpreference utilities. *Pooling Association* is also significant in that it held that the preference clause of the Reclamation Act of 1939[237] applies to government sales of thermal power resources, as well as hydroelectric power, and to interim power sales—issues not previously considered by the courts.

At stake in *Pooling Association* were sales of power for an approximate six year period from the Navajo project, a thermal generation facility. In 1968, the Secretary of Interior was authorized by the Colorado River Basin Project Act to develop the Central Arizona Valley Project to furnish water to parts of the West.[238] To meet the power needs of the Central Arizona Project, the Secretary acquired a share of the Navajo Project. Since the Central Arizona Project was not to become operational until 1980, but the Navajo Project was scheduled to begin operations in 1974, purchasers of the power were needed for the interim period.[239] The Secretary decided to contract with the public and

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232. *Id.* at 244.

233. *Id.*

234. *Id.*

235. Thirty years later, certain aspects of SEPA's contracts with Georgia Power and its sister utility companies in the Southern Company system came under attack in ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. C-C-85-384-P (W.D.N.C. Oct. 30, 1985).

236. 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). Author Vince represented the Pooling Association in this lawsuit.

237. 43 U.S.C.A. § 485h(c) (1964). The Colorado River Basin Project Act, 43 U.S.C.A. §§ 1501 *et seq.* (Supp. 1985), the authorizing statute for the government's involvement in the Navajo Project, incorporates by reference the provisions of the Reclamation Project Act. *See id.* § 1551.

238. *See* 43 U.S.C.A. §§1501 *et seq.* (Supp. 1985).

239. *Pooling Association*, 527 F.2d at 724.

private sponsors of Navajo, and with one additional investor-owned utility.[240] Despite the request of the Pooling Association[241] to purchase the power, the government refused to sell to it and refused to allow its representatives access to meetings where the disposition of the power was being discussed.[242]

In its reversal of the district court's refusal to review the Secretary's decision, the Ninth Circuit noted the mandatory nature of the preference clause, which "clearly calls for the Secretary to defer to the stated congressional objective of offering the government's excess power allotment to public entities first."[243] However, the Ninth Circuit did not order a sale of the power to the Pooling Association, since the preference clause was not the only statutory directive governing sale of power from the Navajo Project. The Secretary also was required to consider "overall project efficiency with respect to the ultimate goals of irrigation."[244] Thus, as cautioned by the court on rehearing, "neither the plaintiffs nor any other preference customer has an automatic entitlement to the excess power that will be available for disposition by the Secretary"; they only must be given the opportunity to compete for the purchase of that power.[245] On remand, one of the issues to have been determined was whether a sale to the excluded preference customers would have impaired the efficiency of the Central Arizona Project for irrigation purposes.[246] The matter was settled prior to reaching trial on the remanded issues by agreement of the private utilities to provide the Pooling Association with equivalent low cost power.

3. The *City of Anaheim* Cases

Sales of power from the Navajo Project were also at issue in the *City of Anaheim v. Kleppe* and *City of Anaheim v. Duncan*[247] cases. In *Anaheim*, the Ninth Circuit expanded on its earlier determination in *Pooling Association* that the preference "right" is not automatic. The court also revealed that it was willing to be sensitive to practical considerations, such as the ability of a preference customer to contract for power at the time it is offered for sale. *Anaheim*, due to its unique factual setting, represents one of the few instances in which preference "rights" were found to be inapplicable.

As indicated above, the Secretary of the Interior acquired a portion of the output of the Navajo Project to meet the power needs of the Central Arizona Project, a major irrigation facility. Power generated by the Navajo Project was to be available for sale by the government for a six-year period in advance of

240. *Id.*

241. The Association is a non-profit corporation comprised of three preference utilities, the Arizona Electric Power Cooperative, Electrical District Number Two, Pinal County, Arizona, and the City of Mesa, Arizona. *See* Pooling Association, 527 F.2d at 722.

242. *See* Adams, Vince & Robbins, *Federal Electric Preference Power Marketing in the 1980's - Developing Legal Trends*, 4 ENERGY L.J. 1, 12 (1983).

243. *Pooling Association*, 527 F.2d at 727.

244. *Id.*

245. *Id.* at 730.

246. *Id.* at 728.

247. City of Anaheim v. Kleppe, 590 F.2d 285 (9th Cir. 1978) (appeal of denial of preliminary injunction); and City of Anaheim v. Duncan, 658 F.2d 1326 (9th Cir. 1981) (appeal of grant of summary judgment for defendants.)

the completion of the Central Arizona Project. For a variety of reasons, the Secretary had only three months to secure commitments from purchasers for Navajo Project power.[248] Although the plaintiff Cities in *Anaheim* were aware of the impending sale, they did not offer to purchase power until three years after the Secretary had contracted with others (including nonpreference utilities) since they lacked transmission capability until that time.[249]

In *Anaheim v. Kleppe*,[250] the plaintiffs sought a preliminary injunction ordering the Secretary to sell to the Cities power which had already been contracted for sale to private utilities. The Cities relied in part upon the *Clark Hill* opinion, contending that they should have been offered power contingent on their ability to acquire transmission capability and that the contracts with the nonpreference customers should have contained a withdrawability provision.[251] The district court denied the injunction.

On appeal of this denial of preliminary relief, the Ninth Circuit affirmed noting that unlike the situation in *Clark Hill* the Cities' offer was not contemporaneous with the offer of the private utilities.[252] The district court subsequently dismissed the action on motions for summary judgment, and on appeal of that decision in *Anaheim v. Duncan*[253], the Ninth Circuit again affirmed, distinguishing *Clark Hill* on the grounds that "given the facts of this case and the unique time pressure under which the United States was operating, the government did not violate the preference clause when it contracted in 1969 to sell the interim power to the utilities."[254] The court further determined that a mandatory application of the preference laws would have impeded, if not canceled, the government's involvement in the Navajo Project, thus interfering with the primary purpose of the Reclamation Project Act of 1939—water conservation and reclamation.[255]

4. *Santa Clara*

The Ninth Circuit was again faced with a question of the applicability of the preference laws in *City of Santa Clara v. Andrus*.[256] In this action, the court adhered firmly to preference principles, stating "[i]t is only if the available supply exceeds the demands of interested preference customers that the Secretary may offer federal power to private entities."[257]

During the early 1960's, the Secretary of the Interior, through the Bureau of Reclamation, was allocating power from the Central Valley Project (CVP). However, Santa Clara was unable to take an allocation at that time as it was under contract with Pacific Gas & Electric Company (PG&E) for its power

248. City of Anaheim v. Duncan, 658 F.2d at 1328.
249. City of Anaheim v. Kleppe, 590 F.2d at 287.
250. 590 F.2d 285 (9th Cir. 1978).
251. *Id.* at 287.
252. *Id.* at 289.
253. 658 F.2d 1326 (9th Cir. 1981).
254. *Id.* at 1330. The court also rejected, again on the "special facts" of this case, the suggestion that a withdrawability provision in the contracts with the nonpreference purchasers was required. *Id.*
255. *Id.*
256. 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).
257. *Id.* at 670.

requirements. In 1965, Santa Clara was able to contract with the Bureau for CVP power; however, since the Secretary had already committed to meet the load growth of other preference customers, power could only be offered to Santa Clara on a withdrawable basis.[258] Through 1970, Santa Clara's allocation increased until it reached a peak of 120,000 kilowatts, but after that time, power was withdrawn from the City to meet the needs of the Bureau's other customers. PG&E supplied the remainder of the City's power needs.[259]

PG&E played an integral role in the marketing of power from the CVP, as its transmission lines were used to deliver electricity from the project to preference customers. Additionally, the government and PG&E had a "banking" arrangement pursuant to which power from the project was sold to PG&E, subject to the right of the Secretary to repurchase the power at a later time to meet the growth needs of preference customers.[260] However, the price of electricity upon resale to the government included a "handling charge" plus a charge for any difference in cost to PG&E in producing the power at the time of resale over its similar cost at the time it purchased the power from the government.[261] The power purchased by PG&E from the government was used by PG&E for sale to its own customers at a "substantial markup."[262]

Santa Clara brought suit against the government, alleging, *inter alia*, that the Secretary's withdrawal of CVP power, and refusal to grant the City a nonwithdrawable allocation, violated the preference laws. Santa Clara also alleged that it plainly would have been able to utilize the power sold to PG&E.[263] The trial court found no violation of the preference laws in the banking arrangement with PG&E but held that the Secretary's decisions allocating CVP power among preference customers were reviewable.[264]

On appeal, the government and PG&E argued that the preference clause was not applicable to the PG&E contracts since the federal power was not sold to PG&E; rather, it was "banked" temporarily with the company.[265] The Ninth Circuit refused to accept this characterization. While the court agreed that the Secretary's goal of "storing"[266] power for the future benefit of preference customers was in accord with the preference clause, it disagreed with the

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258. *Id.* at 664.

259. *Id.*

260. *Id.* at 669. Although neither the trial nor appellate court decisions set forth the particulars of the banking contracts, the terms are described in some detail in Adams, Vince and Robins, *Federal Electric Preference Power Marketing in the 1980's: Developing Legal Trends*, ENERGY L.J. 1, 28-29 (1983).

261. *Santa Clara*, 572 F.2d at 669.

262. *Id.* at 671.

263. When the government began withdrawing power from Santa Clara, PG&E billed the City for that additional amount of power at its rates. Insisting that the withdrawals were unlawful, the City placed the additional monies demanded by PG&E into an escrow account. PG&E counterclaimed in this action for those funds. *Id.* at 665.

264. On appeal, the Ninth Circuit made a critical distinction between the reviewability of a marketing decision allocating power among preference customers and one involving preference and non-preference customers. This portion of the Santa Clara decision and subsequent decisions following the Ninth Circuit's precedent are discussed *infra*.

265. *Id.* at 669.

266. The concept of "storing" power in this context is figurative and is used in an accounting sense, since it is not physically possible to store significant amounts of electric power.

Secretary's methods. Noting the mandatory terms of the preference clause,[267] the court stated: "Congress intended public entities, whenever possible, to benefit from the sale of low cost federal power. An arrangement which enables a non preference entity to reap a benefit which Congress sought to bestow upon public entities, even temporarily, flies in the face of that intent."[268]

Although the banking arrangement in Santa Clara was found to be inconsistant with the preference laws, it is significant that other exchange arrangements between PMA's, private utilities and preference customers, where the benefit to preference customers is concurrent with the "sale" of power to the private utility and the private utility is merely receiving a payment "in kind" for its services, have received judicial approval.[269] In contrast, the facts that appear to have persuaded the Ninth Circuit that the arrangement with PG&E was unlawful were: (1) PG&E was able to make a considerable profit on the power sold to it, both by selling it to its own customers at a marked-up price and by charging the government higher prices for the power upon resale; and, (2) the sales to PG&E were "in such high quantity that this nonpreference customer has become the Bureau's largest customer."[270] Thus, while the involvement of a private utility in a PMA's marketing programs may be subjected to considerable scrutiny by a court, it cannot be assumed that all sales or exchanges of federal power with a private utility company will be deemed violative of the preference laws.

5. *Alcoa*

A dispute between preference and nonpreference industrial customers of the Bonneville Power Administration reached the United States Supreme Court in *Aluminum Company of America v. Central Lincoln Peoples' Utility District (Alcoa).*[271] The Court was faced with reconciling the preference provisions of the Bonneville Project Act[272] with statutory directives governing the sale of federal power to industrial users[273] contained in the Pacific Northwest Electric Power Planning and Conservation Act. The nonpreference customers prevailed, as the Court found that other specific statutory provisions may override the intent of the preference clause.

By way of background, the Bonneville Power Administration contracts for sales of federal power with preference customers, private utilities, federal agen-

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267. "The Secretary is thus given a very specific directive to market federal power to preference customers if any are ready and willing to purchase it. It is only if the available supply exceeds the demands of interested preference customers that the Secretary may offer federal power to private entities." *Id.* at 670.

268. *Id.* at 671. Rather than invalidating the arrangements, the court remanded the matter to the district court to determine, *inter alia*, whether Santa Clara was ready, willing and able to take the intermittent power being sold to PG&E. *Id.* at 672. The matter subsequently was settled.

269. *See, e.g.*, Greenwood Utils. Comm'n v. Hodel, 764, F.2d 1459 (11th Cir. 1985); ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. C-C-85-384-P (W.D.N.C. Oct. 30, 1985); Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., No. W84CA101 (W.D.Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986), discussed *infra*.

270. *Santa Clara*, 572 F.2d at 671.

271. 104 S.Ct. 2472 (1984).

272. 16 U.S.C.A. § 832c(a)(1985).

273. 16 U.S.C.A. §§ 829 *et seq.* (1985).

cies and direct service industrial (DSI) customers (industrial end users that purchase power directly from Bonneville). In 1975, Bonneville entered into contracts with the DSI's which provided that twenty-five percent of their allocation could be interrupted at any time. Thus, this "quartile" of DSI power was subject to interruption by preference customers whenever they desired non-firm power.[274]

The Pacific Northwest Electric Power Planning and Conservation Act[275], passed by Congress in 1980, directed Bonneville to offer existing DSI customers contracts providing each customer with "an amount of power equivalent to that to which such customer is entitled under its [1975] contract. . . ."[276] The Act also provided that the new contracts were to "provide a portion of the Administrator's reserves for firm power loads within the region."[277] The preference and priority provisions of the Bonneville Project Act[278] were expressly retained in the 1980 Act.[279]

In offering new contracts to the DSI's, the Bonneville Administrator determined that while the amount of the power to be allocated to a DSI customer must be the same as in its 1975 contract, the terms for the sale could differ.[280] In order to meet the statutory directive that the sales to DSI's provide a portion of the reserves needed for firm loads,[281] the Administrator decided that the DSI's loads could be interrupted only to meet Bonneville's firm power needs, and not to make sales of non-firm energy to preference customers.[282] The preference customers which were deprived of this source of non-firm energy sued, alleging *inter alia* that the DSI contracts violated the preference clause of the Bonneville Power Act.[283]

Finding no explicit exception to the provisions of the Bonneville Project Act that preserve the longstanding preference given to public utilities, the Ninth Circuit held that the Administrator's interpretation of the Act was unreasonable and its contracts with the DSI customers invalid.[284] The court found that in order to be both reasonable and consistent with the preference clause, the Act must be interpreted so as to subject the initial allocation of nonfirm power to the preference clause.[285]

The Supreme Court reversed the Ninth Circuit's determination. According substantial deference to the Administrator's interpretation of the statutes, the Supreme Court held that his interpretation was a reasonable one.[286] The Court agreed with the Administrator that the preference provision:

> merely determines the priority of different customers when the Administrator receives

274. *Alcoa*, 104 S. Ct. at 2477-78.
275. 16 U.S.C.A. §§ 839 *et seq.* (1985).
276. 16 U.S.C.A. §§ 839 c(d)(1)(B) (1985).
277. *Id.* § 839 c(d)(1)(A).
278. 16 U.S.C.A. §§ 832 *et seq.* (1985).
279. *See* 16 U.S.C.A. § 839(c)(a) (1985).
280. *Alcoa*, 104 S.Ct. at 2478.
281. 16 U.S.C.A. § 839 c(d)(1)(A) (1985).
282. *Alcoa*, 104 S.Ct. at 2479.
283. 16 U.S.C.A. § 832 c(a) (1985).
284. Central Lincoln Peoples' Util. Dist. v. Johnson, 686 F.2d 708, 710 (9th Cir. 1982).
285. *Id.* at 712.
286. *Alcoa*, 104 S.Ct. at 2480.

