

## Report of the Committee on Power Marketing Agencies

The Committee on Power Marketing Agencies presents its summary of litigation and legislative developments affecting the rates, practices and policies of the federal power marketing agencies (PMAs): Southeastern Power Administration (SEPA), Southwestern Power Administration (SWPA), Western Area Power Administration (WAPA), Bonneville Power Administration (BPA), and Alaska Power Administration (APA). Litigation involving the Power Authority of the State of New York (PASNY) also is reported since the PASNY markets hydroelectric power pursuant to a federal type "preference" statute.<sup>1</sup> The report additionally highlights marketing policies and rate actions implemented or proposed by the PMAs during 1988.

### I. LITIGATION UPDATE

Recently, litigation involving the PMAs has focused on the issue of the qualifications that a public body must meet in order to be eligible for preference power. Two cases reported last year<sup>2</sup> continue to dominate this area.

#### A. *Salt Lake City v. Western Area Power Administration*<sup>3</sup>

In 1983, in response to the WAPA's proposal to develop a marketing plan for its Salt Lake City Area projects, Utah Power & Light Company (UP&L) submitted an application to act as an agent in the distribution of federal preference power for the cities and towns located in its service area that do not own retail electric distribution systems. The WAPA rejected UP&L's application on the grounds that it did not comply with congressional intent for the sale of federal power and that there were sound policy reasons for not accord- ing a preference to cities that are not in the business of retail electric distribution.<sup>4</sup>

At the completion of the WAPA's rulemaking proceeding, UP&L filed suit against the agency and the Department of Energy (DOE).<sup>5</sup> UP&L's complaint contained three principal arguments:

- (1) UP&L contended that the preference criteria applied by the WAPA and the DOE violated the statutory directives governing preference power sales and was unconstitutional under the Equal Protection and Due Process Clauses, and the Tenth Amendment.

---

1. Surplus power generated at federally owned reclamation and flood control projects and at the Niagara Redevelopment Project is marketed pursuant to a variety of statutes that grant a "preference" i.e., first purchase right, in the sale of power to municipalities, other public bodies and rural electric cooperatives. See, e.g., Flood Control Act of 1944, 16 U.S.C. § 825a (1982); Reclamation Project Act of 1939, 42 U.S.C. § 485h(c) (1982).

2. See Report of the Committee on Power Marketing Agencies, 9 ENERGY L.J. 239 (1988).

3. *Salt Lake City v. Western Area Power Admin.*, No. 86-C-1000 G (D. Utah filed Oct. 31, 1986).

4. See Revised Proposed General Power Marketing Criteria and Allocation Criteria for Salt Lake City Area Projects, 49 Fed. Reg. 34,900 (1984). The criteria were made final on February 7, 1986. 51 Fed. Reg. 4844 (1986).

5. *Salt Lake City*, No. 86-C-1000 G.

- (2) UP&L complained that the WAPA's practice of purchasing and reselling thermal generation to "firm" its variable hydropower generation was unlawful.
- (3) UP&L contended that the WAPA was required to prepare an environmental impact statement in conjunction with the development of its power marketing policy and that other environmental laws were violated by the WAPA's marketing practices.

UP&L sought to prevent the WAPA from entering into contracts to implement its new power marketing policy which was to govern sales for the post-1989 period. Preference customers from across the country became involved in the lawsuit either as intervenors or *amici*.

On April 14, 1988, Judge Greene of the federal district court in Utah issued his decision on motions for summary judgment filed by the defendants. The court upheld the WAPA's power allocation plan on all the preference issues and flatly rejected UP&L's contention that the preference laws are or have become unconstitutional. Judge Greene found the WAPA's decision to deny preference power to cities lacking electric distribution systems to be "fully reasonable," stating that several factors underlie this conclusion.

First, federal power policy is technical and complex, and involves reconciliation of competing interests. WAPA considered the matter in a detailed and reasoned fashion. Its interpretation represents a reasonable accommodation of manifestly competing policies. Second, as the agency notes, it has consistently so interpreted the clause over a long period of time. Third, the interpretation is consistent with national reclamation policy as expressed in recent Congressional debates and judicial interpretations.<sup>6</sup>

The court also held that even if the municipalities were qualified as preference entities, they would have no entitlement to an allocation of preference power. This conclusion is consistent with that of virtually every other court that has considered the issue.<sup>7</sup>

Judge Greene further found in favor of the defendants on the issue of whether the agency had exceeded its authority by "firming" its resources through the sale of non-federal power. "To the contrary, this Court holds that the statute mandates doing what is reasonably necessary, which would include the acquisition and blending of non-federal power, to maximize the sale of federal power at firm rates."<sup>8</sup>

On June 27, 1988, UP&L appealed Judge Greene's decision on the preference and "firming" issues to the U.S. Court of Appeals for the Tenth Circuit.<sup>9</sup> Briefs have been filed but oral argument has not been scheduled as of the date of this writing.

