

Report of the Committee on Power Marketing Agencies

This report of the Committee on Power Marketing Agencies¹ highlights the significant developments affecting power marketing agency (PMA) rates and practices during 1986. The report is intended to update the Committee's 1985 report² and last spring's *Journal* article, "Recent Legal Developments and Legislative Trends in Federal Preference Power Marketing."³

The focus of the report is on litigation and legislative activities affecting the rates and practices of the five federal PMA's: Southeastern Power Administration (SEPA), Southwestern Power Administration (SWPA), Western Area Power Administration (WAPA), Bonneville Power Administration (BPA), and Alaska Power Administration. Court cases and FERC proceedings involving the Power Authority of the State of New York, which markets power under a FERC license pursuant to a "preference" statute,⁴ are also discussed. Additionally, PMA rate proposals and power marketing policies on which there has been significant activity during 1986 will be summarized. As demonstrated by the length of this report, the past year has been a busy one for the PMA's.

As the laws and procedures governing BPA's activities vary significantly from those of the other PMA's, and since BPA's activities over the past year have been fairly extensive, a separate section of this report (Section V) is dedicated to proceedings involving BPA.

I. LITIGATION AFFECTING PMA RATES AND PRACTICES

A. Cases Decided in 1986

1. *United States v. City of Fulton*: Interim Rate Authority of Secretary of Energy Confirmed

In *United States v. City of Fulton*,⁵ Justice Marshall, writing for a unanimous Court, resolved a conflict between the Federal and Fifth Circuits by determining that, under Section 5 of the Flood Control of 1944,⁶ and the Department of Energy (DOE) Organization Act,⁷ the Secretary of Energy may approve rates developed by the federal PMA's and make those rates effective

1. The Committee has expanded its scope from ratemaking to include all activities of the power marketing agencies.

2. *Report of the Committee on Federal Power Marketing Agency Ratemaking*, 6 ENERGY L.J. 109 (1985).

3. Vince & Wodka, *Recent Legal Developments and Legislative Trends in Federal Preference Power Marketing*, 7 ENERGY L.J. 1 (1986).

4. Niagara Redevelopment Act, 16 U.S.C. § 836 (1982).

5. 89 L.Ed.2d 661 (1986).

6. 16 U.S.C. § 825s (1982).

7. 42 U.S.C. §§ 7101-7375 (1982).

pending review and final approval by the FERC.⁸

Fulton and two other municipal customers of the Southwestern Power Administration (SWPA) had argued that the Flood Control Act requirement that rate increases shall "become effective upon confirmation and approval by the Federal Power Commission," and similar language in the customers' pre-DOE Organization Act contracts with SWPA, precluded interim effectiveness of rate increases. The Court of Claims agreed with this reasoning, and it was affirmed by the Federal Circuit,⁹ in contrast to an earlier decision by the Fifth Circuit in a similar case, *United States v. Tex-La Electric Cooperative, Inc.*¹⁰

In overturning the Federal Circuit decision, the Supreme Court found that the statutory language is ambiguous on approval of interim rates. However, since the relevant agencies, at least since the mid-1970's, had interpreted the Flood Control Act to allow interim approval of rate increases, the administrative interpretation would be upheld if it could be found to be reasonable.

The Court determined that the Secretary of Energy's interpretation was well suited to accommodating the dual goals of protecting the public by ensuring that federal hydroelectric programs recovered their own costs while protecting consumers by ensuring that power is sold at the lowest possible rates. Justice Marshall also found that the contracts at issue simply tracked the statute and did not give the cities any more rights than they had by statute.

In opposing the implementation of SWPA's rates prior to final FERC approval, Fulton had argued that refunds would be an inadequate remedy for excessive rates, relying on *Federal Power Commission v. Tennessee Gas Transmission Co.*¹¹ Justice Marshall distinguished this case on the ground that the procedures under the Natural Gas Act at issue in *Tennessee Gas* are distinct from those adopted by the Secretary of Energy under the Flood Control Act. There is no danger under the Flood Control Act procedures that unreviewed illegal rates would go into effect inasmuch as the rates already would have undergone extensive review through public input and by the DOE Assistant Secretary before being given interim approval.

Earlier cases consistent with the holding in *Fulton* include *United States v. Tex-La Electric Cooperative, Inc.*,¹² *Pacific Power & Light Co. v. Duncan*,¹³ *Montana Power Co. v. Edwards*,¹⁴ and *Colorado River Energy Distributors Association v. Lewis*.¹⁵

8. 89 L.Ed.2d at 672. This holding does not apply to BPA because its rates are expressly subject to interim approval by the FERC under Section 7 of the Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. § 839e(i)(b). The Fulton opinion provides a useful discussion of ratemaking practices applicable to the other PMA's.

9. 680 F.2d 115 (Cl. Ct.) (1982), *aff'd.*, 751 F.2d 1255 (Fed. Cir. 1985).

10. 693 F.2d 392 (5th Cir. 1982).

11. 371 U.S. 145 (1962).

12. 693 F.2d 392 (5th Cir. 1982).

13. 499 F. Supp. 672 (D. Or. 1980).

14. 531 F. Supp. 8 (D. Or. 1981).

15. 516 F. Supp. 926 (D.D.C. 1981).

2. *Trinity County Public Utilities District v. Harrington*: No "Super-Preference" for Rates

The Ninth Circuit was presented with the intriguing question whether particular customers enjoy a "super-preference" to lower rates for power purchased from a PMA in *Trinity County Public Utilities District v. Harrington*.¹⁶ The claim of superior rights to lower rates was rejected.

The plaintiffs in *Trinity* had been granted "first preference" rights to a specified quantity of power from the Central Valley Project pursuant to the Trinity River Division Act.¹⁷ The plaintiffs contended that the Act also requires their rates for the power to be based solely on the costs of the Trinity River Division of the Central Valley Project, and that they, unlike other preference customers, should not be required to pay the costs of WAPA's purchased power program.¹⁸

The District Court and the Ninth Circuit rejected this claim of a "super-preference" insofar as PMA rates are concerned. Although the Trinity River Division Act entitles the plaintiffs to a certain percentage of Central Valley Project power, they are not entitled to preferential rates based on the operating costs of specific plants, nor was WAPA required to eliminate the costs of its purchased power program in developing rates applicable to those customers.¹⁹

3. *City of South Sioux City v. Western Area Power Administration*: WAPA Policy Upheld Despite procedural Defeat in Proceeding

In *City of South Sioux City v. Western Area Power Administration*,²⁰ the Eighth Circuit laid to rest a controversy stemming from a power allocation plan proposed by WAPA in 1980, by upholding the plan despite a procedural flaw in the agency's notice and comment rulemaking. The controversy revolved around a claim that WAPA had not provided adequate notice of the date on which power sales were to commence under the plan and of the criteria for eligibility to receive an allocation.

In the underlying administrative proceeding, four Nebraska cities, which already received power from WAPA through the Nebraska Public Power District (NPPD), sought a direct allocation of WAPA power pursuant to WAPA's "Post-1985 Marketing Plan." WAPA rejected the cities' applications on the grounds that the applications were untimely and that the cities were not qualified under WAPA's criteria for allocations as "new customers" since they already received WAPA power through a parent organization.

The district court found the notice to the cities of the need to file timely applications to be inadequate, but held that WAPA's refusal to provide an allocation of power to entities already indirectly receiving WAPA power was unreviewable as a matter "committed to agency discretion by law" under the Ad-

16. 781 F.2d 163 (9th Cir. 1986).

17. Pub. L. No. 84-386, 69 Stat. 720 (1955).

18. 781 F.2d at 166.

19. *Id.* at 168.

20. 793 F.2d 181 (8th Cir. 1986).

ministrative Procedure Act (APA).²¹ In so holding, the district court followed a precedent, well established in several circuits,²² that the allocation of federal power among preference customers is not subject to judicial review, since there is "no law to apply" to the agency's decision.²³

The Eighth Circuit also found the notice to be inadequate but did not agree with the district court that WAPA's power allocation decision was unreviewable. In the Eighth Circuit's view, it had jurisdiction to review WAPA's actions to determine whether the company had failed to follow its own rules for eligibility for power allocations, a possible "abuse of discretion."²⁴ Upon review, however, the court determined that WAPA had not abused its discretion in denying the plaintiffs' applications, because the cities were not eligible due to their receipt of WAPA power through NPPD.²⁵

The municipalities in *Sioux City* apparently had no dispute with their umbrella organization (NPPD) over WAPA power allocations. However, in at least one situation, a controversy has developed over the right to the PMA power allocations when members of an umbrella organization split off from the parent. The Kaw Valley Electric Cooperative Company (KVE) brought an antitrust suit against Kansas Electric Power Cooperative, Inc. (KEPCo) for, among other things, inducing SWPA to assign a power allocation intended for all Kansas cooperatives to KEPCo and then refusing to share that allocation with cooperatives unless they became members of KEPCo under allegedly unfair conditions.²⁶ The KVE cooperative had once been a KEPCo member but sought to purchase power more cheaply elsewhere, in part because it disagreed with KEPCo's acquisition of nuclear resources. The antitrust suit was dismissed on statute of limitations grounds,²⁷ and is on appeal to the Tenth

21. 5 U.S.C. § 701(a)(2)(1982).

22. See, e.g., *Electricities of North Carolina, Inc. v. Southeastern Power Admin.*, 774 F.2d 1262 (4th Cir. 1985); *Greenwood Utils. Comm'n 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); *Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin.*, 627 F. Supp. 350 (W.D. Tex. 1985); appeal docketed, No. 86-1059 (5th Cir. Jan. 27, 1986); *Arvin-Edison Water Storage Dist. v. Hodel*, 610 F. Supp. 1206 (D.D.C. 1985).

23. This doctrine stems from the U.S. Supreme Court's analysis in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), 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.'" *Id.* at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). See also *Heckler v. Chaney*, 105 S. Ct. 1649 (1985), explaining the apparent contradiction between the APA provision allowing review for an abuse of discretion (5 U.S.C. § 706(2)(A)) and the provision precluding review of actions entrusted to agency discretion by law (5 U.S.C. § 701(a)(2)): "[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.'" 105 S. Ct. at 1655.