> "conflicting or competing" applications for power that the Administrator is authorized to allocate administratively. § 4(b) of the Project Act, 16 U.S.C.A. § 832c(b). In the instant case, the initial contracts offered by the Administrator to the DSI's are not part of an administrative allocation of power. The power sold pursuant to those contracts is allocated directly by the statute. Because there is no administrative allocation of power, there can be no competing applications. The preference provisions of the Project Act as incorporated into the Regional Act therefore simply do not apply to the initial contracts that the statute requires the BPA to offer.[287]

The Court was careful to note that the issue was not "whether the preference rules have been changed; the issue is whether the preference rules apply to power that the statute requires BPA to sell to DSIs."[288] Thus, while the preference clause establishes a pervasive federal policy of preferring public bodies and electric cooperatives in the sale of federal power, the preference clause can be overriden by Congress to accomplish other objectives.

B. Internecine Warfare Among Preference Entities

As indicated in the preceding section, in a dispute between preference and nonpreference entities, preference customers are likely to prevail, unless the sale of federal power to a preference customer would interfere with another statutory objective. However, when the dispute is *among* preference customers, the preference "right" is inapplicable. Courts are virtually unanimous in holding that no single preference entity has an "entitlement" to federal power when competing against other qualified preference entities, although courts have begun to accord substantial deference to existing preference customers who are competing against newcomers. Thus, the PMA's are allowed nearly complete discretion to create geographic boundaries for their marketing territories, to grant unequal allocations of power, and to establish legitimate eligibility requirements for their customers. In so doing, PMA's have traditionally attempted to preserve the power supply programs of existing customers before serving new regions and entities. While courts appear to be willing to scrutinize PMA decisionmaking for procedural deficiencies, no court to date has been willing to substitute its judgment for that of a PMA in selecting among eligible preference customers.

1. *Power Authority*

One of the first cases to examine the applicability of the preference laws to disputes among preference beneficiaries was *Arizona Power Authority v. Morton*.[289] *Power Authority* focused on the issue of whether the preference laws prohibit geographic distinctions among preference customers in the allocation of federal power. The Ninth Circuit found no guidance in the reclamation laws that it examined, and thus held that the issue was entirely within the discretion of the Secretary of Interior.

The electricity at issue in *Power Authority* was generated by the Colorado River Storage Project. Marketing criteria issued by the Secretary of the Interior

287. *Id.* at 2482.
288. *Id.* at 2484.
289. 549 F.2d 1231 (9th Cir.), *cert. denied*, 434 U.S. 835 (1977).

allocated a greater portion of the power to preference customers in the northern or "upper basin" states.[290] Public utilities in the "lower basin" states protested this "geographic preference."[291] After a thorough examination of the legislative history of the Colorado River Storage Project Act,[292] which incorporated the preference clause of the Reclamation Project Act of 1939,[293] the court concluded that the Secretary has broad discretion to adopt whatever geographic preference he desires and . . . we have no jurisdiction to review his actions."[294]

2. *Santa Clara*

In *City of Santa Clara v. Andrus*,[295] the Ninth Circuit expanded on its analysis of the reviewability of a PMA's allocation decision commenced in *Power Authority*. As discussed in the preceding section of this article, the court did not hesitate to scrutinize aspects of the Secretary's power marketing program granting sales to a nonpreference customer.[296] However, an entirely different situation was presented when the marketing decision involved choices among preference customers. Such decisions, the court held, are unreviewable.

At issue in *Santa Clara* were power sales from the Central Valley Project. The Secretary of Interior had granted firm contracts for CVP power to a number of preference customers, but offered Santa Clara only a contract for "withdrawable" power.[297] As the power needs of the other preference customers grew, Santa Clara's allocation was reduced. The City brought suit against the government, alleging, *inter alia*, that the Secretary's refusal to grant it a nonwithdrawable allocation violated the preference laws.[298]

The starting point for the court's analysis was the Administrative Procedure Act, which grants an exception to judicial review where actions are "committed to agency discretion by law."[299] In *Citizens to Preserve Overton Park v. Volpe*,[300] the Supreme Court interpreted this provision to mean that judicial review is precluded "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[301] One of those "rare instances" was presented to the Ninth Circuit in *Santa Clara*. The court found that the preference clause of the Reclamation Project Act of 1939[302] provides no law to apply to the marketing of power among preference customers:

> The preference clause requires only that public entities be given a preference over private entities in the marketing of power generated by federal reclamation projects. It does not require that all preference customers be treated equally or that all potential

290. *Id.* at 1232.
291. *Id.*
292. 43 U.S.C.A. §§ 620 *et seq.* (Supp. 1985).
293. 43 U.S.C.A. § 485h(c) (1964).
294. *Power Authority*, 549 F.2d at 1241.
295. 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).
296. *Id.* at 669.
297. *Id.* at 664.
298. *Id.*
299. *See* 5 U.S.C.A. § 701(a)(2) (1977 & Supp. 1985).
300. 401 U.S. 402 (1971).
301. *Id.* at 410 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)).
302. 43 U.S.C.A. § 485h(c) (1964).

> preference customers receive an allotment. Where, as here, one preference entity challenges the Secretary's decision to discriminate against it in favor of other preference entities, the reclamation laws provide no law to apply to the dispute. If he so chooses, the Secretary can market *all* available CVP power to a single public entity without running afoul of the preference clause.[303]

The court also examined the language of Section 5 of the Flood Control Act,[304] only to find that it also was "too vague and general to provide law to apply."[305]

> The Flood Control Act's directive to market power in such a way as to "encourage the most widespread use thereof" could be interpreted in many different ways, such as to require that power be sold to as many different preference entities as possible, thereby fostering the most widespread geographic use of the power, or to mandate sale of the power to those preference entities whose customers present the most diversified mix of agricultural, industrial or residential users, or to require sale of federal power to those preference entities which serve the largest number of ultimate users.[306]

In the Ninth Circuit's view, interpretation of the Flood Control Act's marketing provisions required a "profound exercise of discretion."[307]

3. *Fort Mojave Indian Tribe v. United States*

Shortly after the Ninth Circuit's issuance of the *Santa Clara* decision, a federal district court in California was faced with the question whether the refusal of the Secretary of Interior to grant an allocation to an Indian tribe, a municipality and two other political subdivisions violated the preference laws. In *Fort Mojave Indian Tribe v. United States (Fort Mojave)*,[308] the court found the *Santa Clara* "nonreviewability" decision to be fully applicable to the dispute before it.

In *Fort Mojave*, the plaintiffs contended that they were entitled to an allocation of federal power on several grounds, including an alleged affirmative duty of the government to provide them with electric power, and a denial of due process because certain of the plaintiffs were not offered the opportunity to purchase the power. The court rejected the first claim, noting that "this case is legally indistinguishable from *Santa Clara*, and . . . the Secretary's decision not to grant plaintiffs an allowance of power during the 1975 reallocation is not judicially reviewable."[309] As to the denial of due process contention, the court held that the plaintiffs had no property interest in federal power and thus were not entitled to constitutional due process protections.[310] Additionally, the court was unpersuaded by the plaintiffs' allegation that the government had failed to inform them of the proposed power allocation, since public notice of the proceeding was given.[311] It granted summary judgment for the defendants.

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303. *Santa Clara*, 572 F.2d at 667 (citations omitted).
304. 16 U.S.C.A. § 825s (1985).
305. *Santa Clara*, 572 F.2d at 668.
306. *Id.*
307. *Id.*
308. No. CV77-4790 ALS (C.D. Cal. July 10, 1978).
309. *Fort Mojave*, slip op. at 17.
310. *Id. See also Santa Clara*, 572 F.2d at 675-77.
311. *Fort Mojave*, slip op. at 16-17.

4. *Greenwood*

Although the "no jurisdiction to review" precedent set by the Ninth Circuit in *Santa Clara* is now well established,[312] seven years were to pass before another federal appellate court agreed with the Ninth Circuit. In the interim, the U.S. District Court for the Middle District of Georgia issued a decision in *Greenwood Utilities Commission v. Schlesinger*,[313] holding that a PMA's allocation decision could be reviewed for an "abuse of discretion." That determination was later overturned by the Eleventh Circuit.

In *Greenwood*, the plaintiff challenged a decision of SEPA allocating power from three federal hydroelectric projects to a region that did not include Greenwood's geographic location.[314] The defendants moved for summary disposition of a number of the issues presented by Greenwood's complaint, including whether Section 5 of the Flood Control Act[315] granted SEPA unreviewable discretion to select a geographic marketing area.[316] While acknowledging the Ninth Circuit's characterization of Section 5 of the Flood Control Act as a statute "so vague as to breathe discretion at every pore,"[317] the Middle District of Georgia held that it nevertheless would "still have jurisdiction to review an abuse of that discretion."[318]

Before the court could reach a determination of whether SEPA had abused its discretion, SEPA made an allocation of power from its Cumberland System of projects to a geographic area that included Greenwood.[319] Since Greenwood was designated to receive an allocation from the Cumberland projects, the district court held that the action against SEPA was moot.[320] On appeal,[321] the Eleventh Circuit upheld the finding of mootness, but disagreed with the lower court's decision on the reviewability issue.

> The Flood Control Act merely establishes a series of general directives to control the distribution of excess electricity. It does not establish an entitlement to power.[322]

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312. The remainder of this section discusses the cases following the *Santa Clara* precedent.

313. 515 F. Supp. 653 (M.D. Ga. 1981). The authors represented the Municipal Electric Authority of Georgia, a defendant-intervenor in this action. Author Vince and L. Clifford Adams, Jr. were designated by the committee of defense counsel in this lawsuit to serve as lead counsel for handling all pretrial matters, including discovery. During its eight year lifespan, this case developed an interesting patina. It was transferred from the U.S. District Court for the District of Columbia by Judge Gerhard Gesell to Chief Judge Wilbur D. Owens, Jr. of the Middle District of Georgia, to Senior Judge William A. Bootle in the Middle District and then back again to Chief Judge Owens, who ultimately dismissed it on grounds of mootness. The dismissal was affirmed by the Eleventh Circuit.

314. *Id.* at 656-57. SEPA's marketing decision was rendered in 1975 and 1976, prior to the applicability of the Administrative Procedure Act notice and comment rulemaking requirements to the allocation of power by the PMA's. *See* 42 U.S.C.A. § 7191.

315. 16 U.S.C.A. § 825s (1985).

316. *Greenwood*, 515 F. Supp. at 655.

317. *Santa Clara*, 572 F.2d at 668.

318. *Greenwood*, 515 F. Supp. at 659.

319. The three projects involved in *Greenwood* were in SEPA's Georgia-Alabama marketing system.

320. *See* Greenwood Utils. Comm'n v. Edwards, No. 77-179-MAC (M.D. Ga. Oct. 21, 1983). Other aspects of the decision pertaining to Greenwood's request for a "retroactive" relief and its claim that the action was not moot in light of sales by SEPA to nonpreference customers are discussed *infra*.

321. Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985).

322. *See also* ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. 84-2152, slip. op. at 5 (4th Cir. March 19, 1985).

> . . . There is no law to apply the Secretary's decision to market power among preference customers. Under section 5's "most widespread use" directive, some entities could get more power than others if, for instance, the Secretary determined that they could most efficiently use it. Other preference entities could be shut out completely, yet there would be nothing for this Court to do because there are no legal standards for guidance.[323]

In reaching this determination, the court relied upon a recent Supreme Court opinion[324] that explained the apparent contradiction between the Administrative Procedure Act provision allowing review for an abuse of discretion,[325] and the provision precluding review of actions committed to agency discretion by law:[326] "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion then it is impossible to evaluate agency action for 'abuse of discretion.' "[327]

5. *ElectriCities*

In *ElectriCities of North Carolina, Inc. v. Southeastern Power Administration*[328] (hereinafter, *ElectriCities I*), the Fourth Circuit was presented with the question of whether a power marketing policy establishing geographic boundaries for marketing areas and granting greater allocations of power to long-term customers than to new customers was lawful. The court agreed with the Ninth and Eleventh Circuits that power allocation decisions of this type are unreviewable.

The plaintiffs in *ElectriCities I* challenged a 1980 power marketing policy in which SEPA allocated power from its Georgia-Alabama System of Projects. Despite their participation in the proceeding leading to the promulgation of SEPA's marketing policy, some of the plaintiffs were excluded from receiving an allocation from the Georgia-Alabama system and others did not receive as large an allocation as they desired.

By the time the action reached the Fourth Circuit,[329] ElectriCities' allega-

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323. *Id.* at 1464-65.

324. Heckler v. Chaney, 105 S. Ct. 1649 (1985).

325. 5 U.S.C.A. § 706(2)(A) (1977).

326. *Id.* at § 701(a)(2).

327. *Heckler*, 105 S. Ct. at 1655.

328. 774 F.2d 1262 (4th Cir. 1985). This was the first of three lawsuits to be filed by ElectriCities (a North Carolina joint action agency), challenging SEPA's allocation and contractual practices. *ElectriCities I* involved a challenge to SEPA's allocation of power from its Georgia-Alabama System of Projects. In ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. 84-625-CIV-5 (E.D.N.C. June 18, 1985) (*ElectriCities II*), the plaintiffs alleged that SEPA had unreasonably delayed the issuance of a marketing policy for the Kerr-Philpott System of Projects. That action reached the Fourth Circuit first on appeal of the denial of the plaintiffs' request for a preliminary injunction (*see* No. 84-2152 (4th Cir. March 19, 1985)), and again following the lower court's determination on the merits, at which time the court vacated the lower court decision. *See* No. 85-1919 (4th Cir. Nov. 18, 1985). *In* ElectriCities of N.C., Inc. v. Southeastern Power Admin., No. C-C-85-384-P (W.D.N.C. Oct. 30, 1985) (*ElectriCities III*), the plaintiffs challenged the legality of contracts entered into by SEPA to implement the Georgia-Alabama marketing policy that had been the subject of *ElectriCities I*. The authors represented the Municipal Electric Authority of Georgia in its intervention in *ElectriCities I* and *III*, and author Vince represented the Southeastern Power Resources Committee, an association composed of the cooperative preference entities in six Southeastern states, in its efforts to defeat the plaintiffs' motion for preliminary relief in *ElectriCities II*.