Although summary judgment was granted on UP&L's challenge to the WAPA's criteria, two issues were set for trial since Judge Greene found disputed issues of fact: (1) whether WAPA had used its involvement in the Rocky Mountain Generation Cooperative as a "cloak" to perform a market-

---

6. *Id.*, slip op. at 40-41.

7. *See, e.g.*, *Brazos Elec. Power Coop., Inc. v. Southwestern Power Admin.*, 819 F.2d 537 (5th Cir. 1987), and cases cited therein.

8. *Salt Lake City*, slip op. at 51.

9. *Salt Lake City*, Docket No. 88-1976 (10th Cir. June 27, 1988).

ing function which WAPA is not authorized to perform, and (2) whether the magnitude of the impact of the WAPA's power marketing decisions required the issuance of an environmental impact statement. The parties agreed to hold the first issue in abeyance pending the outcome of UP&L's appeal on the preference and firming issues. Extensive discovery was held on the environmental claims, and a trial was originally scheduled for late November 1988. The trial on the environmental claims was postponed due to settlement discussions among the parties.

On December 20, 1988, the National Wildlife Federation, joined by the Grand Canyon Trust, American Rivers, Inc. and Western River Guides Association, filed suit in the Utah District Court alleging essentially the same environmental grievances set for trial in the *Salt Lake City* case.<sup>10</sup> The plaintiffs have requested that the case be consolidated with the existing action and have indicated their purpose in filing an independent lawsuit is to prevent a settlement which does not require the WAPA to perform an environmental impact study in conjunction with its marketing program.<sup>11</sup>

*B. Municipal Electric Utilities Association of New York State v. Power Authority of the State of New York*<sup>12</sup>

The definition of "public bodies" and, thereby, the ultimate recipient of preference power was at issue before the Federal Energy Regulatory Commission (FERC) in *MEUA v. PASNY*. An initial decision requiring preference recipients to be in the business of retail electric distribution was issued by a FERC Administrative Law Judge on February 16, 1988.<sup>13</sup>

The MEUA had challenged the decision of PASNY to allocate Niagara Project preference power to various New York city and county Municipal Distribution Agencies (MDAs). Although formed under state laws, these MDAs did not own or operate distribution facilities. Rather, they attempted to qualify as "public bodies" pursuant to the Niagara Redevelopment Act<sup>14</sup> by entering into a "lease and Operating Agreement" with the local private power company for distribution of preference power to ultimate customers.<sup>15</sup> *MEUA*

---

10. *National Wildlife Fed'n v. Western Area Power Admin.*, No. 88-C-1175-J (D. Utah filed Dec. 20, 1988).

11. The Committee would be remiss if it did not mention the unprecedented order of the Federal Energy Regulatory Commission (FERC) in the proposed merger of UP&L and Pacific Power & Light. As a condition of the merger, the FERC has required the merged company to perform wheeling services for other utilities, a matter which has generated considerable controversy in the electric utility industry. See 45 F.E.R.C. ¶ 61095 (1988).

12. *Municipal Elec. Utils. Ass'n of N.Y. State v. Power Auth. of the State of N.Y.*, F.E.R.C. Docket No. EL86-24-000 [hereinafter *MEUA v. PASNY*].

13. *MEUA v. FERC*, 42 F.E.R.C. ¶ 63,018 (1988).

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

15. In two pending New York State cases, two MDAs, the City of New York Public Utility Service and County of Westchester Public Utility Service Agency, have sought additional amounts of Niagara Project power from MEUA members. A threshold question in each case would be whether the MDAs qualify as preference customers pursuant to the Niagara Redevelopment Act. See *County of Westchester Public Util. Serv. Agency v. PASNY*, Index No. 43785/85 (N.Y. Sup. Ct. filed Dec. 20, 1985); *New York City Pub. Util. Serv. v. PASNY*, Index No. 25170/85 (N.Y. Sup. Ct. filed Sept. 13, 1985). On December 19, 1988, the judge in *NYCPUS v. PASNY* refused to grant a preliminary injunction prohibiting the

v. *PASNY* was consolidated with a challenge brought by the Connecticut Municipal Electric Energy Cooperative (CMEEC) and the Massachusetts Municipal Wholesale Electric Company (MMWEC) to PASNY's allocation of Niagara Project preference power to the Vermont Department of Public Service (VDPS), which, similarly, did not own or operate distribution facilities and had "leases" with local utilities.