24. The Eighth Circuit's holding can be reconciled with the apparently contradictory precedent in the Fourth, Ninth and Eleventh Circuits and two district courts noted above. Courts have indicated a willingness to review PMA allocation decisions for procedural deficiencies (akin to the alleged failure to follow agency rules in *Sioux City*) such as the time within which a PMA must finalize an allocation decision. See *Electricities of North Carolina, 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). This is distinct from substituting the court's judgment for the PMA's on a substantive basis, which no court, including the *Sioux City* court, has yet been willing to do.

25. *Sioux City*, 793 F.2d at 182-83.

26. No. 85-4009 (D.Kan. filed Jan. 9, 1985).

27. Order of Oct. 26, 1986.

Circuit.²⁸

There is little guidance as to what the law requires in regard to power allocations made to an umbrella organization when that organization breaks up or members split off. In many circumstances the PMA has made allocations to individual cities even though those cities are members of an umbrella organization that may act as agent in negotiating the agreements effectuating the allocations and may have certain delivery obligations. Such a direct allocation would obviate some of the problems inherent in a breakup of the umbrella organization.

4. *Metropolitan Transit Authority v. Federal Energy Regulatory Commission*: Preference Customers Must Be Capable of Direct Distribution of Electricity

*Metropolitan Transit Authority v. Federal Energy Regulatory Commission*²⁹ presents the first instance in which a court directly has tackled the issue whether public bodies lacking retail electric distribution facilities are eligible for preference power allocations.³⁰ The Second Circuit upheld a FERC decision finding such entities to be ineligible.

The Niagara Redevelopment Act (NRA),³¹ like many statutes authorizing federal hydroelectric projects, contains a preference for "public bodies and non-profit cooperatives." Three types of entities, in addition to the traditional municipally-owned electric utilities, have attempted to qualify as "public bodies" pursuant to the NRA: state agencies which purchase preference power and resell it on an equal basis to investor-owned utilities, municipally-owned utilities, and rural electric cooperatives; an end-user of power which was established by state law; and entities formed by counties or municipalities in New York State which purchase preference power and allegedly "lease" the facilities of private power companies to send the power to ultimate consumers.

In *Metropolitan Transit Authority*, the Second Circuit affirmed the FERC finding that neither a state agency selling on an equal basis to investor-owned, municipal, and cooperative utilities nor an end-user of power may qualify as a preference customer pursuant to the NRA.³² The Power Authority of the State of New York (PASNY), owner and operator of the Niagara Project, had allocated preference power from the project to both the Vermont Department of Public Service (VDPS) and the Metropolitan Transportation Authority (MTA). VDPS, in turn, sold the power equally to investor-owned, municipally-owned, and cooperatively-owned electric utilities in Vermont. The MTA, a state agency, used the power itself.

28. *Appeal docketed*, No. 87-1078 (10th Cir. Jan. 15, 1987).

29. 796 F.2d 584 (2d Cir. 1986).

30. In *City of Portland v. Munro*, No. 77-928 (D. Or. dismissed March 19, 1981), the court dismissed a complaint by the City of Portland against BPA on the ground that the plaintiff did not meet the criteria to be considered by BPA as a preference customer since it did not have its own utility facilities. Other than this conclusory statement, the court did not provide an analysis or further support for its reasoning.

31. 16 U.S.C. § 836 (1982).

32. See *Massachusetts Mun. Wholesale Elec. Co. v. Power Auth. of New York*, 30 F.E.R.C. ¶ 61,323 (1985) (Opinion No. 229) and 32 F.E.R.C. ¶ 61,194 (1985) (Opinion No. 229-A) [hereinafter *MMWEC v. PASNY*].

The FERC and the Second Circuit determined that an entity must meet five criteria in order to be deemed a public body under the NRA: (1) the entity must be able to provide yardstick competition, pursuant to which provision of low-cost power to municipally-owned utilities and non-profit cooperatives will encourage investor-owned utilities to reduce electric rates;³³ (2) the public body must be a distributing entity;³⁴ (3) it must have utility responsibility;³⁵ (4) "public bodies" may not be defined in such a way as to benefit investor-owned utilities or their consumers;³⁶ and (5) "public bodies" may not be defined in such a broad manner as to dilute the benefits of preference power.³⁷ The FERC and the Second Circuit gleaned this criteria from a review of the legislative history of the NRA and other preference laws, which led to the conclusion that "Congress intended the term 'public bodies' to mean 'public distribution systems' or 'publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail.'"³⁸

Sixty-three municipalities and counties in New York State have formed municipal distribution agencies (MDAs) for the purpose of purchasing Niagara project preference power which would be sold to citizens of those municipalities and counties. The question whether these MDAs are legitimate preference customers pursuant to the NRA was raised before the United States District Court for the Southern District of New York³⁹ which on July 31, 1986, dismissed the case on the basis of primary jurisdiction before the FERC.

Cases challenging the preference status of both the MDAs⁴⁰ and VDPS pursuant to its new "leasing" arrangement⁴¹ have been consolidated and ordered expedited by the FERC.⁴² The FERC directed the Presiding Administrative Law Judge to assure that parties address the following legal issues in the proceeding:

- (1) How may governmental entities which lease distribution facilities from investor-owned utilities qualify as NRA "public bodies?"
- (2) Does an NRA "public body" need to compete with investor-owned utilities for customers in order to perform a yardstick competition function?

33. This yardstick competition principle was determined to be basic to the NRA in an earlier case dealing with the allocation of Niagara Project power to New York State preference customers. *Municipal Elec. Utils. Ass'n of New York State v. Power Auth. of New York*, 21 F.E.R.C. ¶ 61,021 (1982) (Opinion No. 151), and 23 F.E.R.C. ¶ 61,031 (1983) (Opinion No. 151-A) [hereinafter *MEUA v. PASNY*], *aff'd in relevant part, sub nom.*, *Power Auth. of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984).

34. Opinion No. 229, 30 F.E.R.C. at 61,651; *MTA v. FERC*, 796 F.2d at 592. See also Opinion No. 151, 21 F.E.R.C. at 61,129. The issue of whether the MTA was a public body pursuant to the NRA was first decided by the FERC in Opinion No. 151. It was subsequently removed to be decided in *MMWEC v. PASNY* because MTA was not a party to the earlier proceeding. See *MEUA v. PASNY*, 23 F.E.R.C. ¶ 61,031 (1983).

35. Opinion No. 229-A, 32 F.E.R.C. at 61,444; *MTA v. PASNY*, 796 F.2d at 593 n.7.

36. *Id.*; 32 F.E.R.C. at 61,444 and 61,451 n.7; 796 F.2d at 592.

37. *Id.*; 32 F.E.R.C. at 61,450 n.6; 796 F.2d at 592.

38. 796 F.2d at 590.

39. *PASNY v. MEUA*, 83 Civ. 6584 (JES) (S.D.N.Y. filed Sept. 6, 1983); *MEUA v. PASNY*, 85 Civ. 1124 (JES) (S.D.N.Y. filed Feb. 11, 1985).

40. *MEUA v. PASNY*, FERC No. EL86-24-000 (filed Feb. 14, 1986).

41. *Connecticut Mun. Elec. Energy Coop. and Massachusetts Mun. Wholesale Elec. Co. v. PASNY* [hereinafter *CMEEC v. PASNY*], FERC No. EL86-29-000 (filed March 13, 1986).

42. *MEUA v. PASNY, CMEEC v. PASNY*, 35 F.E.R.C. ¶ 61,332 (1986).

- (3) What other responsibilities, if any, must a governmental entity assume to qualify as a "public body" under the NRA?

In addition, the FERC directed the judge to evaluate agreements between the MDAs and the investor-owned utilities to determine whether the agreements are lawful and whether there was any attempt made to circumvent the law.⁴³

Hearings in the proceeding were scheduled to commence February 17, 1987.

5. *City of Santa Clara v. Herrington*: Withdrawability of PMA Allocations

The landmark preference case, *City of Santa Clara v. Andrus*,⁴⁴ reappeared in the courts recently to settle a dispute over the proper interpretation of a settlement agreement reached after remand of the original lawsuit. In *City of Santa Clara v. Herrington*,⁴⁵ the court determined that power contracts offered by WAPA to certain cities that had intervened in the original court action violate the terms of the settlement because those contracts provide for the withdrawal of WAPA power under certain conditions whereas the settlement provided for nonwithdrawable allocations.

In the original suit, the City of Santa Clara challenged withdrawal of power from it to serve the load growth of Palo Alto and five other preference customers (Cities) of the Central Valley Project (CVP) at a time when sales of CVP power were being made to Pacific Gas & Electric Company (PG&E) in conjunction with a "banking" arrangement. The Ninth Circuit held that allocations among preference customers were not reviewable by the court but that sales of power to such a non-preference customer at a time when a preference entity was ready, willing and able to purchase and use that power would be illegal, unless the sales were necessary to maximize the efficiency of the project for its primary purpose, irrigation.⁴⁶

In the settlement agreement, the Cities gave up certain rights to load growth allocations but their new allocations were referred to as "non-withdrawable" (existing power contracts with the Cities had provided for withdrawal under certain conditions).

The contracts WAPA tendered pursuant to the settlement agreement provided for withdrawal of allocations to the Cities for any of three reasons: (1) to supply the "first preference" customers in Trinity, Tuolumne and Calaveras Counties, California; (2) to supply CVP project use requirements; and (3) in the event power available for the service to the total load of preference customers exceeded a certain level that PG&E is obligated to support. WAPA claimed that all of the parties to the settlement agreement understood that the Cities' allocations would be withdrawable for these purposes.

The court found that the written agreement was clear on its face and that, as evidenced by the pre-settlement agreement contracts, WAPA knew how to write a contract to provide exceptions to non-withdrawability. The court also

43. *Id.* at 61,758.

44. 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

45. No. C-75-1574 SC (N.D. Cal. Oct. 11, 1985).

46. 572 F.2d at 670-72.

agreed with the Cities' assertion that if the settlement were read to allow withdrawal of their allocations, they would not have received any benefit under the settlement while giving up substantial rights, and while every other party benefited.

WAPA has appealed the decision to the Ninth Circuit.⁴⁷ The case was scheduled for oral argument on January 16, 1987.

B. Pending "Preference" Lawsuits

1. *Salt Lake City v. Western Area Power Administration*: Constitutional Attack On Preference Laws

In an action filed on October 31, 1986 in the U.S. District Court for the District of Utah,⁴⁸ Utah Power & Light Co. (UP&L) and 158 Utah and Wyoming cities, towns and counties are seeking a declaration that virtually all federal power marketing statutes are unconstitutional and that certain programs and policies of WAPA should be found unlawful.