329. The plaintiffs initially had filed a far-ranging complaint challenging such issues as whether the

tions of illegality were narrowed to two primary areas: (1) whether SEPA's establishment of geographic boundaries for its Georgia-Alabama projects was arbitrary and capricious and violated the "most widespread use" criteria of Section 5 of the Flood Control Act;[330] and (2) whether SEPA's decision to "grandfather" the allocations of existing preference customers was similarly unlawful.[331] The Fourth Circuit determined that Section 5 of the Flood Control Act was "too vague to provide a standard by which a court can review SEPA's decisions."[332] Relying upon the analysis of the Flood Control Act provided by the Ninth Circuit in *Santa Clara*,[333] the court noted that "the phrase 'most widespread use' might mean most geographically widespread distribution of power, distribution to the most diversified mix of ultimate consumers, or distribution to preference customers that reach the greatest number of ultimate consumers."[334]

The Fourth Circuit's finding of nonreviewability also was applied in the *ElectriCities III* lawsuit,[335] which challenged SEPA's implementation of the Georgia-Alabama power allocations through contracts with private utilities whose facilities were required for transmission of the power to preference customers. Finding that "plaintiff's alleged injury more accurately rests in SEPA's decisions in the 1980 policy to allocate energy between the eastern and western divisions,"[336] decisions which were committed to agency discretion, the district court dismissed on grounds of lack of standing.[337]

Tennesee Valley Authority was a valid preference customer; whether SEPA was required to consider alleged anticompetitive effects of its marketing policy in rendering its allocation decision; and whether SEPA adequately considered the plaintiffs' proposal that SEPA unify its four systems of projects into a single marketing system. *See ElectriCities I*, No. 82-888-Civ-5, *slip op.* at 5 (E.D.N.C. Oct. 16, 1984).

330. In both *Greenwood* and *ElectriCities I*, the plaintiffs complained of geographic limitations on marketing areas that precluded their receiving desired allocations of power. The "flip side" on this argument was presented by the State of Arkansas in Arkansas v. Hodel, No. LR-C-82-807 (E.D. Ark. dismissed June 8, 1984), in which the State sought declaratory and injunctive relief preventing the Southwestern Power Administration from marketing federal power to projects *outside* the river basin in which the power is generated. Arkansas challenged the fact that although 47% of the power marketed by Southwestern is generated at facilities within Arkansas, the agency's marketing plan required the State to share that power with five other states. The action was settled upon the agreement of Southwestern to notify the Governor of future activities that would affect Arkansas.

331. *ElectriCities I*, 774 F.2d at 1262. In regard to the "grandfathering" issue, ElectriCities also alleged that SEPA had improperly considered the past political support of existing customers for SEPA's projects, a claim the court considered and rejected. *Id.* at 1268-69. In reviewing this allegation the court noted that "agency action [which] is committed to agency discretion by law is not completely shielded from judicial review," citing to Justice Brennan's concurrence in Chaney v. Heckler, 105 S. Ct 1649 (1985), in which he indicated that an agency decision violating a statutory or constitutional command or prompted by a bribe is not immune from judicial review. *Id.* at 1267.

332. *Id.* at 1266.

333. *Santa Clara*, 572 F.2d at 668.

334. *ElectriCities I*, 774 F.2d at 1266. The court also upheld the lower court's alternative holding that SEPA's marketing policy was rational, if reviewable. *Id.* at 1270.

335. No. C-C-85-384-P (W.D.N.C. Oct. 30, 1985). The facts of this case are discussed in more detail *infra*.

336. *Id.* at 13.

337. *Id.*

C. *Procedural Challenges to PMA Allocation Decisions*

In addition to challenging the substantive aspects of PMA marketing decisions, preference litigants frequently have alleged procedural violations in PMA decisionmaking.[338] While courts are not reluctant to scrutinize the procedures used by a PMA in developing its marketing program, none of the procedural attacks to date has resulted in overturning the substantive determinations of a PMA's allocation policy.

1. *Sioux City*

In *City of South Sioux City v. Western Area Power Administration*,[339] the District Court for Nebraska refused to order an allocation of additional power for the preference customer plaintiffs even though a violation of the Administrative Procedure Act notice and comment rulemaking requirements *was* found. The court disposed of the legal issues presented by the dispute in a series of summary judgment motions.

In its first decision, the *Sioux City* court held that *Federal Register* notices and other materials issued by Western to devise a "Post-1985 Marketing Plan" for certain of its projects were misleading.[340] The court determined that the published materials failed to inform the plaintiffs when the power allocations pursuant to the policy would begin and failed to explain properly the meaning of certain terms in the notices, thus causing the plaintiffs to file their applications for power out of time.[341] On a subsequent motion, the court determined that the plaintiffs nevertheless had no entitlement to power on a basis other than the defective post-1985 marketing plan.[342] Additionally, the court held that Western's other preference customers (who had declined to intervene) would not be declared indispensable parties to the action.[343] Thus, the issue was narrowed to whether Western had any basis for rejecting the plaintiffs' applications for power, other than the fact they were not timely filed. In its final ruling on summary judgment, the court found that there was no assurance that the plaintiffs would have received an allocation had their application been filed on time, since other criteria, which were not reviewable by the courts, could have affected the eligibility of the plaintiffs to receive preference power.[344] An appeal of the decision is now pending.

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338. *E.g.*, City of South Sioux City v. Western Area Power Admin., No. 82-L-107 (D. Neb. May 20, 1985) (Sioux City), *appeal docketed*, No. 85-1757 NE (8th Cir. June 7, 1985); Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., W84CA101 (W.D. Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27,1986). *See also* Greenwood Utils. Comm'n v. Schlesinger, 575 F. Supp. 653 (M.D. Ga. 1981).

339. No. 82-L-107 (D. Neb. May 20, 1985), *appeal docketed*, No. 85-1757 NE (8th Cir. June 7, 1985).

340. *Sioux City*, (Memorandum and Order on Motions for Summary Judgment) (D. Neb. Jan. 31, 1983).

341. *Id.* at 4.

342. *Sioux City*, (Memorandum and Order on Motion to Alter or Amend Judgment, Motion to Strike Brief, and on Summary Judgment) (D. Neb. Sept. 8,1983).

343. Sioux City, (Memorandum and Order on Motions for Summary Judgment) (D. Neb. May 20, 1985).

344. *Id.* The court reached this determination even though there was testimony from one Western

2. *Brazos*

Procedural and substantive challenges to a PMA's marketing decision also were raised in *Brazos Electric Power Cooperative, Inc.v. Southwestern Power Administration.*[345] In *Brazos*, the court upheld the propriety of Southwestern's power allocation decision and declined to review the substantive determinations made by the agency during its marketing proceedings and subsequent contract negotiations.

In 1980, Southwestern promulgated a policy allocating power which was to become available during the period 1980 to 1988. The plaintiff, which did not participate in the notice and comment proceeding leading to the issuance of the policy, claimed that Southwestern's notices of the proceeding were defective. The plaintiff chiefly complained that there was no preliminary notice that additional power would be made available to the "ERCOT" region of Texas in which it is located and that it was thus deprived of an opportunity to apply for that power.[346] Two other rural electric cooperatives located in ERCOT, Rayburn Country Electric Cooperative, Inc. and Tex-La Electric Cooperative of Texas, Inc. did apply for and receive additional power allocations.[347]

Three years later, when Southwestern, Rayburn Country and Tex-La, and the Texas Utilities Electric Company (whose facilities were required for transmitting, scheduling and firming the power for the cooperatives) were in the process of negotiating contracts to implement the allocations, Brazos requested that it be given a share of this power and that it be allowed to assume the transmission and scheduling obligations of the private utility.[348] When these requests were denied, Brazos brought suit against Southwestern. Rayburn Country, Tex-La, other interested preference customers of Southwestern, and the utility company all intervened to defend the agency's existing marketing program.

The court held that Southwestern's notices informing the public of its administrative proceeding were adequate and in compliance with the law. Additionally, the court refused to review the issues of whether Southwestern's allocation of power to Rayburn Country and Tex-La, and the cooperatives' use of a nonpreference utility as a "scheduling agent," were lawful.[349] As to Brazos' claim that it had been unlawfully deprived of excess energy which it had been receiving prior to the new contractual arrangements, the court held that the Flood Control Act "does not establish an entitlement to power," citing the *Greenwood* decision.[350] Finally, the court noted that there was, in any event, a

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official indicating that plaintiffs would have received power if their applications had been timely. However, testimony from Western's Administrator did not give this assurance. *Id.* at 4.

345. No. W84CA101 (W.D. Tex. December 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986). The aspects of this lawsuit pertaining to the involvement of a private utility in the agency's marketing program are discussed *infra*. In this action, the authors represented defendant-intervenor Rayburn Country Electric Cooperative, Inc.

346. *Id.* at 8-9. "ERCOT," the Electric Reliability Council of Texas, is electrically isolated from the remainder of the country. *Id.* at 4.

347. *Id.* at 9.

348. *Id.*

349. *Id.* at 10-11.

350. *Id.* at 12.

rational basis for the agency's decisions—Brazos' failure to participate in the allocation proceeding. "Brazos seeks to have SWPA become its advocate by awarding additional power to it though none was requested. Clearly, the role of advocate for one preference entity over another is outside the statutory scope of the authority of SWPA."[351] Brazos has appealed the district court's dismissal to the U.S. Court of Appeals for the Fifth Circuit.[352]

In light of the overwhelming precedent upholding PMA allocations of power among preference customers, it is difficult to conceive of a substantive challenge to a PMA marketing decision that would entice a court into an examination of the merits of that decision. However, it is equally clear the courts will not be as reluctant to review an agency's marketing program where direct contravention of the preference laws can be found, or where procedural requirements have been violated.

D. Ancillary Issues

In resolving preference power allocation disputes, courts often have been called upon to determine ancillary issues, such as the length of time a PMA may take to issue a final power marketing policy, whether preference entities have standing to challenge a PMA's marketing programs, what forms of relief may be made available to a successful preference litigant, and whether there is a "super-preference" to federal power.[353] Cases pertaining to these issues are discussed in this section.

1. Must a PMA Issue a Final Power Marketing Policy Within a Fixed Time Frame?

The question of whether a PMA must issue a final power marketing policy within a fixed time frame was first raised in *ElectriCities of North Carolina, Inc. v. Southeastern Power Administration*,[354] (*ElectriCities II*). In this case the plaintiffs brought suit against SEPA to require it to issue a final power marketing policy for its Kerr-Philpott System of Projects, from which many of the plaintiffs' members were slated to receive an allocation.[355] ElectriCities alleged that the delay in issuance of the final policy was unreasonable and that an interim policy under which power was being allocated had been issued in violation of statutory notice and comment requirements. The district court agreed with the plaintiffs' first claim and required the issuance of a final

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351. *Id.* at 11-12.

352. The appeal was docketed as No. 86-1059 (5th Cir. Jan. 27, 1986).

353. *See also* the discussion in Adams, Vince, and Robbins, *Federal Electric Preference Power Marketing in the 1980's: Developing Legal Trends*, 4 ENERGY L.J. 1, 20-23 (1983) regarding due process protection for preference customers; *id.* at 32-34, the issue of whether Congressional approval of project appropriations can forgive an alleged violation of the preference laws; and *id.* at 34-35, the applicability of the National Environmental Policy Act to power marketing decisions.

354. No. 84-625-CIV-5 (E.D.N.C. June 18, 1985), *vacated*, No. 85-1919 (4th Cir. Nov. 18, 1985). This action was brought by the same plaintiffs involved in the unsuccessful challenge to SEPA's power marketing policy for its Georgia-Alabama System in *ElectriCities I*.

355. *See* Revised Proposed Power Long-Term Marketing Policy, Kerr-Philpott System of Projects, 47 Fed. Reg. 27,600 (1982).

marketing policy, but declined to order a substantive revision of SEPA's interim policy.[356]

SEPA initiated its allocation proceeding for the Kerr-Philpott System of Projects on October 19, 1979, issued a proposed marketing policy on July 3, 1980, and issued a revised proposed policy on June 18, 1982. However, as of June 1984, when suit was filed, no final policy had been issued.[357] The agency stated that it had been unable to promulgate the final policy because its limited resources[358] had been concentrated on the implementation of policies for its Georgia-Alabama and Cumberland Systems, which contain nineteen of its twenty-two projects.[359]

Finding the agency's issuance of a final Kerr-Philpott policy to be "unreasonably delayed", the court ordered that the policy must be finalized within thirty days.[360] The court acknowledged ElectriCities' lack of an entitlement to federal power, but stated that ElectriCities "does have a right . . . to some decision as to whether or not ElectriCities will receive an allocation of federal power, and how much it will receive."[361] While the agency may have had discretion to determine when to begin the allocation process, once the process had begun, the agency was required to complete the decisional process.[362] The court did not rule on the plaintiffs' claims of invalidity in the promulgation of the interim policy, since it believed that requiring SEPA to implement and issue a new interim policy would merely delay the final policy further.[363]

SEPA issued its final Kerr-Philpott policy within the thirty day time frame,[364] and then asked the Fourth Circuit to vacate the lower court order on grounds of mootness. That request was granted by the Fourth Circuit;[365] however, the district court has retained jurisdiction of the count of the complaint pertaining to the legality of the interim policy to ensure that the final policy is implemented within a reasonable period of time.[366]

Although the factual circumstances of this case were extreme, *ElectriCities III* indicates that a preference customer has a right to a final determination on its request for power, particularly if the decision is withheld for a significant period of time.

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356. At the outset of this lawsuit, ElectriCities sought a preliminary injunction establishing an escrow fund from which it could ultimately be compensated for any damages to which its members were found entitled after issuance of the final policy. The denial of that request is examined *infra*, in the discussion pertaining to remedies available to preference customers.

357. *ElectriCities II*, No. 84-625-CIV-5 at 4-5. An interim policy put into effect in June 1982 allocated all the Kerr-Philpott power to existing customers, which did not include the plaintiffs' members. *Id.* at 4.

358. SEPA has only seven staff members qualified to formulate marketing policies and negotiate contracts. *Id.* at 9.

359. *Id.* at 6.

360. *Id.* at 14.

361. *Id.* at 12.

362. *Id.* at 13. While declining to find bad faith in SEPA's actions, the court believed there was a lack of forthrightness by the agency in informing customers as to the status of its consideration of the policy. *Id.* at 14.

363. *Id.* at 15.

364. *See* Power Marketing Policy; Kerr-Philpott System of Projects, 50 Fed. Reg. 30,751 (1985).

365. *See* Docket No. 85-1919 (4th Cir. Nov. 18, 1985).

366. *See* Order in No. 84-625-CIV-5 (E.D.N.C. Jan. 14, 1986).

2. Who Has Standing to Challenge a PMA Policy?

In a number of preference cases, courts have determined that PMA's have discretion to select geographic boundaries for their marketing areas or to "prefer" customers in a particular locale.[367] In the *ElectriCities III*[368] lawsuit, preference customers successfully relied upon this discretion granted to the PMA's to bar a plaintiff located in another marketing area from challenging the marketing program from which they benefitted.

Both the *ElectriCities I* and *ElectriCities III* lawsuits involved SEPA's marketing program for its Georgia-Alabama System of Projects. In *ElectriCities I*, the Fourth Circuit upheld the validity of SEPA's marketing policy for these projects. In *ElectriCities III*, the plaintiffs challenged SEPA's implementation of the policy through contracts with private utilities whose facilities were integral to the agency's programs. The court dismissed the action on grounds of lack of standing.