In deciding that neither the MDAs nor the VDPS qualify as "public bodies" and thereby preference customers pursuant to the Niagara Redevelopment Act, the Presiding Administrative Law Judge determined that a "public body" pursuant to the Niagara Redevelopment Act must meet a number of criteria.

First, such a "public body" must be authorized under state law to be in the electric utility business. He decided that the MDAs and VDPS are so authorized.

Second, a "public body" must provide yardstick competition. He found that this criterion has been mandated in *Metropolitan Transportation Authority v. FERC*.<sup>16</sup> Additionally, the Presiding Administrative Law Judge further defined the necessary elements of yardstick competition:

Yardstick competition requires that the public body be a model for an alternative method of electric power supply for communities which are dissatisfied with the rates or service of the investor owned utilities now serving them. Yardstick competition involves a threat of takeover or displacement to the investor owned utilities. Underlying the concept of yardstick competition there must be a meaningful opportunity for the consumers and regulators to compare the rates and quality of service of the public utility with that of investor owned utilities. While a public body need not supply all of the power requirements of a customer it does have to substantially meet the energy needs of its customers.<sup>17</sup>

He held that neither the MDAs nor the VDPS provide yardstick competition.

Third, "public bodies" must be "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." The initial decision divided this criterion, which had been mandated in *Metropolitan Transportation Authority*, into two categories: (1) a "public body" must be directly responsible to retail consumers for the electricity sold and delivered to them and (2) a "public body" must have control over the distribution system. The judge further defined the first requirement "direct responsibility" as follows:

To be directly responsible, a public body must be the decision maker in determin-

---

transfer of Niagara Project preference power from down state to upstate MDAs. Otherwise, neither case has been active. See *NYCPUS v. PASNY*, Index No. 25170/85 (N.Y. Sup. Ct. Dec. 19, 1988).

16. *Metropolitan Transp. Auth. v. FERC*, 796 F.2d 584 (2d Cir. 1986), cert. denied, 107 S. Ct. 1286 (1987). In this case, various parties, including MEUA, CMEEC and MMWEC had challenged allocations of preference power by PASNY to VDPS. The FERC and the appellate court held that the VDPS was not a preference customer and public body pursuant to the Niagara Redevelopment Act, since it was not capable of distributing power directly to retail electric consumers, but left open the question whether leasing distribution facilities would be acceptable. Subsequently, MDAs and the VDPS entered into agreements with private power companies purporting to "lease" the distribution facilities of those private power companies in order to "sell" preference power to ultimate consumers. It was this newly constituted VDPS which was challenged in *MEUA v. PASNY*.

17. *MEUA v. PASNY*, 42 F.E.R.C. at 65,164.

ing how the requirements of its customers are met. The responsibility must be to the retail consumer of electricity. Responsibility is shown when consumer complaints concerning rates or services are directed to the public body, which must have the ability to take corrective action.<sup>18</sup>

Under the second category, "control" was defined as "the authority to manage a system without restraint."<sup>19</sup> Neither the MDAs nor the VDPS were found to have the necessary direct responsibility to retail customers or the necessary physical control over distribution facilities to qualify as preference customers.

Although the Presiding Judge held that the VDPS and the MDAs did not meet the "public bodies" requirement and had, therefore, been improperly allocated preference power, he held that the PASNY had acted in good faith in making allocations to fifty-two MDAs and the VDPS and declined to grant retroactive relief.

Exceptions to the initial decision have been filed with the full Commission.

C. *Central Montana Electric Power Cooperative, Inc. v. Bonneville Power Administration*<sup>20</sup>

A final decision was entered by the U.S. Court of Appeals for the Ninth Circuit in *Central Montana Power Coop. v. BPA*. The central issue in this case was whether the "Montana preference" established in connection with the Hungry Horse Project had been extended to the Libby Project.

Both projects are located in northwestern Montana and are within the "Pacific Northwest Region," as defined in the Northwest Power Preference Act of 1964.<sup>21</sup> Accordingly, unless the restrictions of that Act are superseded by other laws, the BPA is precluded from selling firm power from these projects to customers, including preference customers, outside of the Pacific Northwest Region.<sup>22</sup>

The Hungry Horse Act<sup>23</sup> provides for beneficial uses "primarily in the State of Montana." This is interpreted to mean that, subject to the normal operation of other preference laws *inter se*, customers in Montana, wherever located, have first call on power from the project. With respect to Hungry Horse, the Montana preference supersedes the restrictions on out-of-region sales contained in the Northwest Power Preference Act.