The controversy stems from a 1983 application by UP&L, in conjunction with WAPA's development of a marketing plan for its Salt Lake City area projects, to act as an agent in the distribution of federal power for the cities and towns located in UP&L's service area that do not own retail distribution systems. WAPA rejected UP&L's application after thorough consideration of the legislative history of the pertinent statutes and the constitutional issues raised by UP&L.⁴⁹ In WAPA's view, the legislative history of the preference laws and long-standing DOE policy requires municipalities to be in the business of distributing electricity to consumers in order to qualify as preference customers.⁵⁰ WAPA also did not view its actions as violating any constitutional requirements.⁵¹

In the complaint stemming from WAPA's denial of UP&L's application, the scope of the dispute has been expanded to include a challenge to WAPA's arrangements for the "firming" of its hydroelectric power through the purchase of thermal generation, and allegations that WAPA violated environmental laws in developing its marketing plan. Six separate causes of action are raised by the plaintiffs in their complaint:

- Count I alleges that the preference concept as applied by WAPA and the DOE is unlawful and that WAPA failed to comport itself with the statutory directives governing preference laws by refusing to allocate power to the public bodies lacking retail distribution systems of their own.
- Count II alleges that WAPA's policy fails to meet the legislative purposes of the DOE Organization Act⁵² regarding, *inter alia*, promotion of conservation and the needs of energy consumers.
- Count III questions a number of factual criteria relied upon by WAPA in devel-

47. *Appeal docketed*, No. 85-2899 (9th Cir. Dec. 6, 1985).

48. *Salt Lake City v. Western Area Power Admin.*, No. C86-1000G (D. Utah filed Oct. 31, 1986).

49. Revised Proposed General Power Marketing Criteria and Allocation Criteria for Salt Lake City Area Projects, 49 Fed. Reg. 34,900 (1984).

50. *Id.* at 34,903-04.

51. *Id.* at 34,907-08.

52. 42 U.S.C. §§ 7101-7375 (1982).

oping its Salt Lake City Area policy, such as WAPA's estimation of its resources, and alleges that Western's firming arrangements are arbitrary, capricious and unlawful.

- Count IV is a claim based on the National Environmental Policy Act of 1969⁵³ which asserts that WAPA improperly failed to prepare an environmental impact statement and to consider other environmental laws in the development of its marketing policy.
- Count V alleges that the preference statutes and the preference concept as applied by WAPA violate the plaintiffs' due process and equal protection rights.
- Count VI is an additional constitutional claim based on the Tenth Amendment, which reserves certain rights to the States.

The original complaint sought a declaration that the preference provisions of virtually all federal reclamation and power statutes are unconstitutional, both on their face and as applied by WAPA and DOE; an order overturning WAPA's marketing criteria and rescinding all contracts entered in violation of applicable law; a declaration that the plaintiff municipalities are entitled to power allocations; and an injunction requiring WAPA and the DOE to conform their policies to the court's findings. In a Second Amended Complaint filed on December 31, 1986, the scope of the relief sought was narrowed somewhat to focus on WAPA and DOE policies and contracts pertaining to WAPA's Salt Lake City marketing area. However, the complaint continues to seek a declaration that all preference laws that "govern or are given effect by WAPA" be declared unconstitutional and null and void.⁵⁴

On November 3, 1986, UP&L filed a motion for a preliminary injunction preventing WAPA from finalizing its pending contracts until resolution of the lawsuit. At the time of this writing, the motion had not been decided by the court. The case has sparked widespread interest from preference customer groups around the nation. The Colorado River Energy Distributors Association, representing the interests of certain WAPA customers, has been granted defendant-intervenor status, and several regional and national organizations (including the American Public Power Association and the National Rural Electric Cooperative Association) have been granted the right to participate in the proceedings as *amici*.

2. *Central Montana Electric Power Cooperative, Inc. v. Administrator, Bonneville Power Administration*: Is there a "Montana Preference"?

In October 1986, Central Montana Electric Power Cooperative, Inc. and Upper Missouri Generation and Transmission Cooperative, Inc. filed action in both the U.S. District Court in Montana and the United States Court of Appeals for the Ninth Circuit to establish that Montana entities are entitled to a special preference in the sale of power and energy from Libby Dam.⁵⁵ The Administrator of BPA had previously rejected the cooperatives' request for

53. 42 U.S.C. §§ 4321 (1982).

54. Complaint, Prayer for Relief, ¶ (A).

55. *Central Montana Elec. Power Coop., Inc. and Upper Missouri G&T Elec. Coop., Inc. v. Admin. of the Bonneville Power Administration*, CV 86-190-GF-PGH (D. Mont. filed Oct. 1, 1986); *Central Montana Elec. Power Coop., Inc. and Upper Missouri G&T Elec. Coop., Inc. v. Administrator of the Bonneville Power Admin.*, No. 86-7602 (9th Cir. filed Oct. 5, 1986).

Libby Dam power based upon the Administrator's decision that no Montana preference exists in relation to the project.

A specific preference for Montana entities is included in legislation authorizing the Hungry Horse project.⁵⁶ Plaintiffs in *Central Montana* claim that the same preference for Montana extends to Libby. They base their claim on several congressional actions in relation to the project, the most recent of which is Section 10(f) of the Pacific Northwest Electric Power Planning and Conservation Act⁵⁷ which states:

The reservation under law of electric power primarily for use in the State of Montana by reason of the construction of Hungry Horse and Libby Dams and Reservoirs within that State is hereby affirmed. Such reservation shall also apply to 50 per centum of any electric power produced at Libby Regulating Dam if built.⁵⁸

On December 18, 1986, BPA filed a motion to dismiss the district court action on the ground that exclusive jurisdiction over the subject matter is reposed in the United States Court of Appeals for the Ninth Circuit. On December 17, 1986, the Ninth Circuit stayed proceedings until February 27, 1987, to allow the Montana district court the first opportunity to deal with the case. On December 24, 1986, plaintiffs filed a motion for summary judgment in the district court.

3. *Brazos Electric Power Cooperative Inc. v. Southwestern Power Administration*: SWPA Policy Upheld by District Court

In *Brazos Electric Power Cooperative, Inc. v. Southwestern Power Administration*,⁵⁹ the plaintiff rural electric cooperative presented to the court a procedural and substantive challenge to a power allocation made to two other Texas cooperatives by SWPA. The court upheld the agency's decision in all respects.

In its procedural challenge, Brazos alleged that SWPA violated the notice requirements of the Administrative Procedure Act,⁶⁰ and the DOE Organization Act,⁶¹ as its notice did not adequately alert customers of the potential for new power allocations in Texas. According to Brazos, this lack of notice deprived it of its right to secure a fair share of this power. Brazos also challenged the substantive aspects of a contract between the purchasers of the power and an investor-owned utility, Texas Utilities Electric Company (TUEC), whereby TUEC performs transmission, scheduling and firming services for the cooperatives. Brazos alleged that the SWPA power is actually sold to TUEC which then re-sells the power to the allocatees.

The December 30, 1985 opinion by the district court held that (1) SWPA provided adequate notice in its administrative proceeding; and (2) the substantive issues raised by Brazos are non-reviewable because the Flood Control Act

56. 43 U.S.C. § 593a (1982).

57. 16 U.S.C. § 839 (1982).

58. *Id.* § 839g(f).

59. 627 F. Supp. 350 (W.D. Tex. 1985).

60. 5 U.S.C. §§ 500-576 (1982).

61. 42 U.S.C. §§ 7101-7375 (1982).

of 1944⁶² is “‘too vague to supply this court with a standard by which it can judge the propriety of [SWPA’s] actions.’”⁶³ The court further held that allocations such as those before it are “clearly within agency discretion by law and therefore not subject to judicial review.”⁶⁴ Finally, the court determined that even if it were to review the allocation at issue, there was a rational basis for SWPA’s decision, apparently relying on Brazos’ failure to participate in the allocation proceeding or to take action protesting the agency’s action within a reasonable period of time thereafter.⁶⁵ Furthermore, according to the court, the fact that only TUEC owns transmission lines from the project necessitates the use of TUEC to perform those services.⁶⁶

Brazos appealed the District Court’s dismissal to the U.S. Court of Appeals for the Fifth Circuit,⁶⁷ and oral argument was held on December 1, 1986.

II. LEGISLATIVE DEVELOPMENTS

A. *Sale of the Power Marketing Agencies*

1. Overview

Over the last several years, the Administration has shown keen interest in the sale of the PMA’s, also known as “privatization” and “divestiture.” Privatization of the PMA facilities was first proposed in the Grace Commission Report.⁶⁸ The rationale underlying this sale, like the proposed sale of other federal assets, is that the government should play only a limited role and has no place performing certain functions, such as power production and marketing. The Reagan Administration has thus proposed to sell the PMA’s to non-federal entities.

Because PMA privatization has consistently met with early, vehement Congressional opposition, the precise details of the Administration’s plans never have been presented. However, as explained in last year’s budget package,⁶⁹ the sale of the projects themselves has not been contemplated, since the projects generally serve a number of purposes, of which power production is only one. Rather, the power output, by itself, has been the proposed object of sale.

The Administration’s recently-issued FY 1988 Budget⁷⁰ “reproposes” privatization in spite of strong opposition to last year’s proposal. The Alaska Power Administration and SEPA are targeted for early sale, by 1989, to be followed by the sale of remaining PMA’s in later years.

62. 16 U.S.C. § 825s (1982).

63. *Brazos*, 627 F. Supp. at 354-56 (quoting *Electricities of North Carolina, Inc. v. Southeastern Power Admin.*, 774 F.2d 1262 (4th Cir. 1985)).

64. *Id.* at 355 (citing 5 U.S.C. § 701(a)(2) (1982)).

65. *Id.*

66. *Id.* at 354-55.

67. *Appeal docketed*, No. 86-1059 (5th Cir. Jan. 27, 1986).

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

69. See Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1987 [hereinafter 1987 Budget], at 5-35.

70. See Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1988 (hereinafter 1988 Budget), at 2-46 to 2-47.

2. FY 1987 Budget Proposal

Last year, the Office of Management and Budget (OMB) included in the FY 1987 Budget a proposal to sell the federal PMA's as a revenue-raising measure.⁷¹ The budget focused on SWPA and BPA for first sale.⁷² The Department of Energy set up a Task Force to study privatization of a number of federal assets, including the PMA's,⁷³ and the various PMA's began internally to look at the sale.