A brief word regarding the background of SEPA's marketing program is necessary to an understanding of this case. In SEPA's final marketing policy for its Georgia-Alabama System, SEPA subdivided the marketing area into an eastern and western division.[369] The western division includes all of Georgia, most of Alabama, and portions of Mississippi and Florida[370]—primarily the service territory of the four operating subsidiaries of the Southern Company. The plaintiffs' members were not located in the western division nor were they eligible to receive allocations from the projects located in that division, although some of ElectriCities' members were scheduled to receive allocations from the eastern portion of the Georgia-Alabama system.[371]

In *ElectriCities III*, the court determined that it was particularly significant that SEPA owned no transmission lines and was dependent upon the facilities of regional utilities to transmit allocations to preference customers.[372] In the western area of the Georgia-Alabama System, SEPA had longstanding arrangements with the Southern Companies to transmit, schedule, and firm power for delivery to preference customers. As a result of these arrangements, the Southern Companies historically purchased "capacity without energy"[373] from SEPA which the western area preference customers were unable to use on an economic basis. These capacity "payments" to the Southern Companies enabled SEPA to keep the transmission rates for its western area Georgia-Alabama customers substantially lower than would have been the case without such sales of capacity. However, in SEPA's 1980 policy for the Georgia-Alabama System, the agency's "goal" to phase out these sales and to make all its capacity available to preference customers, was noted.[374] Thus, in its contracts

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367. *E.g.*, Arizona Power Auth. v. Morton, 549 F.2d 1231 (9th Cir.), *cert. denied*, 434 U.S. 835 (1977); Greenwood Utils. Comm'n v. Hodel, 764 F.2d 1459 (11th Cir. 1985); *ElectriCities I*, 774 F.2d 1262 (4th Cir. 1985).

368. *ElectriCities III*, No. C-C-85-384-P (W.D.N.C. Oct. 30, 1985).

369. *Id.* at 5.

370. *Id.*

371. *Id.*

372. *Id.*

373. *See* note 96, *supra*.

374. Power Marketing Policy, Georgia-Alabama System of Projects, 45 Fed. Reg. 65,140 at 65,143

implementing the western area power allocations, SEPA provided for a gradual phase out of the "capacity without energy" sales to the Southern Companies, which, in turn, would cause a gradual increase in transmission charges for these preference customers.[375]

ElectriCities alleged that these sales of capacity without energy to the Southern Companies violated the preference laws, since its members could make use of that power.[376] The government, and the western area preference customers who had intervened in defense of the agency's programs, countered with the argument, *inter alia*, that ElectriCities' members lacked standing to challenge the contractual arrangements for the western division of the Georgia-Alabama System. The defendants contended that even if the contracts were unlawful and were overturned by a court, the arrangements simply would be revamped, but all the available power would remain in the western division where it had been allocated. Since ElectriCities' members would not benefit even if they prevailed, they lacked standing to challenge the contracts.[377] The defendant-intervenors also stressed to the court the fact that an abrupt termination of the capacity without energy sales to the Southern Companies would result in a drastic and sudden increase in transmission rates.[378]

The court agreed with the defendants that ElectriCities lacked standing to have any of its claims heard. The court reasoned that:

> Plaintiff's alleged injury more accurately rests in SEPA's decision in the 1980 Policy to allocate energy between the eastern and western divisions. That policy involves the types of decisions committed to agency discretion and not subject to judicial review. Consequently, Plaintiff's eastern division members' claims of invalid action in the western division do not meet the requirements of standing of (1) injury-in-fact, (2) causal connection, and (3) injury capable of redress.[379]

Thus, *ElectriCities III* stands for the proposition that once a PMA has exercised its discretion to establish geographic boundaries for a marketing territory, preference customers from outside that territory will not be able to litigate the manner in which power is marketed within that region.

3. What Remedies are Available to the Successful Preference Litigant?

While preference power litigants rarely have been successful in overturning an agency's substantive power allocation policies, the successful litigant still

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(1980).

375. *ElectriCities III* at 11.

376. ElectriCities additionally claimed that the sale of energy generated by a pumped storage project on an interim basis to the Southern Companies in exchange for the power needed for pumping purposes was similarly unlawful, and that SEPA violated notice and comment rulemaking requirements of the Administrative Procedure Act and the Department of Energy Organization Act by failing to provide public notice of the sales to the Southern Companies. It was ElectriCities' contention that its members should have been apprised of the negotiations with the Southern Companies and given the opportunity to purchase "capacity without energy" and given the opportunity to provide pumping energy in lieu of the private utilities. ElectriCities also brought suit against the Southern Companies, alleging tortious interference with prospective business relations between SEPA and its members. *Id.* 7-8.

377. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

378. *ElectriCities III* at 11.

379. *Id.* at 13 (citations omitted).

has a range of remedies available to it. The most appropriate relief, and the form most often sought by preference complainants, is a declaration of the plaintiff's rights and an injunction ordering the PMA to revamp its marketing program or prohibiting it from taking certain action.[380] A remand to the trial court or to the PMA for further consideration consistent with the court's opinion may be ordered.[381] However, a direct allocation of power by federal courts is unlikely. General principles of administrative law do not ordinarily permit courts to intrude into the power marketing business, for "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."[382] If the agency has more than one option open to it, a court may not infringe on the agency's discretion by dictating the approach to be taken.[383]

Occasionally, preference plaintiffs have sought other forms of relief, such as a preliminary injunction in the early stages of litigation,[384] or "retroactive" relief upon conclusion of the matter.[385] Although preliminary relief has typically been denied, attempts to gain redress for alleged injuries suffered at the hands of a PMA have met with varying degrees of success.

Courts have uniformly declined to grant a preference plaintiff interim relief, either in the form of a preliminary injunction or the establishment of an "escrow" fund to compensate the victorious party for any losses. In *City of Anaheim v. Kleppe*,[386] the court refused to grant a preliminary injunction ordering the government to sell to the plaintiffs power being sold to nonpreference customers, since the court did not believe that the plaintiffs were likely to prevail on the merits of the action.[387] The District Court for the Western District of Texas ruled in a similar fashion in the *Brazos* lawsuit in which the plaintiffs sought, among other forms of preliminary relief, an injunction preventing Southwestern from selling power to other preference customers.[388] The court additionally believed that the public interest would not be served by a grant of the requested relief, since greater harm would befall the existing customers[389] as a direct consequence of such relief.

In *Brazos* and in *ElectriCities II*, the plaintiffs sought, as an alternative form of preliminary relief, the establishment of an escrow fund into which the

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380. *See, e.g., Santa Clara*, 572 F.2d at 663.

381. *Id.* at 680; *see also Pooling Association*, 527 F.2d at 728.

382. F.C.C. v. National Citizens Committee for Broadcasting, 436 U.S. 775, 792 n. 15 (1978) (citations and internal quotation omitted).

383. Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978). However, this has not stopped plaintiffs from seeking a remand "with instructions", directing the PMA to follow a specific course of action. *See, e.g.*, Amended Complaint, Prayer for Relief, Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin., No. W84CA101 (W.D. Tex. Dec. 30, 1985), *appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986).

384. Preliminary relief was sought in the *City of Anaheim, Brazos*, and *ElectriCities II* lawsuits.

385. Retroactive relief was sought in the *Santa Clara* and *Greenwood* lawsuits.

386. 590 F.2d 285 (9th Cir. 1978). The facts of this case have been set forth in the discussion of establishment of the preference right, *supra* § IVA.

387. 590 F.2d at 290.

388. Brazos Elec. Coop., Inc. v. Southwestern Power Admin., No. W84CA101 (Orders Denying Motion to Transfer, Denying Motion for Preliminary Injunction and Granting Motion to Confine Discovery to the Administrative Record) slip op. at 5 (W.D. Tex. Dec. 27, 1984).

389. *Id.*

existing customers of the PMA would be required to place the difference between the rates at which they bought federal power and "market" rates, to be distributed at the end of the litigation in accordance with the outcome.[390] In *ElectriCities II*, the Fourth Circuit upheld the district court's denial of the requested relief on the ground that:

> [P]laintiffs have no current right to SEPA power or SEPA rates, and they claim no such right in their complaint. To the contrary, they acknowledge that their entitlement to SEPA power at SEPA rates will only begin when, and if, they are included in a marketing policy and have signed a delivery contract in fulfillment of that policy. Without a right to SEPA rates, plaintiffs have no right to compensation for their present power costs. They can show no likelihood of winning such compensation in the underlying lawsuit and no cognizable injury from failing to receive the compensation.[391]

A similar result was reached in *Brazos*.[392]

Aside from the issue of the plaintiff's entitlement to federal power, the legality of such an escrow arrangement is questionable. Requiring a PMA to collect "market" rates for power from its customers would violate the repayment provisions of the preference laws[393] as well as Congressional appropriations bills prohibiting the consideration of market based rates by PMA's.[394] Additionally, as discussed below, to the extent an escrow fund is construed as a claim for damages against the government, it would be barred on the grounds of sovereign immunity.

In at least two instances,[395] plaintiffs have sought "retroactive relief" as compensation for the period during which they were deprived of lower cost federal power. Although money damages would compensate the injured preference entity for its economic losses, money damages are barred by the doctrine of sovereign immunity.[396] In *Greenwood*, the plaintiff (whose claim was declared moot after it received a power allocation from the government) alleged that it was entitled to "an additional allocation of power to compensate it for the power that it should have been allocated in the past, but was not."[397] The Eleventh Circuit upheld the district court's finding that this was in effect a claim for monetary damages for which sovereign immunity had not been waived.[398]

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390. *Id.* at 4; *see also ElectriCities II*, No. 84-2152, slip op. at 4 (4th Cir. March 18, 1985).

391. *ElectriCities II*, No. 84-2152, slip op. at 5-6.

392. *Brazos* (Order of December 27, 1984) at 5.

393. *See, e.g.*, Flood Control Act of 1944 § 5, 16 U.S.C.A. § 825s (1985), which provides:

> Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. . . . All monies received from such sales shall be deposited in the treasury of the United States as miscellaneous receipts.

394. *See, e.g.*, Energy and Water Development Appropriations Act, 1984, Pub. L. No. 98-50 § 506, 97 Stat. 247 (1983).

395. *See Santa Clara* and *Greenwood*.

396. United States v. Mitchell, 445 U.S. 535 (1980); *see also* City of South Sioux City v. Western Area Power Admin. (Memorandum and Order on Motion and Cross-Motion for Summary Judgment Regarding Irreparable Injury) (D. Neb. Aug. 22, 1984).

397. *Greenwood*, 764 F.2d at 1461.

398. *Id.* The court also approved the lower court's finding that a grant of the request for a "supplemental, retroactive allocation of power" would not be equitable, as it would deprive other preference custom-

A different conclusion was reached in the *Santa Clara* lawsuit. In that action, the City prevailed on its claim that a "banking" arrangement with Pacific Gas & Electric Company (PG&E) pursuant to which PG&E was sold power by the government at a time when Santa Clara was seeking an allocation, violated the preference laws. PG&E had counterclaimed for funds placed in escrow by Santa Clara. Santa Clara took the position that power purportedly furnished to it by PG&E at PG&E's rates, was federal power that should have been allocated to the City.[399] PG&E argued that regardless of the outcome of the case on remand, it was entitled to all the monies being held.[400]

The court held that the past sales to PG&E would be void if found to be lawful on remand, since actions taken in violation of statutory requirements are of no effect. Consequently, Santa Clara could be given a "retroactive" reallocation of power to be accomplished through an adjustment of the "bank account" established between the government and PG&E.[401] The court was careful to note that such a readjustment would not affect other preference customers,[402] unlike the situation in *Greenwood*.

Without the availability of an "account" that may be readily adjusted, as in *Santa Clara*, a successful preference litigant is unlikely to prevail on a claim for compensation during the period it was denied power. It will be equally difficult for the plaintiff to obtain preliminary relief, unless its chance of success on the merits appears to be overwhelming. The most likely form of relief the litigant will receive is a remand to the agency, which may be scant comfort after a lengthy period of denial of access to this lower cost power.[403]

4. Is There a "Super-Preference" to Federal Power?

A creative legal theory was utilized by preference customers attempting to overturn one of Western's marketing decisions in *Arvin-Edison Water Storage District v. Hodel*.[404] The plaintiffs attempted to claim a "super-preference" to federal power that would entitle them to an allocation over other preference customers.

Arvin-Edison was an action largely involving a review of ratemaking practices by Western. However, one aspect of the plaintiffs' complaint was a claim that the agency's decision to market additional power without granting them special consideration as irrigators violated the reclamation laws.[405] The court rejected this claim of a "super-preference" for irrigators in the sale of power, holding that the preference clause of the Reclamation Project Act[406]

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ers, who had already made plans anticipating receipt of a given portion of federal power, of this limited resource. *Id.* at 1462.

399. *Santa Clara*, 572 F.2d at 677.

400. *Id.*

401. *Id.*

402. *Id.* The adjustment of accounts also would not work an "intolerable burden on governmental functioning" advanced by the defendants as an additional ground for barring relief. *Id.* at 679.

403. In the *Greenwood* lawsuit, eight years passed from the filing of the action to the appellate court decision, which upheld the district court's dismissal of the action on grounds of mootness.

404. No. 82-2466 (D.D.C. March 28, 1985).

405. *Id.* at 2.

406. 43 U.S.C.A. § 485h(c) (1966).

"does not require that all preference customers be treated equally or that all preference customers even receive an allocation."[407] The agency's allocation decision was thus deemed to be unreviewable.[408]

V. Participation of Private Utilities in Federal Power Marketing

An issue closely related to the allocation of federal power, but deserving of separate consideration, is the role of private utilities in the transmission and distribution of federal power on behalf of the PMA's and preference customers. In a number of regions, federal power marketing programs are not self-sufficient. Rather, facilities of regional utilities, frequently privately owned, are required to transmit and schedule federal power for delivery to preference customers. The services of the utility may also be required to "firm" the power allocation.[409]

The involvement of private utilities in transmitting federal power and providing services to preference customers has been challenged in several lawsuits by preference litigants. The results have been mixed: in *Santa Clara*, the government's power "bank account" with a private utility was found to be inconsistant with the preference laws. In *Greenwood, ElectriCities III*, and *Brazos*, however, exchange arrangements with private utility companies were not so disfavored, as further discussed below.

Occasionally, the private utility's involvement in the marketing of preference power has rendered it vulnerable to legal action by disgruntled preference entities. To date, an antitrust lawsuit stemming from a preference allocation dispute,[410] and a claim of tortious interference with prospective business relations between a potential preference customer and the PMA[411] have been brought against private utilities participating in the government programs. As we shall see, both actions were unsuccessful.