Central Montana Electric Power Cooperative and Upper Missouri Generation & Transmission (G&T) Cooperative, which are located and serve distribution cooperatives in eastern Montana (outside the Pacific Northwest Region), applied to BPA to purchase power from Libby. The two cooperatives' applications were based on the contention that the Montana preference

---

18. *Id.*

19. *Id.* at 65,165.

20. *Central Mont. Power Coop., Inc. v. Bonneville Power Admin.*, 840 F.2d 1472 (9th Cir. 1988) (BPA).

21. Northwest Power Preference Act of 1964, 16 U.S.C. §§ 837-837h (1982) [hereinafter NWPPA].

22. *Id.* § 837a.

23. Hungry Horse Act, 43 U.S.C. § 593a (1982).

had been extended to the Libby project by various Congressional actions, culminating in the enactment of section 10(f) of the Northwest Power Planning Act of 1980.<sup>24</sup> Upon denial of their applications by BPA on the ground the Montana preference does not extend to Libby, they sought review by the United States Court of Appeals for the Ninth Circuit.

Notwithstanding the history of Congressional actions indicating the intent of Congress to extend the Montana preference to Libby and section 10(f) of the Northwest Power Planning Act which provides: "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." The court held that the Montana preference had not been extended to the Libby project.

## II. LEGISLATIVE DEVELOPMENTS

### A. *Effect of 1988 Elections on PMA Customers*

For the past several years, the Reagan Administration has initiated proposals to sell the PMAs to nonfederal entities, alter the repayment practices of the PMAs, and alter the management or repayment terms for individual federal multipurpose water projects. It is unclear at this time however, whether the administration of President Bush will pursue these same policies, embark on new PMA initiatives, or support continuation of existing federal power policies.

In response to a questionnaire<sup>25</sup> prepared by the National Rural Electric Cooperative Association, then-candidate Bush endorsed the continued use of the preference principle for allocation of federally generated power, but stated that the pricing of this power "needs to be carefully examined to determine what is best for all concerned."<sup>26</sup> Then Vice-President Bush, in answering the questionnaire, did not explicitly reject the possibility of continued efforts to sell the PMAs. The Republican party platform adopted last August is also vague on the question of privatization. The platform endorses the general concept of privatizing "government monopolies that poorly serve the public and waste the taxpayers' dollars," but does not cite specific programs, agencies, or functions that should be divested.<sup>27</sup>

The 1988 elections produced changes in House and Senate committee assignments, with two Democratic seats and three Republican seats open on the Senate Energy and Natural Resources Committee.<sup>28</sup> The 101st Congress will also see Rep. Panetta (D-Cal.) succeeding Rep. Gray (D-Pa.) as chair of the House Budget Committee and Sen. Sasser (D-Tenn.) replacing retired Sen. Chiles (D-Fla.) as chair of the Senate Budget Committee.<sup>29</sup> As in past years, it

---

24. Northwest Power Planning Act of 1980, 16 U.S.C. § 839g(f) (1982).

25. Action Committee for Rural Electrification, *The 1988 Presidential Candidates* (Feb. 1988).

26. George Bush for President, response to National Rural Electric Cooperative Association questionnaire (Feb. 1988).

27. See RURAL ELECTRIFICATION 8 (Dec. 1988).

28. See THE CONGRESSIONAL MONITOR 24 (Nov. 10, 1988).

29. See THE CONGRESSIONAL MONITOR 2 (Dec. 8, 1988).

is expected that the congressional budget committees will continue to be a focal point for possible changes in federal power policies as Congress seeks new ways to generate revenue in order to reduce the federal budget deficit.

### B. Proposed Sale of PMAs

#### 1. Overview

For the past several years, the Administration has attempted to divest the federal government of its investment in the five federal PMAs. This proposal has met strong reaction in Congress, which adopted a permanent prohibition against the expenditure of government funds to study the sale of four of the PMAs absent specific congressional authorization.<sup>30</sup>

#### 2. SEPA Sale Legislation

Proposed legislation to authorize a study of the sale of the SEPA was transmitted to Congress by the Administration on June 10, 1987.<sup>31</sup> The legislation was introduced in the House by Rep. Conte and three co-sponsors.<sup>32</sup> In the Senate, Sen. McClure, ranking minority member on the Senate energy panel, introduced the legislation "by request,"<sup>33</sup> stating in his introductory remarks that "I have been and remain adamantly opposed to such transfers."<sup>34</sup> These legislative proposals received no further attention in the 100th Congress.