The PMA sale proposal met with significant Congressional opposition. Rep. Fazio headed the efforts against it on the House side and Sen. Evans led in the Senate. Ultimately, both Houses passed a provision, as part of the Urgent Supplemental Appropriations Act, prohibiting the expenditure of any funds to study the sale of the PMA's.⁷⁴ The Congressional prohibition does not cover the Alaska Power Administration, which has published a notice seeking comments on the sale of its assets.⁷⁵

In October of 1986, Rep. Synar, Chairman of the Subcommittee on Environment, Energy and Natural Resources, also released a report on the Administration's privatization efforts.⁷⁶ The report found that DOE, in its internal studies of the sale of the PMA's, had failed to quantify the impact of the sale on PMA ratepayers, and also had unfairly imposed the costs of studying the sale of these ratepayers.

3. FY 1988 Budget Proposal

In view of the certainty that the Administration would persist in its divestiture efforts, in spite of the urgent Supplemental Act's clear ban, many Members of Congress determined to go on record early in opposition to privatization. In December 1986, Rep. Wright, now Speaker of the House, led a group of 77 House Members in sending a letter urging OMB not to include the sale of the PMA's or straight-line amortization in the FY 1988 Budget.⁷⁷ A similar letter was sent by a group of 22 Senators, led by Sens. Bumpers and Nickles,⁷⁸ with individual letters sent by Sens. Nunn⁷⁹ and Domenici.⁸⁰

On January 5, 1987, the Administration released its FY 1988 Budget which once again proposed the sale of the PMA's.⁸¹ This budget envisions that

71. 1987 Budget at 5-35.

72. *Id.*

73. See DOE News: March 24, 1986, R-86-044, news release by U.S. Department of Energy, Office of the Press Secretary.

74. Pub. L. No. 99-349, 100 Stat. 710 (1986).

75. 51 Fed. Reg. 26,924 (1986).

76. H.R. REP. NO. 99-935, 99th Cong., 2d Sess. (1986).

77. Letter dated December 12, 1986. See *Public Power Weekly*, Dec. 22, 1986, at 4, for a nearly complete list of signatories.

78. Letter signed by Sens. Dale Bumpers, Don Nickles, Dan Evans, Howell Heflin, Pete Wilson, John Melcher, Dennis DeConcini, David Pryor, Tom Harkin, Jeff Bingaman, Albert Gore, Jim Sasser, Larry Pressler, Alan Cranston, Spark Matsunaga, Max Baucus, David Boren, James Exon, Mark Hatfield, Edward Zorinsky, Wendell Ford, and Daniel Inouye (Dec. 12, 1986).

79. Letter dated December 23, 1986.

80. Letter dated December 17, 1986.

81. See *supra* note 70, at 11.

the sales of SEPA and the Alaska agency will occur by 1989, and states the Administration's intention to propose legislation for SEPA's sale.

On January 8, 1987, OMB responded to Congressional opposition to the budget's proposal by alleging that the sale of the PMA's would promote good government by removing the government from an area where private enterprise has traditionally functioned. OMB believes that "it would be better for the government . . . to stop competing" with private entities in the area of power generation.⁸²

Also, on January 8, 1987, Rep. Smith of Nebraska introduced a sense of the House resolution supporting "federal ownership and operation of the power marketing administrations."⁸³ The resolution also opposes the sale of the PMA's, and supports continuation of present policies on allocation and repayment of investment.

B. Proposal to Modify Repayment Practices to Increase Rates

1. Straight-line Amortization

The Reagan Administration, in its budgets over the last several years, has proposed to require the use of straight-line amortization for PMA rates. Although Congress has rejected this proposal to date, it is once again put forward in the Administration's FY 1988 Budget.⁸⁴

Under straight-line amortization, customers pay an equal installment for depreciation of investment each year over the remaining useful life of the asset. This is in contrast to the current repayment method, which is akin to the method used by most lenders. Under the current method payments are comprised primarily of interest in the early years, with more modest payments of principal. As time elapses, the interest portion lessens and the principal increases.

In recent letters to OMB in advance of release of the budget, over 100 Members of the House and Senate expressed opposition to straight-line amortization.⁸⁵ These Members stated that this change would unnecessarily increase rates for the many consumers receiving preference power.

In its FY 1988 Budget, the Administration stated that straight-line amortization is necessary to place the PMA's on a more sound financial basis by regularizing repayment.⁸⁶ It claims that rates will increase as a result of this change by 0 to 13.5 percent for wholesale bulk power sales, and 0 to 5 percent for retail customers. It also asserts that residential ratepayers in the Northwest, who will be the hardest hit, will see monthly bills increase by only \$5.00, but will still have bills at half of the national average.

82. Letter of January 8, 1987 at 1.

83. H. Res. 43 (1987).

84. 1988 Budget at 2-46 to 2-47.

85. See *supra* notes 77-80, at 12.

86. 1988 Budget at 2-46.

2. Alternatives To Cost-Based Rates

a. GAO Study

Last year, Sen. Howard Metzenbaum requested that the Government Accounting Office (GAO) perform a study of alternatives to cost-based rates, the rates currently charged to customers by the PMA's. The results of this study are contained in a September 1986 report entitled, "Federal Electric Power — Pricing Alternatives for Power Marketed by the Department of Energy."⁸⁷

In this report, GAO examined alternative pricing methods, those based on cost-of-service principles, and those based on other than cost-of-service principles. The GAO reviewed, *inter alia*, proposals for computing a project's interest rate by relating the carrying costs to the Treasury's interest costs; scheduling repayments to the Treasury (including shortening the repayment period from 50 to 30 years); marginal cost pricing; market-level pricing; and user fees. The report does not endorse any particular methodology as its expressed purpose is to provide a "starting point" for examining alternatives.⁸⁸ The report cautions that a number of important considerations were not examined, including the impact of rate increases on PMA ratepayers, regional economies, and Treasury revenues.⁸⁹

b. Market-Based Rates

Congress has periodically been urged by OMB to consider changing PMA rates from cost-based to market-based rates. These requests have been rejected by Congress, thus far.

However, the GAP report on pricing alternatives discussed above specifically identifies market-based rates as an alternative to current rates.⁹⁰ It suggests that PMA power could be marketed to the highest bidder (with no discussion of the application of preference principles) or a rate could be negotiated between buyer and seller.⁹¹

III. PMA RATE PROPOSALS AND POWER MARKETING ACTIVITIES

In this section of the Report, rate changes by the PMA's (with the exception of the Alaska Power Administration) and power marketing policies as to which there has been significant activity during 1986 will be discussed. These policies largely pertain to the allocation of power and to proposals for the development of new projects using funds provided by non-federal entities.

With the exception of BPA, the rates charged to PMA customers are developed by the PMA Administrator, put into effect on an interim basis by the Deputy Secretary of the DOE, and subjected to FERC approval before they can become final.⁹² FERC review is limited to (1) a determination whether the

87. GAO/RCED-86-186 BR, September 1986.

88. GAP Report at 2.

89. *Id.*

90. *Id.* at 32.

91. *Id.*

92. Delegation Order No. 0204-108, 48 Fed. Reg. 55,664 (1983). The procedure for approval of BPA's rates is discussed *infra* in Section V.

rates are the lowest possible to consumers consistent with sound business principles; (2) whether revenue levels are sufficient to recover costs; and (3) whether the assumptions and projections are appropriate.⁹³ With this narrowly circumscribed review, FERC approval of rates has not been difficult for the PMA's to obtain.

A. SEPA

1. Georgia-Alabama System of Projects

New rates were approved by the FERC in 1986 for SEPA's Georgia-Alabama System of Projects, despite a protest filed by Electricities of North Carolina, Inc. (Electricities). In an order issued July 22, 1986,⁹⁴ the FERC confirmed the new rates through September 30, 1990.

Electricities' protest stemmed in part from a long-standing dispute between it and SEPA over the sale of decreasing amounts of "capacity without energy" to investor-owned utilities in the western division of SEPA's Georgia-Alabama System in exchange for lower transmission rates for the western division customers.⁹⁵ In the proceeding before the FERC, Electricities alleged that the rates to eastern division customers (including its members) were unfairly affected by these sales to private utilities in the western division; that other aspects of the rates were discriminatory; and that SEPA had failed to comply with procedural requirements of the DOE Organization Act⁹⁶ and the Administrative Procedure Act⁹⁷ before entering into agreements with the private utilities.⁹⁸ The FERC rejected these contentions, in part due to its lack of authority to review rate design issues stemming from power marketing decisions by SEPA (*i.e.*, the east/west split of the Georgia-Alabama System) and in part by disagreeing with the substance of Electricities' contention that the rates were unreasonable, discriminatory or otherwise unlawful.⁹⁹

2. Cumberland and Kerr-Philpott Systems

New rates were proposed and put into effect on an interim basis for SEPA's Cumberland¹⁰⁰ and Kerr-Philpott¹⁰¹ Systems of Projects in September 1986. The Cumberland rates are proposed for the period through June 30, 1989. The Kerr-Philpott rates cover the period through September 30, 1991.

93. *Id.*

94. U.S. Dept. of Energy — Southeastern Power Administration, 36 F.E.R.C. ¶ 61,079 (1986) (Order Confirming and Approving Rate Schedules on a Final Basis, and Terminating Docket).

95. *See* Electricities of North Carolina, Inc. v. Southeastern Power Admin., 621 F. Supp. 358 (W.D.N.C. 1985).

96. 42 U.S.C. §§ 7101-7375 (1982).

97. 5 U.S.C. §§ 500-576 (1982).

98. This claim had also been raised in Electricities' lawsuit in the Western District of North Carolina, and was rejected by the court on the ground that the plaintiff lacked standing to challenge the arrangements. 621 F. Supp. at 364.

99. The FERC criticized SEPA's use of an incorrect project interest rate for 1984 plant additions and expressed concern regarding SEPA's contracts which permit rate adjustments only every five years, but did not reject the rates for either reason.

100. 51 Fed. Reg. 32,129 (1986).

101. 51 Fed. Reg. 34,132 (1986).