One of the most intensely litigated topics in preference power marketing at the present time is the potential role of private utilities in the distribution of federal power to ultimate consumers. Public bodies lacking electric distribution systems have attempted to gain access to preference power by arranging to utilize, in various forms, the distribution facilities of private utilities. While several of these efforts by otherwise eligible preference customers have been rebuffed,[412] federal courts in New York have been asked to render a determination on the question what facilities and services a preference entity must have available, and in what form they must be available to the preference entity, before it will be deemed a legitimate preference customer.[413]

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407. *Arvin-Edison*, slip op. at 33.

408. *Id.* at 33-34.

409. *See* background discussion regarding the power marketing agencies, *supra*.

410. Greenwood Utils. Comm'n v. Mississippi Power Co., 751 F.2d 1484 (5th Cir. 1985).

411. *See ElectriCities III*.

412. *E.g.*, City of Portland v. Munro, No. 77-928 (D. Or. dismissed March 19, 1981).

413. *See, e.g.*, Power Authority of N.Y. v. Municipal Elec. Utils. Ass'n of N.Y., No. 83-6584 JES (S.D.N.Y. filed Sept. 6, 1983); Massachusetts Mun. Wholesale Elec. Co. v. Power Auth. of N.Y., Docket No. EL80-19, 30 F.E.R.C. ¶ 61,323 (1985), *clarified*, 32 F.E.R.C. ¶ 61,194 (1985), *appeal docketed sub nom.*, Metropolitan Transit Auth. v. FERC, No. 85-4115 (2d Cir. Aug. 2, 1985).

A. The Role of Private Utilities in the Transmission of Federal Power

In several instances, plaintiffs have challenged private utility company involvement in the transmission, scheduling, and firming of federal power. The goal of the plaintiffs in these actions has been to increase their own share of preference power, or, where the complainant has independent sources of generation or transmission, to displace the private utility in its provision of these services in order to obtain additional preference power benefits.

In *Santa Clara*, the plaintiff's objective was to secure an allocation of firm power from the government. The city was being sold power on a withdrawable basis while at the same time PG&E, a private utility, was permitted to purchase power under a so-called "banking" arrangement. Under this arrangement, power was sold to PG&E subject to repurchase by the government at a later time to meet the increased demands of its preference customers, albeit at a higher price. In the interim, PG&E sold the power to its own consumers at its regular rates.[414] The court found that the sale to PG&E, which allowed it to reap direct and sizeable benefits from federal power while the needs of a preference customer went unfulfilled "flies in the face of [Congressional] intent."[415]

The plaintiff in *Greenwood* had a similar goal: increasing its share of federal preference power. After a protracted battle in federal court to obtain an allocation of power from SEPA's Georgia-Alabama System of Projects, Greenwood's claims against the government were declared moot when it was designated as an allottee of Cumberland System power.[416] The plaintiff protested that its claims were not moot since SEPA allegedly continued to violate the preference laws through sales of capacity without energy to private utilities. The district court rejected this argument, in language quoted verbatim in the appellate court's affirmance, as follows:

> With regard to plaintiff's first argument, the court must observe that plaintiff has overlooked a critical fact. SEPA has no transmission lines. In order for plaintiff and other preference entities to receive SEPA power the lines of non-preference, large power companies such as the Southern Company must be used for transmission. These private companies cannot be forced to transmit and wheel SEPA power without some form of compensation; to do so would almost certainly amount to an unconstitutional 'taking' without just compensation. These wheeling and banking services must be paid for by either SEPA or the individual preference buyers. SEPA has administratively decided to pay for these services through the sale of 'capacity without energy.' Were it not for this arrangement plaintiff would have to pay for it. Thus, if SEPA were ordered to discontinue this practice whatever excess power might be available would certainly be offset by the wheeling cost which plaintiff would incur.[417]

In a footnote, the district court indicated that its conclusion "was not intended to be a ruling on the merits of plaintiff's Section 5 claim. Were it not for SEPA's proposal to serve plaintiff, additional considerations would be necessary."[418] Although there was no ruling on the merits of Greenwood's claim, the

414. *See Santa Clara*, 572 F.2d at 669-71.
415. *Id.* at 671.
416. *Greenwood*, 764 F.2d at 1461.
417. *Id.* at 1463.
418. *Id.*

court's approval of this "compensation in kind" is implicit in its statements.[419]

In the *Brazos* lawsuit, the plaintiff's objective in challenging the involvement of a private utility in the government's marketing program was to permit it to replace the utility as the provider of services to preference customers, thereby obtaining additional benefits from the federal power resource. The utility, Texas Utilities Electric Company (TUEC), provided transmission, firming, and scheduling services for two rural electric cooperatives. The preference customers benefitted from the arrangement through the exchange of non-firm power for firm, load factor power; TUEC benefitted from its use of the government's hydroelectric facility as a peaking power resource.[420] Brazos argued that the use of a private utility as a "scheduling agent" on behalf of preference customers was unlawful if a preference entity could provide the same services.[421] The court declined to review the issue, noting that:

> The SWPA's practice of approving customer-selected scheduling agents, regardless of their status as preference customers or whether there are other preference customers wishing to act as a preference customer's scheduling agent, does not violate the Flood Control Act, 16 U.S.C.A. § 825s. This is a matter clearly within agency discretion by law and therefore not subject to judicial review. 5 U.S.C.A. § 701(a)(2).[422]

The court found "equally convincing" the language from the *Greenwood* opinion implicitly approving the payment "in kind" to a private utility for its transmission services.[423]

Although there are certainly circumstances in which direct or indirect sales to private utilities by a PMA would be deemed unlawful, courts are cognizant of practical realities in the federal power marketing programs. If a direct and immediate benefit to preference customers from the arrangement can be perceived, the role of the private company in the federal program is less likely to meet with judicial disapproval.

B. Vulnerability of Private Utilities Through Participation in Federal Power Marketing Programs

Two interesting lawsuits have resulted as an offshoot of private utilities' involvement in federal power programs, both alleging anticompetitive conduct because of the utilities' provision of services to the PMA and its preference customers. In both, the defendant utility companies were absolved of any liability.

One of these cases arose out of the Greenwood Utilities Commission chal-

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419. The arrangement with the Southern Companies came under attack again in the *ElectriCities III* lawsuit. However, the court did not reach the merits of the claim as it dismissed on the ground that the plaintiff lacked standing to challenge sales to preference customers in a different marketing division.

420. Since the two cooperatives were wholesale power customers of TUEC, and TUEC's facilities were used to transmit the federal power and its own power to the cooperatives, the transaction was handled as an exchange of monies between the parties. The cooperatives argued that TUEC's net benefit from the transaction was no more than that to which it was entitled for its transmission, scheduling, and firming services. *See Brazos* (Defendant-Intervenor Cooperatives' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment) at 72-85.

421. *Brazos*, slip op. at 11.

422. *Id.*

423. *Id.* at 13.

lenge to SEPA's refusal to allocate it power. In an early phase of the *Greenwood* lawsuit, the plaintiff sought to amend its complaint, asking that the federal antitrust laws be "read into" SEPA's enabling act to supplement the guidelines of the Flood Control Act. Greenwood alleged that the arrangements between SEPA and the Southern Companies had effectively allowed monopolization of electric power in the areas served by the utilities.[424] The judge denied the request to amend the complaint, following an oral argument on the motion in which he queried:

> I have a little difficulty. The Ninth Circuit, didn't it hold among other things that this Secretary could discriminate all he wanted to as between preference customers? How would you square that with the duty to abide by anti-trust laws if he can discriminate all he wants to as between preference customers?[425]

Following the denial of its motion, Greenwood filed an independent action against Mississippi Power Company, alleging violation of the Clayton and Sherman Acts and requesting treble damages and injunctive relief.[426] The thrust of Greenwood's complaint was that SEPA's refusal to sell it power was a result of the monopoly power held by Mississippi Power and its sister companies over the transmission of electricity from SEPA.[427] The trial court granted summary judgment for the defendants, holding that the plaintiff was in reality challenging a federal government program, and that if the action were proper, the plaintiff had made no showing of harm since there was no proof that the government would have given plaintiff the power it sought in any case.[428]

The appellate court reached the same result, but for different reasons. Although it disagreed with the lower court's conclusion that Greenwood failed to prove it would have received an allocation "but for" the private utilities' actions, the Fifth Circuit did not adopt Greenwood's view of Mississippi Power's antitrust liability. The court found no unlawful conspiracy between the company and SEPA, and further held that the efforts by Mississippi Power and its affiliates to convince the government to adopt their marketing ideas were protected by the First Amendment of the United States Constitution. Any anticompetitive consequences of the resulting marketing arrangements were deemed to be "unimportant."[429]

Allegations of anticompetitive behavior by the Southern Companies were also part of the *ElectriCities III* lawsuit. In that case, the plaintiff brought a state law claim against the Southern Company and its four operating subsidiar-

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424. *See* Greenwood Utils. Comm'n v. Edwards, No. 77-179-MAC (amended complaint) (M.D. Ga., submitted July 17, 1979).

425. Transcript of Oral Argument Before the Honorable William A. Bootle at 14, Greenwood Utils. Comm'n v. Edwards, No. 77-179-MAC (M.D. Ga. Nov. 5, 1979).

426. Greenwood Utils. Comm'n v. Mississippi Power Co., No. J80-0350(C) (S.D. Miss. dismissed Nov. 17, 1983), *aff'd*, 751 F.2d 1484 (5th Cir. 1985).

427. *Greenwood v. Mississippi Power*, 751 F.2d at 1487.

428. *Id.* at 1495.

429. *Id.* at 1499. Plaintiffs in preference power allocation lawsuits have also alleged that the PMA's are required to consider the anticompetitive implications of their policies in devising their marketing programs. Courts thus far have rejected this contention. *See ElectriCities I*, No. 82-888-CIV-5, slip op. at 13 (E.D.N.C. Oct. 16, 1984); *Brazos*, slip op. at 10. *See also* Motor and Equipment Mfrs. Ass'n v. E.P.A., 627 F.2d 1095 (D.C. Cir. 1979) *cert. denied*, 446 U.S. 952 (1980) (holding that there is no "general" antitrust policy binding all federal agencies).

ies for tortious interference with the prospective business relations of its members in their dealings with SEPA. ElectriCities asserted that the companies had intentionally and maliciously interfered with the plaintiff's purchase of power from SEPA. The court dismissed this claim as well as the claims of illegality in SEPA's marketing program on grounds of lack of standing, noting that since ElectriCities' members were not located in the involved marketing area, the members "have no prospective business relations concerning SEPA's Policy allocation of energy to the western division."[430]

If the decisions in the *Greenwood v. Mississippi Power* and *ElectriCities III* lawsuits are representative, it would appear that federal courts are unwilling to hold private utilities culpable of anticompetitive behavior merely because of their voluntary participation in the federal government's power marketing programs.

C. Role of Private Utilities in Distribution of Electricity to Consumers on Behalf of Preference Bodies

An issue that has stirred intense debate among preference customers, private utilities, consumers, the federal PMA's, and the Power Authority of the State of New York is whether a preference entity must own or have control of an electric distribution system before it is eligible to receive a preference power allocation. In light of the low cost of this federal resource, it is understandable why consumers in many regions of the country are anxious to obtain the benefits of preference power, whether their local utility is publicly or privately owned. Attempts by municipalities and other political subdivisions to gain entry as preference customers despite their lack of ownership or control of electric distribution systems began in the earliest days of federal power marketing and have arisen in such diverse locations as California, Oregon, Utah, and New York. To date, all such attempts have failed, as will be further discussed below.

As a result, many municipalities and other public bodies have become more sophisticated in their attempts to comply with preference customer eligibility requirements, and some now seek to gain recognition as preference customers through lease arrangements with privately owned utilities. The legality of such an arrangement is currently the subject of litigation in New York.[431] However, the issue transcends the interests of preference customers and consumers in any one state or region: approval of the New York plan would be precedent for the establishment across the country of "paper" distribution agencies that would seek out preference power allocations that, in turn, would be passed onto private utilities for distribution to consumers.

1. *United States v. San Francisco*

As indicated, the question whether a municipality must have an electric distribution system to be eligible for federal power is not a new one. The issue reached the U.S. Supreme Court in 1950 in *United States v. City and County*

430. *ElectriCities III*, slip. op. at 12.

431. *See, e.g.*, Power Auth. of N.Y. v. Municipal Elec. Utils. Ass'n of N.Y., No. 83-6584 JES (S.D.N.Y. filed Sept. 6, 1983).

of San Francisco,[432] in which the Court held that provisions of a special grant to San Francisco from the U.S. government were violated by the use of a private utility in the distribution of power to the City's consumers.

Pursuant to the Raker Act of 1913,[433] Congress granted San Francisco certain lands and rights-of-way in national parks and forests for the purpose of supplying the City with water and for establishing a system for the generation and distribution of electric energy.[434] Section 6 of the Act prohibited the City "from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."[435] If the City violated this provision, the grant was to revert to the United States Government. The Act further provided that the government could bring suit against the City to enforce the provisions of the Act.[436]

At issue before the Supreme Court was whether the City had violated the provisions of this grant by allowing the sale and distribution of power through Pacific Gas & Electric Company (PG&E), a private utility. The City defended its arrangements with PG&E by arguing that PG&E was merely acting as its agent in the distribution of electricity, an arrangement the Act was not intended to prohibit. In opposition, the government argued that the grant to the City was made upon the condition that the power be sold by the City directly to consumers without private profit in order to bring it into direct competition with privately owned utilities.[437]

The Supreme Court agreed with the government that the City's use of PG&E to distribute this power to consumers violated the Raker Act:

> Congress clearly intended to require—as a condition of its grant—sale and distribution of [the] power exclusively by San Francisco and municipal agencies directly to consumers in the belief that consumers would thus be afforded power at cheap rates in competition with private power companies, particularly Pacific Gas & Electric Company.[438]

Moreover the Court held that the law could not be circumvented through a contractual sham:

> Terminology of consignment of power, rather than of transfer by sale, and verbal description of the power Company as the City's agent or consignee, are not sufficient to take the actions of the parties under the contract out of Section 6. . . . Mere words and ingenuity of contractual expression, whatever their affect between the parties, cannot by description make permissible a course of conduct forbidden by law.[439]

While the *San Francisco* opinion is useful precedent for the proposition that municipalities obtaining the benefit of federal power must be distributors of electricity, few federal power statutes contain provisions as precise as those found in the Raker Act.

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432. 310 U.S. 16 (1950).
433. 30 Stat. 242 (1913).
434. *San Francisco*, 310 U.S. at 18.
435. *Id.*
436. *Id.* at 18-19.
437. *Id.* at 19-20.
438. *Id.* at 26.
439. *Id.* at 28.

2. Statutes and Case Law Affecting the Pacific Northwest

The Bonneville Project Act is one of the few power marketing laws that sheds light on whether public bodies must be in the business of distributing electricity before they can be deemed eligible preference customers. Section 4 of the Act[440] contains a provision allowing time for the public bodies and cooperatives preferred by the Act to obtain financing necessary "to enable such prospective purchaser to enter into the public business of selling and distributing the electric energy proposed to be purchased," and to hold elections and acquire facilities "to become qualified purchasers and distributors of electric energy."[441] Thus, it is apparent that Congress intended the recipients of Bonneville Project power to be in the electric distribution business.

Despite this seemingly clear statutory requirement, the City of Portland, Oregon made a request in 1977 to the Bonneville Power Administration that it be given an allocation of preference power. At that time, the City did not have an electric distribution system of its own nor had it taken any significant action to create a municipal utility. Bonneville informed the City that it had no available power, and the City filed suit[442] requesting a declaration that it was an eligible preference customer entitled to an allocation from Bonneville.

Bonneville moved for dismissal of the action, contending, *inter alia*, that it was not ripe for the court's consideration.[443] The agency argued that since the City had not taken the necessary action to acquire utility facilities, it lacked the capability to accept and distribute power even if it were to receive an allocation. In a ruling from the bench at a hearing on December 27, 1978, the court granted the motion to dismiss, stating "[t]he plaintiffs have not taken the necessary steps to be considered as proper applicants for firm power."[444] In a written order issued two years later, the court indicated its dismissal of the action was based on the following reasons:

> 1. Plaintiffs did not meet the criteria to even be considered by the BPA as a preference applicant;
> 2. This action only presents a hypothetical set of facts with plaintiffs only seeking an option to have power available to them without having made any commitments to obtain such power; and
> 3. This action is not ripe for adjudication.[445]

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440. 16 U.S.C.A. § 832c (1985).

441. *Id.* The Boulder Canyon Project Act contains a similar requirement:

> [N]o application of a State or political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

43 U.S.C.A. § 617d(c).

442. City of Portland v. Munro, No. 77-928 (D. Or. dismissed March 19, 1981).

443. *City of Portland* (Motion to Determine Jurisdiction) at 2 (D. Or. submitted July 19, 1978).

444. Transcript of Proceedings Before the Honorable Robert M. Takasugi, at 18 (D. Or. Dec. 27, 1978).

445. Order Granting Defendants' Motion to Dismiss (D. Or. Dec. 5, 1980). The action was finally dismissed on March 19, 1981 by stipulation of the parties.

Although the Bonneville Project Act and the *City of Portland* case provide ample precedent that Bonneville power would not be allocated to public bodies lacking the means to distribute electricity, the issue is somewhat moot in the Pacific Northwest region. The mootness is due to the provisions of the Pacific Northwest Electric Power Planning and Conservation Act[446] which grants the benefit of lower cost power to consumers of private utilities through purchase and exchange arrangements.[447]

3. Evidence of Congressional Intent in Other Power Marketing Statutes

The Reclamation Project Act of 1939[448] and the Flood Control Act of 1944,[449] unlike the Bonneville Act, do not describe the nature of the public bodies to which they grant a preference. However, the legislative histories of these provisions reveal an understanding on the part of legislators that the preference was being granted to public utility systems, *i.e.*, municipalities and other public bodies in the business of distributing electricity. For example, in discussing the distinction between earlier reclamation laws providing a preference for "municipal purposes,"[450] and the preference for municipalities and other public bodies in the Reclamation Project Act, Representative Case of South Dakota noted that, "[e]xisting law only gives preference to sales for municipal purposes, not to municipalities as distributors of power."[451] In hearings on the proposed bill, Congressmen and witnesses alike made repeated reference to "municipally owned power systems" and "publicly owned distribution systems in the market,"[452] evidencing Congressional belief that the legislation was intended to benefit public entities that had the means of distributing the federal power.

An even clearer statement of Congressional intent is found in the statements of Representative Dunn of Pennsylvania, urging passage of the Tennessee Valley Authority Act:[453]

> The natural resources of the earth were not created for a privileged few. They belong to the people of the earth. Therefore, the people as a class should own them. There are many states and towns in the United States that own, control and operate electric power and water systems, and it has been proved, under municipal ownership, the citizens of these communities have much lower rates than those who reside in cities and towns where electric power and water are owned by private corporations.[454]

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446. 16 U.S.C.A. § 839 *et seq.* (1985).

447. 16 U.S.C.A. § 839c(c) (1985).

448. 43 U.S.C.A. § 485h(c) (1964).

449. 16 U.S.C.A. § 825s (1985).

450. *E.g.*, Reclamation Act of 1920, 43 U.S.C.A. § 522; Salt River Project Act of 1902, 43 U.S.C.A. § 598.

451. 84 CONG. REC. 10223 (1939).

452. *Hearings on H.R. 6773 and H.R. 6984 before the Committee on Irrigation and Reclamation*, 76th Cong., 1st Sess. 130-132 (1939). *See also* the 1956 report of the Committee on Government Operations on the Effect of Department of Interior and REA policies on Public Power Preference Customers, H.R. Rep. 2279, 84th Cong., 2d Sess. (1956), which abounds with references to "municipal power systems," and "nonprofit community systems as distributors of power."

453. 16 U.S.C.A. §§ 831 *et seq.* (1985).

454. 77 CONG. REC. 2283 (1933).

More recently, Congress expressly considered the question whether federal preference power should be sold to public bodies lacking electric distribution systems. During debate over the Hoover Power Plant Act of 1984, amendments were offered by Representatives Bates and Hunter which would have required a preference to be given to entities "without regard to whether these entities own their own transmission and distribution facilities."[455] Speaking in favor of his amendment, Representative Bates stated that "the point remains that it is at this time unfair to not allow, because of a Catch-22 in the preference clause that says if you do not have the ability to directly distribute the power, you cannot even wait at the end of the line and have preference."[456] Both the Bates and Hunter amendments were defeated after heated debate in which it was contended that they would "destroy the preference clause."[457]

When read as the whole, the fifty plus years of consideration of the preference laws by Congress, capped by the defeat of the Bates-Hunter amendments to the Hoover Power Plant Act of 1984, presents a strong indication that Congress intended to benefit public bodies as distributors of power, not as passive recipients of the benefits of federal power programs. However, Congress has only once directly confronted this question, and many of the preference statutes are silent as to whether public bodies are required to be in the electric utility business to be eligible for preference allocations.

4. DOE and PMA Policies

The Department of Energy has been forthright about its stand on preference customer eligibility requirements. However, only one of the PMA's, Western, has issued public notice of its policies in this regard. Both DOE and Western have adhered to the position that preference customers must be in the utility business in order to be eligible for federal power allocations.

One of the clearest statements of the test which a public body must pass in order to qualify as a preference customer is contained in the *City of Needles* Opinion of the Department of Energy General Counsel.[458] In a response to a request by the City of Needles, California, for reinstatement of sales of power it had been receiving, although it lacked a distribution facility at that time, the DOE General Counsel set forth the requirements that preference entities must have "utility responsibility" and must be "ready, willing and able" to receive and distribute power to consumers.

> Utility responsibility means that the preference customer is responsible for providing reliable service at reasonable rates without discrimination, for meeting any growth in loads served, and does so under privileges granted by the state or any other political subdivisions. Ready, willing and able to receive and distribute power means that the customer has the present ability to take power as of the date the power is offered or within a reasonable time thereafter. This in turn requires that the preference customer have available transmission and distribution facilities adequate to deliver power from WAPA delivery points to its loads.

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455. 130 CONG. REC. H3335, H3338 (1984).

456. *Id.* at H3336.

457. *Id.* at H3338 (statement of Rep. Udall).

458. Department of Energy General Counsel Lynn R. Coleman, Request of City of Needles for Reinstatement of Sales of Federal Power for Benefit of its Citizens (November 21, 1978).

> . . . In order to meet this responsibility, the city may be required to enter into contracts with other utilities for the wholesale purchase of supplemental power, i.e., power needed to supplement the amount available from WAPA to meet customer needs. Needles would likely also need to secure a means of delivering power to its customers, as well as to make arrangements for meter reading, billing and accounting of power deliveries.[459]

The DOE General Counsel suggested that Needles would have to purchase, lease or condemn the facilities of the private utility then providing it with service to meet these requirements.[460]

Western has echoed the "utility responsibility" theme in its power marketing policies. Western and its predecessor, the Bureau of Reclamation, have long recognized that a preference entity is ineligible for an allocation of federal preference power unless it is in the business of distributing electricity. While there are references as far back as 1954,[461] which indicate the Bureau of Reclamation's policy that it would not serve municipalities lacking electric distribution systems, Western's policy in this regard has been most clearly expressed in its recent round of power marketing policies for its Boulder City Area, Salt Lake City Area, Loveland-Fort Collins and Stampede Projects. In each of these policies, Western has declared its requirement that municipal applicants for preference power demonstrate their "utility responsibility" before they will be permitted to receive an allocation.[462]

In the proceeding leading to the issuance of its marketing criteria for its Salt Lake City Area Projects, Western was faced with a request by the Utah Power & Light Company (UP&L), an investor-owned utility, that preference power be allocated either directly to it or to 143 Utah cities and towns that do not own distribution systems for which UP&L would act as agent in the distribution of the power. UP&L contended that refusal to grant it or the cities and towns an allocation of power was unconstitutional, as a denial of due process and equal protection rights, and under the Tenth Amendment of the United

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459. *Id.* at 4.

460. *Id.* at 5.

461. In a June 12, 1979, Memorandum from the Director, Office of Power Marketing Coordination to the Administrators of the five regional PMA's regarding "Power Allocation Policy - Past Allocation Practices," the policies of the Bureau of Reclamation from the earliest days of power marketing are set forth. At page 4 of the section pertaining to the Pick-Sloan Missouri Basin Program (Eastern Division), there is a discussion of preference customer applications for power during a 1953-1954 allocation proceeding. Several applicants were unable to be served by the Bureau due to "lack of distribution facilities by certain municipalities", among other factors. The 1962 allocation of power from the Colorado River Storage Project is also discussed. At page 7 of that section, it is stated: "Five municipalities which did not own or operate their own distribution systems were nevertheless granted allocations based on their applications on the assumption that they would become utilities within a reasonable period of time and place their allocations under contract." The criteria, issued by the Bureau on March 9, 1962, further provides that "[p]roject power will not be sold to a preference customer for sale or exchange to a nonpreference customer for resale." Bureau of Reclamation General Power Marketing Criteria, March 9, 1962, at 2.

462. *See, e.g.*, General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects, 48 Fed. Reg. 20,872 (1983); Proposed Post-1989 General Power Marketing Criteria for the Loveland-Ft. Collins Area, 48 Fed. Reg. 38,279 (1983); Revised Proposed General Power Marketing Criteria and Allocation Criteria for Salt Lake City Area Projects, 49 Fed. Reg. 34,900 (1984); Stampede Project Power Availability, Call for Power Allocation Applications, Announcement of Proposed Allocation Criteria, 49 Fed. Reg. 39,098 (1984).

States Constitution.[463] Western rejected UP&L's arguments, citing ample legislative history, as well as the DOE's *City of Needles* opinion, to support its view that Congress intended the preference clause to be extended to municipalities as distributors of power.[464]

Western also rejected UP&L's contention that its marketing policy did not serve notions of equity or the "widespread use" requirements of the preference statutes. As stated by Western:

> Many Federal dollars are spent on purposes that give direct benefits only to a particular group. The use of Federal taxes to build and operate public works in the eastern portion of the United States, for example, offers no direct benefit to those who live in the western part of the country. . . . Relevant Federal laws give preference to public bodies and cooperatives, not to all taxpayers. While the notion of widespread use is certainly important in the marketing of Federal power, it does not vitiate the preference clause.[465]

Western further rejected, as unsupportable, UP&L's claims of constitutional violations.[466]

While the policies of SEPA and Southwestern with regard to preference customer eligibility requirements have not been reduced to writing, the authors have held informal discussions with knowledgeable personnel from these agencies and have learned that their unstated policy is in accord with Western's. Thus, it would seem that the PMA's are unlikely to grant allocations to preference entities failing to meet their customer eligibility requirements. As courts have uniformly held that choices among preference customers are a matter entirely within a PMA's discretion,[467] a PMA's decision in this regard is not likely to be overturned by a court.

5. The *"PASNY"* Cases

Niagara project power, marketed by the Power Authority of the State of New York (PASNY) pursuant to a license granted by the federal government,[468] has become the subject of intense debate and political jockeying by a number of interest groups in New York and several other Northeast states. As a result of FERC decisions holding that public bodies which lack distribution systems are ineligible as preference customers,[469] a number of municipalities and other political subdivisions in New York have formed "paper" distribution agencies (so-called "municipal distribution agencies") to "lease" private utility

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463. *See* April 15, 1983 comments on UP&L in response to Western's request for applicant profile data, 48 Fed. Reg. 5303 (1983).

464. Revised Proposed General Power Marketing Criteria and Allocation Criteria for Salt Lake City Area Projects, 49 Fed. 34,900 at 34,903-04 (1984). *See also* Post-1989 General Power Marketing and Allocation Criteria, 51 Fed. Reg. 4844 (1986) in which Western reaffirmed its earlier statements, stating it was "legally bound to uphold the preference law regardless of whether it may or may not be founded on an anachronistic idea." *Id.* at 4847.

465. 49 Fed. Reg. at 34905.

466. *Id.* at 34907-08.

467. *See, e.g., Santa Clara, Greenwood,* and the *ElectriCities cases*, discussed *supra.*

468. *See* 16 U.S.C.A. § 836 (1985).

469. Pursuant to the Niagara Redevelopment Act, the FERC has jurisdiction to review certain power allocation decisions of PASNY, as a condition of its license. *See* 16 U.S.C.A. § 836(b) (1985).

company distribution and transmission facilities.[470] Similar action was taken by the Vermont Department of Public Services, a former recipient of Niagara Power.[471] The legality and propriety of these arrangements has been made the subject of several lawsuits and FERC proceedings, as existing preference customers of PASNY seek to protect their allocations from serious dilution.

The Niagara Redevelopment Act grants to public bodies and nonprofit cooperatives a preference in the sale of fifty percent of Niagara project power. This power is to be made available "for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers."[472] Additionally, the Act requires that up to fifty percent of the Project power subject to preference be made available for use "within reasonable economic transmission distance in neighboring States."[473]

In 1982, the FERC issued a decision in *Municipal Electric Utilities Association of the State of New York v. Power Authority of the State of New York*[474] (hereinafter *MEUA v. PASNY*), finding that PASNY was in violation of the Niagara Redevelopment Act by failing to make at least fifty percent of the Niagara hydropower available to preference customers. One issue that arose during that proceeding was whether sales of preference power to the Metropolitan Transit Authority of New York (MTA) were proper since, although it is a public body, MTA is not a distributor of power. The Commission concluded that Congress had intended to limit the meaning of the term "public bodies" to those governmental entities that sell and distribute preference power to the people as consumers.[475] On rehearing, the Commission vacated its findings regarding MTA's status as a public body.[476] Since MTA was before the Commission in another proceeding, *Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York*[477] (hereinafter, *MMWEC v. PASNY*), the Commission decided that it would consider the question of MTA's status anew in that proceeding.[478]

MMWEC v. PASNY involved a review of PASNY's allocations of Niagara power to "neighboring" states, as required by the Act. In addition to the question of eligibility of the MTA, an issue arose in this action as to whether the Vermont Department of Public Service, formerly adjudged by the Federal Power Commission to be an eligible preference customer despite the fact that it resells the majority of its Niagara power allocation at wholesale to nonprefer-

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470. *See* J.C. Lichtenberg, *Allocation of Preference Power—The Importance of the Plan of the Power Authority of the State of New York* (presented at the APPA Legal Seminar, San Diego, California, November 12, 1985) [hereinafter cited as Lichtenberg]. The authors are grateful to Ms. Lichtenberg for permission to refer to her paper.