B. SWPA

1. New Rates

The FERC approved new rates for SWPA, to be in effect through September 30, 1989, in an order issued on July 22, 1986.¹⁰² No protests were raised by customers, although the National Wildlife Federation sent a letter to the Commission requesting that it not approve SWPA's rates for two reasons: (1) that the revenues would not repay the federal investment in a timely fashion; and (2) that the capacity of the Harry S. Truman Project was overestimated.

The FERC found SWPA's repayment procedures to be in accordance with DOE Order No. RA6120.2, and held that with regard to the Truman Project, SWPA had used the best available data at the time it developed its rate schedule. The FERC suggested that SWPA develop and file new rates if new data proved the need for higher rates. The FERC also noted a slight deviation from DOE policy in SWPA's repayments but did not find the deviation to have a material effect on the rates.

2. Non-Federal Funding Policy

Based on a January 24, 1984 letter from President Reagan stating his Administration's policy to require private non-federal funding of new federal hydroelectric power projects, SWPA in 1985 began to develop a policy for negotiating such funding for 17 new projects identified by the U.S. Army Corps of Engineers as economically feasible and environmentally acceptable. The policy will be developed in at least two phases. The first phase, which SWPA presently has underway, concerns the manner in which power generated at these new projects will be allocated by SWPA. The second phase, not yet proposed, concerns the development of criteria for the selection of non-federal sponsors.

One of the most significant features of SWPA's proposed allocation policy for power from non-federally funded projects is SWPA's strict adherence to the preference concept. In a "Revised Proposed Power Allocation Policy" published on October 20, 1986, SWPA stated that it would adhere to the general principle that "public bodies and cooperatives should have preference in receiving the power from [the new] Federal projects."¹⁰³ SWPA further indicated that:

[T]o be in compliance with the Section 5 of the Flood Control Act, all the power is reserved for allocation to preference customers. Non-preference sponsors would not be given Federal power and energy as a part of repayment if preference customers are ready, willing and able to receive the allocation.¹⁰⁴

If no preference customer desires an allocation, and a non-preference customer wishes to provide funding, the non-preference customer can receive an allocation of power from the project, but its allocation is limited to a five-year

102. U.S. Secretary of Energy, *Southwestern Power Admin.*, 36 F.E.R.C. ¶ 61,078 (1986) (Order Confirming and Approving Rates on a Final Basis, and Terminating Docket).

103. 51 Fed. Reg. 37,228 & 37,229 (1986).

104. *Id.* at 37,231.

term.¹⁰⁵

SWPA's revised proposal also sets forth a detailed allocation scheme. As to the portion of any new project financed by federal funds, the power from that project will be allocated to each state within the SWPA marketing area based on the ratio of existing SWPA customer load within that state to total existing SWPA customer load.¹⁰⁶ Existing SWPA customers within the state receive 90% of the power, while new SWPA customers will be allocated 10% of the power.¹⁰⁷

With regard to the portion of a new project financed by non-federal funds, the allocation is based on four possible combinations of two factors: (1) whether the project is operated and marketed in such a way that it impacts on or supports other federal hydroelectric projects in SWPA's system; and (2) whether the project increases SWPA system rates. Essentially, a project sponsor will have a right to an allocation of power and energy from the project equal to the percentage of construction funds the sponsor provides, adjusted to account for impacts on other federal hydroelectric projects, and reduced by 50% if the project increases SWPA system rates.¹⁰⁸

Comments on this revised allocation policy were submitted on November 19, 1986. SWPA expects to publish its final policy on the power allocation aspect of non-federal funding by March, 1987, and will turn its attention to the criteria for project sponsors after that time, in conjunction with the U.S. Army Corps of Engineers.

C. WAPA

For ease of reference, the material in this section is divided by project (or integrated projects, where appropriate). During 1986, there were no major ratemaking or power marketing actions with regard to the Parker-Davis Project, the Pick-Sloan Missouri Basin Program — Eastern Division, or the Falcon and Amistad Projects.

1. Boulder Canyon Project

The Final General Regulations for the Charges for the Sale of Power from the Boulder Canyon Project were published on November 28, 1986.¹⁰⁹ The Regulations will appear at 10 C.F.R. Part 904. The Regulations define the methodology to be used in the computation of charges for the sale of power from the Boulder Canyon Project (Hoover Dam) after June 1, 1987.

2. Central Valley Project

a. Rules for Withdrawal of Power

Final rates for the withdrawal of power from Central Valley Project

105. *Id.* at 37,234.

106. *Id.* at 37,233.

107. *Id.*

108. *Id.*

109. 51 Fed. Reg. 43,124 (1986).

(CVP) customers were published on March 5, 1986.¹¹⁰ The rules are intended to clarify methods of withdrawal of CVP power from customers under circumstances presented by law or contract. The *Federal Register* notice also provides final criteria governing the allocation and service of power to the Trinity "first preference" customers. In the notice, WAPA stated that it would not withdraw purportedly "non-withdrawable" power from customers party to the Santa Clara settlement until resolution of the lawsuit discussed in section II.A.5., *supra*.

b. Lewiston Dam

A notice of proposed options for the financing of power development of the Lewiston Dam of the CVP was published on August 15, 1986.¹¹¹ The Bureau of Reclamation and WAPA have been studying the feasibility of additional power development at the Lewiston Dam, part of the Trinity River Division of the CVP, and have initiated a process to explore options for non-federal financing of the development.

WAPA has invited interested parties to submit proposals or comments and to participate in financing a study design and construction of the project. Three options for financing are listed in the notice. One option would involve a straight-forward loan of the funds needed for construction with the new power to be used for CVP purposes and sales to CVP customers. The lender would receive a return on its investment. The second option provides for the investor to receive an allocation of the additional power generation financed. Under the third option, the additional power would be blended with CVP power and the investor would receive CVP power. If the provider of funds is to receive power (*i.e.*, if the second or third option is chosen), preference entities will be given priority and greater consideration will be given to entities without federal power allocations.

c. Colorado River Storage, Collbran and Rio Grande Projects

The Final Post-1989 General Power Marketing and Allocation Criteria for the Colorado River Storage (CRSP), Collbran and Rio Grande Projects were published on February 7, 1986.¹¹² Proposed allocations based on the Criteria were published on September 11, 1986.¹¹³ A notice of an increase in the project transmission rates for CRSP was published on June 11, 1986,¹¹⁴ and a notice of an increase in power rates for the Collbran Project was published on the same date.¹¹⁵ A notice of an integrated proposed power rate for the CRSP, Collbran and Rio Grande Projects was published on November 5, 1986.¹¹⁶

110. *Id.* at 7702.

111. *Id.* at 29,330.

112. *Id.* at 4844. This is the policy that led to the lawsuit filed in October 1986 against WAPA by UP&L and 150 cities in its service area, discussed in *supra* section II.B.1.

113. 51 Fed. Reg. 32,362 (1986).

114. *Id.* at 21,229.

115. *Id.* at 21,226.

116. *Id.* at 40,250.

d. Pick-Sloan Missouri Basin Project, Western Division and Fryingpan-Arkansas Project

The Final Power Marketing Plan and Allocation Criteria for the post-1989 period for the Pick-Sloan Missouri Basin Project, Western Division was published on January 31, 1986.¹¹⁷ The Fryingpan-Arkansas resource will be marketed in accordance with this plan. Proposed allocations were published on May 27, 1986.¹¹⁸ The rate for the sale of capacity without energy from the Fryingpan-Arkansas project was extended for one year by Rate Order No. WAPA-29, published on April 1, 1986,¹¹⁹ and a notice of proposed rate adjustment for the project was published on June 13, 1986.¹²⁰

e. Navajo Generating Station

A request for additional applications for power from the Navajo Generating Station was published on August 22, 1986.¹²¹ This power will be offered under an Interim Power Marketing Plan developed pursuant to the Hoover Power Plant Act¹²² until a long-range marketing plan is established by the Secretary of Interior in conjunction with the Central Arizona Conservation District, the Governor of Arizona, and the Secretary of Energy. A proposed Navajo interim power rate was published on August 22, 1986.¹²³

f. Washoe Project

A notice of proposed rates for the sale of power from the Stampede Division of the Washoe Project was published on May 28, 1986.¹²⁴ A notice of Rate Order No. WAPA-30, placing the rates into effect on an interim basis, was published on September 24, 1986.¹²⁵

IV. BONNEVILLE POWER ADMINISTRATION

A. Statutory Background

The Pacific Northwest Electric Power Planning and Conservation Act,¹²⁶ (Northwest Power Act, or the Act), sets out the procedures for BPA's ratemaking. Under Section 7 of the Act,¹²⁷ the BPA Administrator has the responsibility to develop BPA's rates. The procedures to be followed in developing the rates are set out in Section 7(i) of the Act, and include an opportunity for public participation in a trial-type hearing before BPA. The Northwest Power Act provides for interim approval to the FERC instead of the DOE Secre-

117. *Id.* at 40,120.

118. *Id.* at 19,080.

119. *Id.* at 11,102.

120. *Id.* at 21,614.

121. *Id.* at 30,116.

122. 98 Stat. 1333 (1984).

123. 51 Fed. Reg. 30,120 (1986).

124. *Id.* at 19,260.

125. *Id.* at 33,918.

126. 16 U.S.C. §§ 839-839h (1982).

127. *Id.* at § 839e.

tary.¹²⁸ The Commission is also given the power to grant final approval of BPA's rates.

There are two different procedures to be followed for the final approval of BPA's rates, depending on the customer class served by the rate. For rates to customers within the statutorily defined Pacific Northwest Region,¹²⁹ Commission review is limited to a determination that the rates (1) are sufficient to recover operating costs and assure repayment of the federal investment; (2) are based upon total system costs; and (3) equitably allocate the costs of the Federal transmission system between federal and non-federal use of the system.¹³⁰

As for nonfirm rates for nonregional customers, Commission review, carried out under Section 7(k) of the Act, is more extensive. Section 7(k) allows for an additional hearing at the Commission in accordance with the procedures established for ratemaking under the Federal Power Act, and also provides for Commission review of nonregional nonfirm rates under the standards that applied to all of BPA's rates before the passage of the Northwest Power Act.¹³¹

B. Procedures for BPA Ratemaking

1. The "Unusual Circumstances" Exception to BPA Rate Procedures

Section 7(i) of the Northwest Power Act establishes specific procedures to be followed by BPA in establishing rates. The Ninth Circuit in two companion cases carved out an "unusual circumstances" exception allowing BPA to forego statutorily required rate procedures in certain narrow circumstances. In the first case, *California Energy Resources Conservation and Development Commission v. BPA*,¹³² BPA offered two utilities inexpensive replacement energy and a monetary payment in exchange for the scheduling rights at the Trojan nuclear power plant. The net effect of the transaction was an energy rate lower

128. *Id.* at § 839e.