471. *Id.* at 15.

472. 16 U.S.C.A. § 836(b)(1) (1985).

473. *Id.* § 836(b)(2).

474. Docket No. EL78-24, 21 F.E.R.C. ¶ 61,021 (1982), *modified in part sub nom.*, Power Auth. of N.Y. v. FERC, 743 F.2d 93 (2d Cir. 1984).

475. 21 F.E.R.C. at 61,129.

476. *See* Opinion No. 151-A, 23 F.E.R.C. ¶ 61,031 (1983).

477. Docket No. EL80-19, 30 F.E.R.C. ¶ 61,323 (1985), *clarified*, 32 F.E.R.C. ¶ 61,194 (1985), *appeal docketed sub nom.*, Metropolitan Transit Auth. v. FERC, No. 85-4115 (2d Cir. Aug. 2, 1985).

478. *MEUA v. PASNY*, 23 F.E.R.C. at 61,084.

ence utilities,[479] was entitled to an allocation. The Commission decided these issues adversely to MTA and the Vermont agency, concluding that "Congress intended to confer a preference only upon publicly-owned distributors and sellers of electricity, who are capable of selling and distributing this power to the people as consumers of electricity."[480] On rehearing, the Commission reaffirmed its findings, but refused to determine whether Vermont's proposal to lease distribution facilities would qualify it as a preference customer, leaving that issue to PASNY to determine in the first instance.[481] An appeal of *MMWEC v. PASNY* is pending before the Second Circuit.

While these decisions were pending before FERC, PASNY filed suit in Federal District Court for the Southern District of New York asking for a determination whether the municipal distribution agencies (MDA's) which propose to "lease" facilities from private utilities are eligible recipients of its preference power.[482] A challenge by MEUA to allocations to the MDA's was also filed and consolidated with PASNY's action.[483] Additionally, MEUA challenged the legality of the leases before FERC[484] and other preference customers are fighting Vermont's leasing arrangement in federal court.[485] MEUA contends that the leases are not true leases since they, *inter alia*: (1) severely limit the MDA's use of the facilities; (2) allow the utility to retain its franchise responsibility; (3) allow the utility to retain its exclusive control of the system, including the right to sell the facility; and (4) allow the utility to retain billing and collection functions.[486] Thus, MEUA contends, the MDA's are not true utilities.[487]

The decisions in these pending cases, if reached on the merits, promise to have significant import for preference customers and consumers across the country. If "paper" distribution agencies are deemed valid, and federal PMA's permit their use in other regions, existing customers may face severe dilution of

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479. *See* Vermont Pub. Serv. Bd. v. Power Auth. of N.Y., 55 F.P.C. 1109 (1976).

480. *MMWEC v. PASNY*, 30 F.E.R.C. at 61,652.

481. Opinion No. 229-A, 32 F.E.R.C. ¶ 61,184 at 61,451 n. 12 (1985).

482. *See* PASNY v. MEUA, No. 83-6484 JES (S.D.N.Y. filed Sept. 6, 1983).

483. *MEUA v. PASNY*, No. 83-6584 JES (S.D.N.Y. filed Feb. 11, 1985).

484. *See* MEUA v. Consolidated Edison Co. of N.Y., Docket No. EL85-39 (Notice of Complaint issued July 22, 1985). The FERC refused to hear the complaint on the grounds that the lease arrangement was nonjurisdictional, and that a complaint regarding the Niagara Redevelopment Act must be directed at PASNY, not the utility company. *See* Lichtenberg, *supra* note 470 at 18.

485. Allegheny Electric Cooperative v. PASNY, No. 85-5081 RLC (S.D.N.Y. filed July 1, 1985).

486. Lichtenberg, *supra* note 470 at 3-4.

487. *Id.* at 5. "Sham" arrangements to circumvent preference customer eligibility requirements were disapproved in strong language by Assistant Regional Solicitor Leon Jourolmon in an opinion issued on March 5, 1956 in response to a request by the Bonneville Power Administration:

> Otherwise it would be possible to completely nullify the preference provisions by the simple expedients of marketing all power from a project through a public agency set up by a state or city and then through them resell that power to industries or private agencies or persons which are clearly outside of the preference. Under such an arrangement the Government would do by indirection what has been expressly prohibited by direction. It is an elemental principle of law that that which is directly prohibited cannot be done indirectly. . . . [N]o court would hesitate to declare the contract illegal.

Additionally, Western has declared that "public ownership [as opposed to a lease] of a distribution system is a prerequisite to satisfy eligibility requirements for allocations of Federal Power. . . ." Post-1989 General Power Marketing and Allocation Criteria, 51 Fed. Reg. 4844, 4846 (1986).

their allocations.

VI. PMA RATEMAKING AUTHORITY

Our survey of the legislative and legal developments affecting preference power marketing would not be complete without a brief overview of PMA ratemaking. In this section, the statutes governing the PMA rate-setting practices, and the procedures by which PMA rates are approved and implemented are described. These procedures, particularly with regard to the establishment of interim rates, have generated significant controversy. A number of federal courts have issued opinions on the authority of the Secretary of Energy to set interim rates[488] and one such dispute has reached the United States Supreme Court.[489]

The design of PMA rates has received particular attention in Bonneville's region.[490] In addition, two recent lawsuits have given federal courts the occasion to examine whether certain PMA customers have a right to a preferred rate, a proposition that was rejected in both instances.[491] A brief review of these decisions is contained in the discussion that follows.

A. Statutory Authority For PMA Rate-Setting Functions

General guidelines for the setting of rates by the PMA's are contained in the statutes governing federal power marketing. The basic principle of these statutes is that the government's investment in the power generation facilities at federal reclamation and flood control projects is to be recovered with interest over time. However, the rates are to be "cost based" so that they are kept as low as possible, allowing publicly-owned utilities and rural electric cooperatives to compete effectively against private utilities.[492]

Pursuant to the Flood Control Act, the Secretary of Energy is directed to dispose of surplus federal power "at the lowest possible rates to consumers con-

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488. *See, e.g.*, City of Fulton v. United States, 751 F.2d 1255 (Fed. Cir. 1985), *cert. granted*, No. 84-1725, 53 U.S.L.W. 3911 (U.S. July 1, 1985); United States v. Tex-La Elec. Coop., Inc., 693 F.2d 392 (5th Cir. 1982); Montana Power Co. v. Edwards, 531 F. Supp. 8 (D. Or. 1981); Colorado River Energy Distribs. Ass'n v. Lewis, 516 F. Supp. 926 (D.D.C. 1981); Pacific Power & Light Co. v. Duncan, 499 F. Supp. 672 (D. Or. 1980). The focus of this discussion of PMA ratemaking will be primarily on issues that have arisen since the passage of the Department of Energy Organization Act (DOE Act), 42 U.S.C.A. §§ 7101 *et seq.*

489. City of Fulton v. United States, 751 F.2d 1255 (Fed. Cir. 1985), *cert. granted*, No. 84-1725, 53 U.S.L.W. 3911 (U.S. July 1, 1985).

490. In 1984, the Ninth Circuit reviewed FERC's final approval of the first rates proposed by Bonneville after the enactment of the Pacific Northwest Electric Power Planning and Conservation Act (Pacific Northwest Power Act), 16 U.S.C.A. § 839 *et seq.* (1985). In Central Lincoln Peoples' Util. Dist. v. Johnson, 735 F.2d 1101 (9th Cir. 1984), the court determined that: (1) its jurisdiction was limited to review of final rates; (2) FERC's review of regional rates is limited to financial oversight (in contrast to a more extensive scope of review of nonregional rates); (3) Bonneville's ratemaking process was procedurally adequate; and (4) there was substantial evidence to support Bonneville's rate determinations and they thus would be upheld by the court. *See also Report of the Committee on Federal Power Marketing Agency Ratemaking*, 6 ENERGY L. J. 109, 114 (1985) [hereinafter, *Committee Report*].

491. *See* Arvin Edison Water Storage Dist.v. Hodel, No. 82-2466 (D.D.C. Mar. 28, 1985); Trinity County Pub. Util. Dist. v. Hodel, No. 84-0850 (E.D. Cal. Feb. 22, 1985), *appeal docketed*, No. 85-1874 (9th Cir. May 9, 1985).

492. *See* L.C. WHITE, *supra* note 195 at 24, 29.

sistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Secretary of Energy."[493] The Act further directs that:

> Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years.[494]

This statute governs the ratemaking functions of SEPA and Southwestern.[495]

The Reclamation Project Act contains a similar requirement. Sales of electric power are to be made:

> at such rates as in [the Secretary's] judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper.[496]

Western's rates are principally set in accordance with this provision.[497]

The Bonneville Administrator is required to establish rates sufficient:

> to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this chapter and other provisions of law. Such rates shall be established in accordance with sections 9 and 10 of the Federal Columbia River Transmission System Act (16 U.S.C.A. 838) [16 U.S.C.A. §§ 838g and 838h], section 5 of the Flood Control Act of 1944 [16 U.S.C.A. § 825s], and the provisions of this chapter.[498]

Bonneville's rates must also cover the cost of power purchased to meet customers' loads and the exchange arrangements with utilities, as required by the Pacific Northwest Power Act.[499] Separate rate setting provisions govern Bonneville's sales to direct service industrial customers, as those rates are to be designed to cover the costs of the residential exchange program with utilities.[500]

B. Division of Responsibility Within The Department of Energy

The PMA rate design and approval practices involve a division of responsibility within the Department of Energy. Under current procedures, rates are developed by the PMA Administrator, may be put into effect on an interim basis by the Deputy Secretary of the DOE (with the exception of Bonneville

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493. 16 U.S.C.A. § 825s (1985). Prior to the enactment of the DOE Act, the statute provided for confirmation and approval of rates by the Federal Power Commission. *See* United States v. Tex-La Elec. Coop., Inc., 693 F.2d 392, 398 (5th Cir. 1982).

494. 16 U.S.C.A. § 825s (1985).

495. *See Committee Report, supra* note 490, at 109.

496. 43 U.S.C.A. § 485h(c) (1964).

497. *See Committee Report, supra* note 490, at 109.

498. 16 U.S.C.A. § 839e(a)(1) (1985).

499. *Id.* § 839e(b)(1). However, the Act also requires that Bonneville must develop a rate ceiling for its preference customers so that they do not pay higher rates than they would have paid if the Act had not been passed. *See Committee Report, supra* note 490, at 116.

500. 16 U.S.C.A. § 839e(c) (1985).

rates), and must be approved by the FERC before they become final.

Subsequent to the passage of the DOE Act, the Secretary of Energy issued an order delegating the authority to develop PMA rates to the Assistant Secretary for Resource Applications "acting by and through the [PMA] administrators."[501] The Assistant Secretary also was given authority to approve interim rates, subject to refunds; final rates were to be confirmed and approved by the FERC.[502] The procedures set out in the delegation order applied to all five PMA's, including Bonneville.[503]

In December 1983, a new delegation order was issued by the Secretary. Delegation Order No. 0204-108[504] applies to all PMA's except Bonneville, and directs that the PMA Administrator develop rates, the Deputy Secretary of the DOE approve and place into effect interim rates, and the FERC approve rates on a final basis.[505] The order set forth specific limitations on the FERC's review of PMA's rates:

> The Commission review will be limited to: (a) whether the rates are the lowest possible to consumers 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.[506]

The Commission may reject only decisions found to be arbitrary, capricious, or in violation of the law or contrary to the standards of DOE Order No. RA6120.2 (governing repayment principles).[507] If the Commission disapproves a rate, the matter is remanded to the PMA to develop a substitute rate.[508] The Commission has interpreted this delegation order as considerably narrowing its review of PMA rates.[509]

The procedure for development and approval of Bonneville's rates is set forth in the Pacific Northwest Power Act, in a more elaborate fashion than for the other PMA's. The Act requires the Administrator to conduct hearings on proposed rates to develop a full and complete record. The Act further requires that no rates be put into effect on an interim or final basis without FERC approval.[510] In approving final rates, the Commission must find that the rates are sufficient to assure repayment of the federal investment; based upon the agency's total system costs; and equitably allocate the costs of the federal transmission system between federal and nonfederal use of the system.[511] Rates for "non-regional" customers (*i.e.*, customers outside the defined Pacific Northwest

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501. Delegation Order No. 0204-33, 43 Fed. Reg. 60,636 (1978).
502. *Id.*
503. *Id.*
504. 48 Fed. Reg. 55,664 (1983).
505. *Id.*
506. *Id.*
507. *Id.*
508. *Id.*
509. *See* Western Area Power Administration, Order Confirming and Approving Rates and Terminating Docket, 28 F.E.R.C. ¶ 61,142 (1984).
510. 16 U.S.C.A. § 839e(i) (1985).
511. *Id.* § 839e(a)(2).

region[512]) are allowed to secure a more extensive Commission review, including the opportunity for an additional hearing in accordance with ratemaking procedures established by the FERC under the Federal Power Act.[513]

C. *Interim Rates*

Final PMA rates (with the exception of Bonneville rates) are typically put into effect by FERC with a minimum of controversy.[514] However, the Secretary of Energy's delegation of interim rate approval to officials within the DOE has sparked tremendous controversy; one dispute has even reached the United States Supreme Court.[515]

One of the first cases subsequent to the DOE Act which challenged the approval of interim rates by a DOE official was *Pacific Power & Light Co. v. Duncan*.[516] At issue in this proceeding was the approval by an Assistant Secretary of the DOE of interim Bonneville rates. (This case arose prior to the enactment of the Pacific Northwest Power Act, granting interim rate approval to FERC.) The plaintiffs contended that PMA ratemaking authority was transferred by the DOEOA to the FERC, not the Secretary of Energy. The court rejected this contention, noting that "[i]n plain and unambiguous language, Congress granted ratemaking authority for the BPA to the Secretary of Energy, not the FERC."[517] The court further held that this authority extended to interim rates and that hearings on the proposed interim rates were not required.[518] Additionally, the court refused to review rate design issues, stating that there was "no law [for a court] to apply" to the Secretary's decisions in this regard.[519]

Nearly identical challenges to the DOE Assistant Secretary's interim rate authority were brought in *Colorado River Energy Distributors Association v. Lewis, (CREDA)*[520] and *Montana Power Co. v. Edwards*.[521] In both instances, the courts upheld the delegation of authority to and exercise of authority by the Assistant Secretary. The *CREDA* court additionally noted that the sale of elec-

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512. *See id.* § 839a(14).

513. *Id.* § 839e(k). *See also Committee Report, supra* note 490, at 111.

514. *See, e.g.*, Western Area Power Administration, Rio Grande Project, Order Confirming and Approving Rate Schedule, 30 F.E.R.C. ¶ 62,333 (1985); Southeastern Power Administration, Cumberland Basin System of Projects, Order Confirming and Approving Rate Schedule, 29 F.E.R.C. ¶ 62,378 (1984); Alaska Power Administration—Snettisham Project, Order Confirming and Approving Rates, 27 F.E.R.C. ¶ 61,090 (1984); Southwestern Power Administration, Order Confirming and Approving an Extension of Rates, 29 F.E.R.C. ¶ 62,123 (1984). *Cf.* Southeastern Power Admin., Docket No. EF86-3011, a PMA rate approval proceeding in which ElectriCities of North Carolina has intervened, claiming a number of deficiencies in SEPA's rate design. Many of the claimed deficiencies appear to be related to ElectriCities' lawsuit against SEPA in the Western District of North Carolina, No. C-C-85-384-P (W.D.N.C.), which was dismissed by the court on October 30, 1985 on grounds of lack of standing. A number of SEPA's preference customers affected by the rates have intervened in defense of SEPA's rates.

515. City of Fulton v. United States, 751 F.2d 1255 (Fed. Cir. 1985), *cert. granted*, No. 84-1725, 53 U.S.L.W. 3911 (U.S. July 1, 1985).

516. 499 F. Supp. 672 (D. Or. 1980).

517. *Id.* at 677-78.

518. *Id.* at 678-79.

519. *Id.* at 681-83.

520. 516 F. Supp. 926 (D.D.C. 1981).

521. 531 F. Supp. 8 (D. Or. 1981).

tric power from government projects constitutes the sale of surplus government property, as to which the Secretary has broad authority to establish terms, including a requirement that interim rates be collected.[522]

The issue of the DOE's interim ratemaking authority reached the Fifth Circuit in *United States v. Tex-La Electric Cooperative, Inc.*,[523] a controversy stemming from the refusal of certain preference customers of the Southwestern Power Administration to pay an interim rate increase. The court also upheld the DOE's right to place interim rates into effect pending final approval by the FERC. The court reconciled seemingly conflicting provisions of the DOEOA[524] in reaching its conclusion that Congress intended to unify ratemaking authority in the person of the Secretary of Energy, so that the Secretary's "trifurcated" rate procedure, which granted interim rate approval authority to the Assistant Secretary, was proper.[525]

Opinions approving the DOE Secretary's interim rate authority are by no means universal. In *City of Fulton v. United States*,[526] the United States Claims Court determined that the Secretary of Energy did not have authority to effect interim rate increases under the Flood Control Act.[527] Additionally, the court held that the rate increase violated a contract term providing for increases in rates only after confirmation and approval by the Federal Power Commission.[528] The Court of Appeals for the Federal Circuit affirmed[529] (unpersuaded by the Fifth Circuit's opinion in *United States v. Tex-La*), and the Supreme Court granted *certiorari* to determine whether the Secretary may place interim rate increases into effect subject to final approval by FERC.[530] Arguments before the Court were heard during January, 1986.

D. Is There A Right To A Preferred Rate?

An interesting legal theory was applied by preference customers of Western in *Arvin Edison Water Storage District v. Hodel*,[531] and *Trinity County Public Utility District v. Hodel*.[532] In both cases, the plaintiffs claimed they had

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522. *CREDA*, 516 F. Supp. at 931 (citing Arizona v. California, 373 U.S. 546, 580 (1963)).

523. 693 F.2d 392 (5th Cir. 1982). Consolidated with this appeal was the appeal in United States v. Northeast Texas Elec. Coop., Inc., No. 82-2014.

524. The court found a conflict between the provisions of the DOE Act stating that the administrative features of the Flood Control Act, including the rate setting principles, would continue unimpaired, and the provisions unifying all ratemaking authority in the Secretary of Energy. *See* 693 F.2d at 401.

525. *Id.* at 402, 405. In reaching this conclusion, the court clearly disapproved of a lower court decision within the Fifth Circuit reaching the opposite result. *See id.* at 395, *citing to* United States v. Sam Rayburn Dam Elec. Coop., Inc., No. H-80-1781 (S.D. Tex. Aug. 19, 1982), *vacated* (S.D. Tex. April 25, 1983), *aff'd* 712 F.2d 1414 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 997 (1984).

526. 680 F.2d 115 (Ct. Cl. 1982), *aff'd* 751 F.2d 1255 (Fed. Cir. 1985), *cert. granted*, No. 84-1725, 53 U.S.L.W. 3911 (U.S. July 1, 1985).

527. 680 F.2d at 119.

528. *Id.*

529. 751 F.2d 1255 (Fed. Cir. 1985).

530. *See* 53 U.S.L.W. 3844 (May 28, 1985). The respondents have argued that an interim rate increase would violate their contracts with the government in any event. *See City of Fulton*, Brief of Respondents at 15-23 (U.S. Sup. Ct., submitted Oct. 23, 1985).

531. No. 82-2466 (D.D.C. Mar. 28, 1985).

532. No. 84-0850 (E.D. Cal. Feb. 22, 1985), *appeal docketed*, No. 85-1874 (9th Cir. May 9, 1985).

a right to a special rate, lower than that of other preference customers. This claim of right to a "preferred" rate was rejected in both instances.

In *Arvin-Edison*, the plaintiffs, eleven California irrigation and water storage districts that purchase power from Western's Central Valley Project (CVP), contended that as irrigators they were entitled to special rates since the CVP's primary purpose was irrigation.[533] Although the plaintiffs raised a number of objections to Western's rates for CVP power, they principally complained of the fact that they (like all CVP customers), were required to pay for Western's purchased power costs. The plaintiffs contended that the decision to charge them the same rates as were charged to non-irrigators violated the reclamation laws.[534]

The court conducted a thorough review of the laws cited by the plaintiffs as establishing this right to a preferred rate and concluded that irrigators were not entitled to any special treatment under the power marketing provisions of the reclamation laws.[535] "The operational agencies have consistently regarded irrigation districts as part of the single preference class, and they have never accorded them lower rates, a greater priority in the allocation of power, or any other special treatment."[536]

The controversy in *Trinity* arose from sales of power by Western from the CVP under the Trinity River Division Act, which granted preference customers in Trinity County a "first preference" to twenty-five percent of certain power available from the CVP.[537] The thrust of the plaintiffs' complaint was that Western's decision to set a single rate for "first preference" and other preference customers for CVP power violated the Trinity River Division Act. The plaintiffs alleged that the Act required rates for power sold to first preference customers to be based solely on the costs of the Trinity River Division of the CVP, and that they therefore should not be required to pay for Western's purchased power costs.[538] The government countered with the argument that the laws governing sales from the Trinity River Division do not require special rate treatment for first preference customers. The District Court for the Eastern District of California summarily rejected the plaintiffs' arguments in a ruling from the bench at oral argument, and the matter has been appealed to the Ninth Circuit.[539]

Although the rates charged by PMA's are generally lower than wholesale power charges by private utilities, the costs are subject to many of the same economic pressures and increases in costs suffered by other power generators. Particularly in regions such as the West and the Pacific Northwest, where the PMA's are authorized to purchase power to meet preference customers' increased power demands, the rates charged by the PMA's can be expected to increase, and innovative legal challenges by preference customers can be ex-

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533. *Arvin-Edison*, slip op. at 2. As discussed *supra*, the plaintiffs also claimed a "superpreference" right to an allocation of power from the CVP, a claim the court also rejected.

534. *Id.* at 8-9.

535. *Id.* at. 19-23.

536. *Id.* at 21.

537. *See Trinity*, Complaint for Declaratory Judgment and Injunctive Relief, ¶ 8.

538. *Id.* ¶ 13.

539. No. 85-1874 (9th Cir. appeal docketed May 9, 1985).

pected to follow.

VII. NON-FEDERAL FUNDING OF FUTURE HYDRO DEVELOPMENT

One Reagan Administration overture that has received considerable attention recently is the proposal that new projects should be developed with funds from non-federal sources, or a mixture of federal and non-federal funding. In a January 24, 1984 letter from President Reagan to Senator Laxalt, the President made the following declaration concerning the water project financing and cost-sharing policy of his Administration:

> All Federal water development agencies will continue to seek out new partnership arrangements with the States and other non-Federal interests in the financing and cost sharing of all proposed projects. . . .
>
> . . . .
>
> Project beneficiaries, not necessarily governmental entities, should ultimately bear a substantial part of the cost of all project development.
>
> . . . .
>
> The costs incurred by the Federal Government in project planning generally will be shared with project sponsors. Specific arrangements will differ among agencies because of their differing planning, authorizing, and funding procedures.

As is the case with most federal power marketing programs, the method by which this expression of policy will be carried out has been left up to the individual PMA's. Western and Southwestern have already initiated programs pertaining to the construction of projects with non-federal funds. Western has issued *Federal Register* notices for individual proposed projects requesting the participation of non-federal entities in planning and development of the projects.[540] Southwestern has conducted a notice and comment proceeding to develop a policy governing the allocation of power from projects developed with funds from non-federal sources.[541]

The construction of federally-owned projects with funds provided by non-federal entities presents a number of questions regarding the selection of project participants and the manner in which power generated at such projects will be marketed by the PMA's. While the policies with regard to non-federally funded projects is still in its developmental stages, Western and Southwestern have responded to these questions in somewhat diverse fashions.

Western has called for expressions of interest in funding specific amounts of capacity for proposed projects.[542] With the exception of its planned Colorado-Big Thompson Pumped Storage Unit,[543] for which Western indicated that

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540. *See, e.g.*, Market Test for the Diamond Fork Power System, Bonneville Unit, Central Utah Project, Utah; Market Test for Determining the Marketability and Willingness to Non-Federally Finance the Diamond Fork Power System, 49 Fed. Reg. 19,583 (1984); Spring Canyon Pumped-Storage Project, Arizona; Non-Federal Participation in Proposed Planning Investigation and Expression of Peaking Power Needs, 50 Fed. Reg. 7403 (1985); Colorado-Big Thompson Pumped-Storage Unit, CO; Solicitation of Non-Federal Participation in Proposed Planning Investigation Public Information Forum and Expression of Peaking Power Needs, 50 Fed. Reg. 10,113 (1985).

541. *See* Federal Hydroelectric Power; Notice of Intent, 50 Fed. Reg. 7639 (1985); Federal Hydroelectric Power - Proposed Power Allocation Policy, 50 Fed. Reg. 25,316 (1985).

542. *See supra* note 540.

543. 50 Fed. Reg. 10,113 (1985).

selection of participants would be accomplished in accordance with the preference provisions of Section 9(c) of the Reclamation Project Act of 1939,[544] Western has not delineated the manner in which project sponsors are to be chosen. Several non-preference entities have expressed an intent to participate in Western's Spring Canyon Pumped Storage Project.[545] Once selected as a sponsor, the non-federal entity has the right of first refusal to acquire a proportionate share of the project's output, whether or not it is a preference entity.[546]

Southwestern has not, at the time of this writing, determined the manner in which project sponsors would be selected;[547] rather, it has concentrated on developing a general policy for the allocation of power from non-federally funded projects.[548] The agency has indicated that the following principles would apply to such power allocations:

1. If a project sponsor wants federal hydropower, Southwestern will allocate to the entity an amount of marketable power and energy "not to exceed"[549] the percentage of construction funds provided by the entity.[550]
2. If a project sponsor does not want an allocation of power and energy, Southwestern will allocate that entity's share in accordance with its 1980 Final Power Allocation[551] that governs the allocation from Southwestern's existing projects.[552]
3. Non-preference entities would not be barred as project sponsors, but they would be allocated power from the project only if no preference customer were ready, willing, and able to receive the power.[553] Thus, any non-preference entity willing to provide funds would not be guaranteed a share of the project's output but would be entitled only to a return on its investment.[554]

Southwestern has also expressed its interest in supporting the development of non-federally funded projects through integration of projects and provision of dependable capacity and through provision of technical expertise, transmission services, and financing and contractual services.[555]

Although the other PMA's have not yet developed programs for the up-

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544. 43 U.S.C.A. § 485h(c).

545. *See* Parties Indicating Interest in Spring Canyon Pumped Storage Project, Arizona; Non-Federal Participation in Proposed Planning Investigation, 50 Fed. Reg. 45,663, 45,664 (1985). Since the Spring Canyon project has a potential capacity of 1,000 to 4,000 megawatts, and only 1,945 megawatts have been spoken for (*id.*), there apparently would be no need for Western to limit project sponsors to preference customers.

546. *See, e.g.*, 50 Fed. Reg. 7403 (1985); 50 Fed. Reg. 10,113 (1985).

547. *See* 50 Fed. Reg. 25,316, 25,317 (1985). However, Southwestern has stated in general terms that sponsors will normally be the entities that can provide the funds for the project at the lowest cost. *See* Southwestern Power Administration, Non-Federal Participation in Hydroelectric Power Development, Meeting Handbook, p. 27, Oct. 1985 [hereinafter cited as Meeting Handbook].

548. *Id.*

549. In response to the suggestion that Southwestern refer to an allocation "proportionate to" the funds provided, rather than an amount "not to exceed" the funds provided, Southwestern explained that a project sponsor may choose to accept a lower, but more dependable, allocation from Southwestern's interconnected system than would be available from the project by itself. *See* Meeting Handbook, *supra* note 547, at 24.

550. 50 Fed. Reg. at 25,318.

551. 45 Fed. Reg. 19,036 (1980).

552. 50 Fed. Reg. at 25,318-19.

553. Meeting Handbook, *supra* note 547, at 25-26.

554. *Id.* at 23.

555. *Id.* at 14-16.

front financing of hydro projects by non-federal interests, with the "privatization" mood prevalent in the present Administration, it can be expected that few new hydroelectric projects will be developed without an attempt first to secure non-federal sources for the project's financing.

VIII. CONCLUSION

As the demand for low-cost federal preference power continues to outstrip the available supply, intensified challenges to the preference "birthright" and to the manner in which preference power is allocated and marketed by PMA's can be anticipated. The battles will be fierce and will spill over from the courts into the political and legislative arenas.

While legal standards to be applied to power allocation decisions have become increasingly better defined, a number of unresolved issues still loom on the horizon. What are the precise characteristics of qualifying preference customers? What role, if any, can private utilities play in the distribution of federal power to consumers on behalf of preference customers? What are the rights of existing preference customers *versus* newcomers? How widely can preference power be marketed before its benefits become so diluted as to be *de minimis*? What legal remedies are available to a successful preference litigant? What rights do preference customers have when competing against other types of water users at federal hydroelectric projects? Will the present Administration's goal of selling the federal PMA's pass muster in the new era of Gramm-Rudman-Hollings budget cuts? Must the preference "birthright" yield to the demands of private utilities and their consumers for equal access to federal power?

The next year should be a volatile one as the conflicts between preference advocates and their challengers continue to escalate. The stakes are so high that in all likelihood the major issues covered in this article ultimately will be resolved by Congress, rather than the judiciary.