129. The Northwest Power Act defines the Pacific Northwest Region as:

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

16 U.S.C. § 839a(14) (1982).

130. *Id.* § 839e(a)(2). The allocation in (3) is made between federal transmission associated with BPA sales and nonfederal wheeling of power over BPA's transmission facilities.

131. *Id.* § 839e(k). The Commission has summarized the standards that it will apply to Section 7(k) rates as follows:

- 1. To recover the cost of generation and transmission of such electric energy;
- 2. To encourage the most widespread use of Bonneville power;
- 3. To provide the lowest possible rates to consumers consistent with sound business principles; and
- 4. To protect the interests of the United States in amortizing its investment in the projects within a reasonable period.

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

132. 754 F.2d 1470 (9th Cir. 1985).

than that available through existing rate schedules. In the second case, *Portland General Electric Co. v. Johnson*,¹³³ BPA decided to sell power to Direct Service Industrial customers (DSIs) at its nonfirm energy rates which were not available to such customers.

The Ninth Circuit rejected BPA's arguments that the actions did not constitute ratemaking under the Northwest Power Act, but nevertheless concluded that unusual circumstances justified departure from the statutory procedures. The court noted in both cases that BPA had been spilling water on its hydroelectric system and would have wasted energy had it not taken its actions. The court also emphasized the voluntary nature of the transactions and that they caused no one any harm. It added the caveat, however, that "[i]f short-term, emergency variations in rates and availability are required, provision for such emergency variations in the future should be built into the rate structure that is developed in ratemaking hearings and approved by FERC."¹³⁴

2. FERC Procedures for BPA Rate Cases

In 1983, the FERC issued a final rule setting forth procedures to be utilized in its review proceedings on BPA rates under the Northwest Power Act.¹³⁵ In *Southern California Edison Co. v. FERC*,¹³⁶ two California utilities challenged the Commission rules, arguing that the Commission failed to adopt for its review of nonregional nonfirm energy rates, as required by Section 7(k) of the Northwest Power Act, the "procedures established for ratemaking by the Commission pursuant to the Federal Power Act."¹³⁷

The Commission had stated that since Section 7(k) of the Northwest Power Act did not require it to adopt every filing requirement and administrative procedure that it was obligated to follow in Federal Power Act proceedings, it would apply Federal Power Act procedures — including those prohibiting *ex parte* procedures and requiring BPA to file its case-in-chief as part of its rate filing — to nonregional hearings on a case-by-case basis. In *Southern California Edison Co.*, the Ninth Circuit determined, however, that the Commission's interpretation of the Northwest Power Act ignored the clear intent of Congress as expressed by the plain language of the statute, and consequently held that the rule was void to the extent that it "failed to apply the required Federal Power Act procedural rules to its final rule regarding *ex parte* communications and case-in-chief filing requirements."¹³⁸

Additionally, the Ninth Circuit reiterated the position it took in *Central Lincoln Peoples' Utility District v. Johnson*¹³⁹ that Congress intended Section 7(k) of the Regional Act "to protect interests outside the region."¹⁴⁰ Neverthe-

133. 754 F.2d 1475 (9th Cir. 1985).

134. *Id.* at 1484.

135. Confirmation and Approval of the Rates of the Bonneville Power Administration, RM82-6-000, 48 Fed. Reg. 37,006 (1983), *reconsideration granted in part and denied in part*, 48 Fed. Reg. 56,365 (1983).

136. 770 F.2d 779 (9th Cir. 1985).

137. 16 U.S.C. § 839e(k) (1982).

138. *Southern Cal. Edison Co.*, 770 F.2d at 784.

139. 735 F.2d 1101 (9th Cir. 1984).

140. *Southern Cal. Edison Co.*, 770 F.2d at 785-86.

less, pursuant to a Commission request, it remanded for consideration the question of what standard of review is to be applied to BPA's nonfirm, nonregional rates.¹⁴¹

3. New Procedures for BPA Rate Hearings

BPA instituted new procedures governing rate hearings, which became effective on March 7, 1986.¹⁴² In addition to amending the existing procedural rules, they incorporated an interim rule generally prohibiting *ex parte* communications during BPA hearings, and, most significantly, provided a new section allowing for expedited rate proceedings. BPA cited *Portland General Electric Co. v. BPA*¹⁴³ and *California Energy Commission v. BPA*¹⁴⁴ as authority allowing it to hold rate hearings on an expedited basis where delays might frustrate BPA's ability to fulfill its statutory obligations.¹⁴⁵ The expedited rate proceeding rule, section 1010.10, specifies that a record of decision in such proceedings shall be issued within 90 days after the initiation of a hearing, which occurs on the date of publication of notice of the proposed action in the *Federal Register*. BPA intends to utilize the expedited procedures in instances other than general rate cases, such as where a single rate is being proposed or modified. For example, BPA used expedited procedures for the Southern California Edison Company contract rates, discussed below.

4. "Super-expedited" Rate Proceedings

In spite of the Ninth Circuit's caveat that exceptions to the use of statutorily required procedures should be rare,¹⁴⁶ BPA abandoned such procedures and its own regulations twice to revise its 1985 wholesale power rates. On March 5, 1986, BPA proposed a modification of its existing 1985 nonfirm rate schedule, allowing it to make sales under either the Standard or High Cost Displacement rates at any level from 7 mills per kWh to 22.2 mills per kWh. These had previously been fixed rates. BPA contended that this modification was necessary to allow it to make its nonfirm rates competitive in the face of declining oil and gas prices. BPA did not follow the procedures specified in Section 7(i) of the Northwest Power Act or even the expedited 90-day procedures of its own regulations. Instead, BPA argued that the proceeding was simply an extension of the original hearing on its 1985 rates and that the change did not warrant an additional hearing. BPA simply reopened the record compiled in the earlier hearing and took official notice of the decline in oil and gas prices.

FERC granted interim approval to this modification on May 1, 1986.¹⁴⁷ A challenge to this rate on procedural grounds is currently pending before the

141. *Id.*

142. 51 Fed. Reg. 7611 (1986).

143. 754 F.2d 1475 (9th Cir. 1985).

144. 754 F.2d 1470 (9th Cir. 1985).

145. 51 Fed. Reg. 7611 (1986).

146. *Portland Gen. Elec. Co.*, 754 F.2d at 1484.

147. 35 F.E.R.C. ¶ 61,143 (1986).

Ninth Circuit.¹⁴⁸

BPA also used expedited procedures to modify its SP-85 Surplus Firm Power rate schedule.¹⁴⁹ BPA intended this modification to allow it to sell surplus firm power on a temporary, experimental basis to those Direct Service Industries customers that are not already receiving rate relief under other rates. BPA indicated that the "super-expedited" proceedings would allow it to implement this modification by January of 1987 and thereby increase the time available for market experimentation. This time, BPA specifically waived the procedures contained in its regulations.

C. BPA Rate Approvals and Proposals

1. 1981 and 1982 Rates

On September 24, 1986, the Commission granted final approval to BPA's 1981 and 1982 nonregional, nonfirm energy rates (NF-81 and NF-82 rates), which were in effect from July 1, 1981, to October 31, 1983.¹⁵⁰ In doing so, the Commission reversed an administrative law judge's Initial Decision disapproving the NF-81 and NF-82 rates as too low.¹⁵¹

The Initial Decision had held that BPA is not required to base its rates for nonfirm energy on its cost of service; if it does, however, it can allocate the costs for both hydroelectric and thermal electric generating capacity in those rates on an unweighted, proportionate basis.¹⁵² Costs associated with non-operating nuclear generating facilities could also be included in nonfirm rates.¹⁵³ Thermal capacity costs, however, were capped at 3,300 MW of capacity, the maximum amount of additional firm energy capacity that BPA could have obtained by using its nonfirm hydro energy in combination with backup thermal capacity.¹⁵⁴ The Initial Decision also generally included other costs, including costs associated with BPA's residential exchange program, in BPA's nonfirm energy rate.

The Commission agreed in large part with the presiding judge as to his determination of the particular costs that BPA could allocate to nonregional, nonfirm customers: hydro capacity costs, thermal capacity and energy costs, non-operating nuclear facilities costs, network transmission system costs, fish and wildlife program costs, conservation program costs, and the cost of amortization of deferral interest. The Commission disagreed, however, with Judge Miller's inclusion of costs attributable to BPA's residential exchange program, which is designed to ensure that residential customers of Northwest investor-owned utilities receive rate parity with the residential customers of those public utilities which have preference rights to BPA power.¹⁵⁵ The Commission con-

148. Public Utils. Comm'n v. FERC, No. 86-7280 (9th Cir. May 14, 1986) (petition for review filed).

149. 51 Fed. Reg. 44,104 (1986).

150. 36 F.E.R.C. ¶ 61,335 (1986).

151. 29 F.E.R.C. ¶ 63,039, summarized in *Report of the Committee on Federal Power Market Agency Ratemaking*, 6 ENERGY L.J. 109, 115 (1985).

152. 29 F.E.R.C. at 65,077-81 & 65,088-89.

153. *Id.* at 65,093-94.

154. *Id.* at 65,091 & 65,093.

155. 36 F.E.R.C. ¶ 61,335 at 61,811-13.

cluded that regional customers should bear such costs. Moreover, the Commission rejected the presiding judge's 3,300 MW cap on thermal energy capacity costs chargeable to nonregional, nonfirm customers, stating that "BPA's nonfirm energy may reasonably be treated as the product of BPA's entire system."¹⁵⁶

The Commission also decided that the question of whether BPA should use a "share the savings" approach was not at issue in the proceeding since BPA had not elected to use such an approach, and the Commission vacated the Presiding Judge's conclusion on the issue of whether the nonregional, nonfirm energy rates were discriminatory since that issue would be addressed more directly in the Commission's review of BPA's 1983 rates.

2. 1983 Rates

a. Commission Proceedings

In 1985, the Commission granted final approval of BPA's 1983 rates other than those for nonregional, nonfirm energy.¹⁵⁷ This approval extended to BPA's Industrial Incentive Rate (the IIR), which was designed to operate during periods of economic recession. The IIR also allows BPA to negotiate a lower rate with the DSIs when BPA determines that such a sale would increase BPA's revenues. Although the Commission agreed with nonregional parties that the IIR is not a formula rate, it found the IIR to be a "reasonable exercise" of BPA's discretion since it would protect BPA's revenue recovery during times of economic recession and thus maximize BPA's ability to repay the federal investment.

On September 22, 1986, two days before the Commission's issuance of its decision on the NF-81 and NF-82 rates, Judge Leventhal issued an Initial Decision conditionally rejecting BPA's 1983 wholesale nonfirm rate schedule ("NF-83"), based on Judge Miller's Initial Decision in the 1981 and 1982 rate dockets.¹⁵⁸ The primary issue raised by the NF-83 rate schedule was whether BPA had unduly discriminated against nonregional, nonfirm customers. Judge Leventhal concluded that Congress had only intended for section 7(k) to provide nonregional customers procedural protection, not substantive protection, and held that section 7(k) "does not, either expressly or implicitly, prohibit BPA from acting with undue discrimination against nonregional customers."¹⁵⁹

The presiding judge further held that:

- no discrimination occurred and no injury was suffered by the nonregional customers as a result of the NF-83 rates,
- the flexibility in the NF-83 rate schedule was lawful,
- the rate schedule was not unlawfully vague,
- the inclusion in the rates of industrial reserve costs, *i.e.* the costs to BPA of maintaining the contractual right to interrupt power deliveries to its industrial customers in order to protect firm loads, was improper,
- the guarantee surcharge, a 1.8 mills per kWh charge for guaranteed nonfirm energy

156. *Id.* at 61,808.

157. 32 F.E.R.C. ¶ 61,014 (1985).

158. 36 F.E.R.C. ¶ 63,061 (1986).

159. *Id.* at 65,156.

- delivery up to four days, was appropriate,
- the NF-83 rate schedule did not result in a waste of resources,
- the NF-83 rate schedule violated statutory standards by failing to recover BPA's cost of producing nonfirm energy since it excluded residential exchange costs and thermal capacity costs.

Briefs on exceptions were filed by a number of parties and the matter is pending before the Commission.

b. California Energy Commission v. Johnson

The Ninth Circuit has refused to review the 1983 nonregional, nonfirm energy rates under the All Writs Act.¹⁶⁰ In *California Energy Commission v. Johnson*,¹⁶¹ the California Energy Commission (CEC) argued that these rates unlawfully discriminated against California ratepayers and were designed to subsidize the rates charged Pacific Northwest customers. The Ninth Circuit, however, stated that its review of these rates under the All Writs Act would be an unnecessary intrusion into the ongoing administrative proceedings before the Commission. The court emphasized that because the hearing required by Section 7(k) of the Northwest Power Act subjects nonregional rates to much broader review than regional rates, the FERC would review CEC's allegations that the 1983 rates are discriminatory and anticompetitive.

c. Ninth Circuit review of BPA's 1983 Regional Rates

The parties to the multitude of cases seeking review of BPA's 1983 regional rates have stipulated to the dismissal of most of the cases.¹⁶² The only proceedings not dismissed under the Stipulation were those challenging the SP-83 surplus firm power rate, and those involving the availability charge and the demand charge.¹⁶³

3. 1985 Rates

On September 12, 1984, BPA published its proposed 1985 rates, which were anticipated to be in effect for 27 months from July 1985 through the end of September 1987. This rate proceeding is important because 1985 is a threshold year under the Northwest Power Act for several different rate provisions. For example, under section 7(b)(2) of the Act,¹⁶⁴ BPA is to determine a rate cap for its preference customers equal to the rate they would have paid if the Act had not been passed. Any costs that the Northwest Power Act otherwise would allocate to preference customer rates above the Section 7(b)(2) rate cap are to be allocated to other BPA customers. In addition, under Section 7(c), a new methodology is used for setting rates for DSI customers, which includes a determination of a floor rate below which DSI rates may not be set.

160. 28 U.S.C. § 1651(a) (1982).

161. 767 F.2d 631 (9th Cir. 1985).

162. Association of Pub. Agency Customers, No. 85-7503 (9th Cir.).

163. Atlantic Richfield Co. v. BPA, Docket No. 83-7971; City of Seattle v. Johnson, No. 83-7947 (9th Cir.).

164. 16 U.S.C. § 839e(b)(2) (1982).

The Commission granted interim approval of BPA's 1985 rates on June 28, 1985.¹⁶⁵ Since then BPA has made two modifications to its 1985 rates.¹⁶⁶ On May 1, 1986, the Commission conditionally granted interim approval of the BPA's modification to the 1985 nonfirm rates, which BPA had proposed in response to falling oil and gas prices.¹⁶⁷ The second modification, a slight change in the availability provisions of BPA's surplus firm rate schedule, has not yet been acted upon by the Commission.

The Commission has not yet taken final action on any of BPA's 1985 rates. By an order dated December 23, 1986, the Commission set the 1985 nonregional nonfirm energy rates for a hearing pursuant to Section 7(k) of the Northwest Power Act.

4. Variable Industrial Power Rate

On June 16, 1986, BPA filed with the Commission its proposed Variable Industrial Power rate schedule VI-86, designed to guard against the loss of BPA's Direct Service Industries load, which is dominated by the aluminum smelter industry. Because BPA has a capacity and energy surplus, the loss of sales to the DSIs — which constitute approximately 25% of BPA's load and whose energy purchases have become increasingly erratic — could make it more difficult for BPA to repay the federal investment in its facilities. To encourage aluminum smelters to make purchases, BPA developed the VI-86 rate schedule, a formula rate that varies with the price of aluminum. The Commission granted interim approval of this rate on July 31, 1986.¹⁶⁸

5. Long-term Sale to Southern California Edison Company

On July 14, 1986, BPA filed a request for final approval of the SC-86 contract rate for the sale of surplus firm power and nonfirm energy to the Southern California Edison Company (SCE) under a twenty-year contract.¹⁶⁹ BPA requested that the Commission waive Section 300.1(b)(6) of its regulations and approve the contract rate for the full twenty-year term of the proposed contract. The Commission initially refused to do so, however, fearing that the rate could result in a cost under-recovery to BPA over the last fifteen years of the contract term. Consequently, the FERC granted final approval of the rate only for a five-year period.¹⁷⁰

BPA sought rehearing and in an order dated December 19, 1986, the Commission granted rehearing and approved the rates for the full twenty year term of the contract. In reaching this decision, the Commission rejected the argument that either the Northwest Power Act or other statutes limited its approval of BPA rates to five-year periods. While noting its concern that BPA may inadequately recover revenues over the entire twenty-year term, the Com-

165. 31 F.E.R.C. ¶ 61,388 (1985).

166. As discussed *supra*, these modifications were made pursuant to very limited procedures.

167. 35 F.E.R.C. ¶ 61,143 (1986).

168. 36 F.E.R.C. ¶ 61,142 (1986).

169. 51 Fed. Reg. 26,578 (1986).

170. 36 F.E.R.C. ¶ 61,350 (1986).

mission modified its earlier order in view of the small influence the contract would have in relation to total BPA revenues, and because of the escalator provisions in the proposed contract. The Commission emphasized that its approval of the SC-86 contract rates for the entire term of the contract "should not be taken as an indication that [it] will automatically approve similar future requests."

6. Firm Displacement Sales

By statute, BPA may market outside the Northwest region only "surplus energy and surplus peaking capacity," which are essentially defined as energy and capacity for which there is no demand in the Northwest "at any established rate."¹⁷¹ Energy sold out-of-region is withdrawable on sixty days notice to serve the requirements of any Northwest customer, and capacity so sold is withdrawable on sixty months notice.¹⁷² Sales made by BPA within the Northwest as replacement for hydroelectric power sold out-of-region is withdrawable on the same amount of notice.¹⁷³ BPA has concluded that sales made within the Northwest as replacement for *nonhydro* power exported from the region is not subject to the 60-day/60-month withdrawal provisions.¹⁷⁴

These withdrawal provisions have a limiting effect on the value of BPA power to out-of-region utilities. Because BPA wished to market its firm power in a manner not subject to the withdrawal provisions, it proposed to sell power to Northwest utilities which could in turn market their own nonhydro resources outside the region.¹⁷⁵ Although proposed contract principles tied the out-of-region sales closely to the in-region sales, BPA asserts that because its sale is made within the region and does not displace hydroelectric resources sold outside the region, the withdrawal provisions of regional preference do not apply. In addition, BPA takes the position that the regional utility to which Firm Displacement power is sold is not limited by statutory preference provisions in its ability to market an amount of power equivalent to that which it obtains from BPA.

Parties have challenged BPA's position on these points, asserting that the program involves a simple pass-through of BPA power out-of-region to which both the public body and regional preferences, including withdrawability provisions, must be applied.

The rate for BPA Firm Displacement power was filed with the FERC on June 16, 1986. Like the SC-86 rate for the proposed Southern California Edison contract, the FD rate has annual escalators and approval is requested for a period of twenty years. The Commission has not acted upon the rate.

7. 1987 Rates

On December 30, 1986, BPA published its proposed 1987 rates, which

171. 16 U.S.C. §§ 837 & 839f(c) (1982).

172. 16 U.S.C. § 837b (1982).

173. *Id.*

174. *But see* 16 U.S.C. § 839f(c) (1982).

175. 50 Fed. Reg. 37,222 (1985).

BPA anticipates will be in effect from October 1, 1987, to September 30, 1989.¹⁷⁶ The 1987 rates contain various new provisions. One such provision is the Cost Recovery Adjustment Clause, which would provide for an automatic adjustment of BPA's rates based on BPA's actual financial performance in fiscal year 1988 as compared with the anticipated costs and revenues at the time of the rate filing. This adjustment would be made only if the 1988 funds from operations fell outside a predesignated range of \$60 million more or less than planned, and adjustments would be capped at 10 percent.

The 1987 rates also contain two priority firm rates. Under section 7(b)(2) of the Northwest Power Act,¹⁷⁷ BPA is to determine a rate cap for its preference customers equal to the rate they would have paid had the Act not been passed. In the 1987 rate proposal, this test operates for the first time to reallocate costs from priority firm preference customers to other rate classes. As a consequence, BPA has included in the 1987 rates two priority firm rates, a Preference rate, which reflects the adjustment, and an Exchange rate, which does not.

Another provision in the 1987 rates links the industrial firm power and variable rates and the priority firm power rate. BPA intends for this link to provide long-term rate certainty to the DSIs, thereby enhancing DSI loads and stabilizing BPA revenues.

BPA also has included long-term surplus firm rates in its 1987 proposal, and has proposed significant changes in its nonfirm rates. Under its NF-87 rate schedule, BPA sells nonfirm energy at a flexible rate below a cap set at the sum of BPA's average system costs plus thirty percent of the difference between its average system cost and the per-kWh equivalent price of Singapore oil. The latter is intended as a proxy for the decremental costs of prospective California purchasers of BPA's nonfirm energy.

The 1987 BPA transmission rate proposals include two significant additions. BPA has proposed a Lost Opportunity transmission rate for certain transactions, under which BPA will set a price for transmission between a floor set at its firm transmission rate and a ceiling set at its firm power rate. BPA also proposes to adopt the Western Systems Power Pool (WSPP) transmission rate schedule for transactions under the WSPP Agreement; the WSPP rate schedule, if accepted for filing by the Commission,¹⁷⁸ provides for a negotiated transmission rate up to a cap of 33 mills/kwh.

BPA proposes to cap the nonfirm rates over a twelve-year period. The nonfirm rate, however, is designed to be flexible with the rate level based on the cost of energy.

176. 51 Fed. Reg. 47,108 (1986).

177. 16 U.S.C. § 839c(b)(2) (1982).

178. The WSPP Agreement has been submitted to the Commission by participants subject to the jurisdiction of the Federal Power Act. The Agreement provides that it will not become effective until accepted for filing by the Commission and the completion of any hearings.

D. BPA Intertie Access Policies

1. The Near-Term Intertie Access Policy

Before BPA's establishment of the Near-Term Intertie Access Policy (NTIAP) in 1984, access to the Pacific Intertie by Pacific Northwest and Canadian utilities was determined by market forces, except during periods when Pacific Northwest surplus hydroelectric energy exceeded Intertie capacity (*i.e.* spill conditions). During non-spill conditions, Pacific Northwest and Canadian suppliers of economy energy could obtain access to the Intertie by pricing energy competitively and entering into transactions with Southwest purchasers. During spill conditions, access to the Southwest market was allocated among Pacific Northwest utilities and BPA under the Exportable Agreement, which allowed Pacific Northwest signatories to sell certain amounts of energy to Southwest purchasers at the lowest BPA nonfirm energy rate.

In August 1984, BPA changed the Exportable Agreement rate from the lowest to the highest generally available nonfirm energy rate. One month later BPA implemented the Interim Near-Term Intertie Access Policy, governing sales of economy energy to the Southwest, which established an exclusive horizontal market allocation, independent of price, among BPA and Pacific Northwest utilities. BPA made application of the policy contingent on certain regional market conditions. The final NTIAP, virtually identical to the interim policy, became effective in June 1985.

a. Court Proceedings

The Ninth Circuit proceedings were brought to challenge BPA's NTIAP. In the first, an expedited proceeding on the request by the Los Angeles Department of Water and Power for prompt injunctive relief, the Ninth Circuit found the NTIAP consistent with BPA's statutory authority and not an arbitrary and capricious action.¹⁷⁹ Los Angeles had argued that the NTIAP reduces competition among BPA, Pacific Northwest utilities, and Canadian utilities for sales of energy to the Southwest. In response to the City's contention that the NTIAP violates the antitrust laws by displacing competition, the court merely noted that the antitrust laws do not apply to federal government entities. The court determined that BPA has the statutory obligation to market federal power in a manner that ensures that the agency remain self-supporting, and found that in allocating use of federally-owned transmission facilities, BPA must accord preference first to transmission of federal power and then to transmission of other Northwest generated power.

The second proceeding on BPA's NTIAP was brought by the California Energy Commission and the Public Utilities Commission of California, and is still pending.¹⁸⁰

179. Department of Water and Power v. BPA, 759 F.2d 684 (9th Cir. 1985).

180. California Energy Resources Conservation and Development Comm'n v. BPA, No. 84-7836 (9th Cir.).

b. Commission Proceedings

In an Order Denying Petition for Declaratory Order, in *Public Utilities Commission of the State of California*,¹⁸¹ the FERC rejected arguments by various California parties that the changes in the Exportable Agreement rate and implementation of the NTIAP constituted modifications of rates and rate schedules, requiring both adherence to statutory ratemaking procedures and prior Commission approval. Although acknowledging that other BPA actions may have an impact on the revenue BPA receives from sales of power and energy, the Commission based its denial on the determination that the NTIAP and Exportable Agreement alteration did not represent an explicit change in rates or rate schedules. Instead, the Commission characterized the BPA action as an appropriate exercise of its discretion to maximize revenue, and found that any challenge to that action rested in the sole province of the Ninth Circuit. Commissioner Sousa dissented in part from the order on the basis that characterizing BPA's use of the higher standard under the Exportable Agreement as an application of rate implementation criteria ignored the fact that the action effectively amounted to a rate change warranting Commission review.

A petition for rehearing on the order was filed in December 1985. The Commission has not acted on the petition to date.

2. The Proposed Long Term Intertie Access Policy

BPA has proposed a Long Term Intertie Access Policy (LTIAP) to take effect on July 1, 1987, replacing the NTIAP. The LTIAP essentially continues the provisions on Intertie access imposed by the NTIAP. However, BPA's use of the Intertie is given greater protection, through its reservation of capacity equal to the surplus firm power it has available times a shaping factor of 1.8. The LTIAP restricts use of the Intertie for capacity/energy exchanges between other Pacific Northwest utilities and California utilities, until BPA's system is in load/resource balance. Finally, BPA offers somewhat greater access to the Intertie for Canadian utilities, but only after certain events occur, most notably expansion of Intertie capacity to 7900 MW through completion of the upgrade of the DC portion of the Intertie and construction of the Third AC Intertie. Until then, Canadian access is minimal, in accordance with the existing NTIAP provisions.

E. Miscellaneous BPA Issues

1. Average System Costs

a. Commission Proceedings

The Commission denied rehearing and thus confirmed its final rule approving BPA's new methodology for determining "average system costs" (ASC) for power exchanges under Section 5(c) of the Regional Act.¹⁸² Various North-

181. 33 F.E.R.C. ¶ 61,235 (1985).

182. Methodology for Sales of Elec. Power to the Bonneville Power Administration, 30 F.E.R.C. ¶

west utilities challenged the new methodology because it excludes from ASC the costs of return on equity and taxes, which they argued are universally recognized as elements of a utility's cost of service under traditional ratemaking concepts. The Commission, however, indicated that BPA's methodology was not inconsistent with the Congressional purpose of Section 5(c), and emphasized that the ASC methodology "is a mechanism for calculating a subsidy, not for establishing a traditional cost of purchases power."¹⁸³

b. Court Cases

In *Pacificorp v. FERC*,¹⁸⁴ the Ninth Circuit upheld the Commission's approval of BPA's ASC methodology, emphasizing that BPA is entitled to great deference in interpreting the Northwest Power Act and must be upheld unless its interpretation is unreasonable. The court added, however, that it did not sanction any permanent implementation of the exclusions; rather, it deferred to BPA in this instance because of the agency's experience with the program and because of the need to avoid accounting abuses by utilities. It concluded that the statute "neither commands nor proscribes these adjustments in ASC methodology."¹⁸⁵

Prior to the Commission's final action, there also had been court challenges to the BPA's proceedings on the ASC methodology. The Public Utility Commissioner of Oregon and three investor-owned utilities sued BPA in a federal district court challenging the constitutionality of the ongoing agency proceedings on the ASC. They alleged that the participation by the BPA Administrator in the proceedings had violated their Fifth Amendment due process right since he was, they asserted, "absolutely committed" to lowering the ASC calculation and thus had an unalterably closed mind as to the outcome in those proceedings. The district court dismissed the action for lack of subject matter jurisdiction.¹⁸⁶

The Court of Appeals for the Ninth Circuit affirmed the district court's decision.¹⁸⁷ Although it noted that Section 9(e)(5) of the Northwest Power Act, which governs judicial review, does not specify the forum for this action, the court concluded that the Ninth Circuit had exclusive jurisdiction, stating that "where a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review."¹⁸⁸ The court also held that since this challenge involved nonfinal agency action, the action was not ripe for review.

In another proceeding, the Ninth Circuit affirmed a district court's dismissal for lack of jurisdiction of a challenge which asserted that because BPA had initiated the new consultation process less than one year after final FERC approval of the first ASC methodology, it resulted in the breach of BPA's contrac-

61,108 (1985).

183. *Id.* at 61,196.

184. 795 F.2d 816 (9th Cir. 1986).

185. *Id.* at 823.

186. *Public Util. Comm'r v. BPA*, 583 F. Supp. 752 (D. Ore. 1984).

187. *Public Util. Comm'r v. BPA*, 767 F.2d 622 (9th Cir. 1985).

188. *Id.* at 626.

tual obligations with the plaintiffs, two investor-owned utilities.¹⁸⁹ The Ninth Circuit agreed with the district court's holding that the court of appeals rather than the district court had exclusive jurisdiction over the claim, which it viewed as involving a BPA ratemaking subject to its direct review.

2. Residential Exchange

California Energy Resources Conservation and Development Commission v. Johnson,¹⁹⁰ involved BPA's Residential Exchange program, whereby BPA "sells" power to investor-owned utilities and "buys" an equivalent amount of power back at higher rates, in order to equalize residential rates between BPA's preference customers and the investor-owned utilities. The Ninth Circuit upheld a provision in BPA's standard residential exchange contract in which BPA agreed to give a participating utility "not less than seven years' prior written notice" of its intent to acquire power from a less expensive source in lieu of purchasing power offered by an exchanging utility, as authorized under section 5(c)(5) of the Regional Act. It also upheld a provision which specified that the substituted acquisition must be at least five years in duration. In this case, the Ninth Circuit also ruled that challenges to other standard BPA contract provisions were not yet ripe for review.

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189. *Pacific Power and Light Co. v. BPA*, 795 F.2d 810 (9th Cir. 1986).

190. 783 F.2d 858 (9th Cir. 1986).