#### 3. Alaska Power Administration

Since the Alaska Power Administration was not included in the above-mentioned statutory prohibition, efforts to sell the agency have continued through the administrative process. In response to an April 1, 1987, Request for Proposals,<sup>35</sup> the agency has received one bid for each of its two projects.

In September, 1987, the Alaska Power Authority (Authority), a state agency, offered to purchase the Snettisham project, which serves the Juneau area.<sup>36</sup> The Authority's proposal was prepared at the request of the two existing project customers, Alaska Electric Light and Power and Glacier Highway Electric Association, and the local government served by the two utilities. Under the proposal, the two utilities would merge into a single, investor-owned utility, and the new entity would receive all of the output of the Snettisham project from the state agency. The purchase proposal assumes

---

30. Military Retirement Reform Act of 1986, Pub. L. No. 99-348, 100 Stat. 710 (1986).

31. Letter from J. Michael Farrell, General Counsel of the DOE, to the Honorable George Bush, President of the U.S. Senate (June 10, 1987), transmitting legislation to authorize a study of the sale of the SEPA, reprinted in 133 CONG. REC. S12,851 (daily ed. Sept. 25, 1987).

32. H.R. 2718, 100th Cong., 1st Sess. (1987).

33. S. 1719, 100th Cong., 1st Sess. (1987).

34. 133 CONG. REC. S12851 (daily ed. Sept. 25, 1987).

35. Alaska Power Administration, U.S. Dep't of Energy, Divestiture Status Report: *The Purchase Proposal Process*, app. D (July 10, 1987).

36. The Snettisham Transfer Report of the Ad Hoc Committee to the Assembly, the City and Borough of Juneau (July 10, 1987).

use of tax-exempt financing and a purchase price based on the present worth of the outstanding investment of the project.

In November, 1987, a bid was submitted for purchase of the Eklutna project, which serves the Anchorage area, by the three current project customers: Anchorage Municipal Light and Power, Chugach Electric Association, and Matanuska Electric Association.<sup>37</sup> The proposal envisions ownership of the project by either a G&T cooperative or a joint action agency. The purchase price would be the present worth of the outstanding investment and would be financed with tax-exempt bonds.

As of the time of this writing, the purchase agreement for the Snettisham project is near completion. The agreement must be approved by the Office of Management and Budget before it is submitted to Congress. Negotiations are still underway for purchase of the Eklutna project.

### C. *Proposals to Modify PMA Repayment Practices*

Various initiatives to alter the repayment policies of the PMAs have been promoted by the executive branch,<sup>38</sup> Congress,<sup>39</sup> and others<sup>40</sup> during the past several years. However, under the terms of the December 1987 bipartisan budget summit, which produced the two-year Omnibus Budget Reconciliation bill,<sup>41</sup> no efforts were made to change the repayment policies of the PMAs during 1988.

It is unclear at this time whether the fiscal year 1989 budget process will generate any PMA repayment proposals; however, such changes are being advocated by various environmental organizations as part of a compilation of several hundred policy recommendations for the Bush Administration.<sup>42</sup>

### D. *Proposals to Alter the Preference Principle*

The preference clause has been challenged before the courts,<sup>43</sup> the FERC<sup>44</sup> and the Congress.<sup>45</sup> The most recent proposal to alter the criteria for allocation of federal power is contained in a report containing a compendium of recommendations prepared by various environmental organizations.<sup>46</sup> The

---

37. Proposal to purchase the Eklutna Hydroelectric project (Nov. 19, 1987) (submitted to the Administrator, APA).

38. See 1987 OMB Budget to the U.S. Gov't fiscal year 1988, at 2-46.

39. Committee on the Budget, Revised Chairman's Mark for the 1988 Budget Resolution, at Function 270: Energy (1987).

40. See President's Private Sector Survey on Cost Control, Task Force Report on the Department of Energy, the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission (Apr. 15, 1983).

41. Omnibus Budget Reconciliation Act, Pub. L. No. 100-203, 101 Stat. 1330 (1987).

42. Blueprint for the Environment: Advice to the President-Elect from America's Environmental Community (Nov. 1988).

43. See, e.g., discussion of *Salt Lake City*, *supra* at I.A.

44. See, e.g., discussion of *MEUA v. PASNY*, *supra* at I.B.

45. See, e.g., Amendment offered by Rep. Boxer to the Hoover Power Plant Act of 1984, 130 CONG. REC. H3319 (daily ed. May 3, 1984).

46. Blueprint for the Environment: Advice to the President-Elect for America's Environmental Community (Nov. 1988).



report endorses supplementing the existing consumer owned utility allocation requirement with other requirements intended to promote various environmental objectives. The report states further that "preference might also be provided on the basis of other current social objectives."<sup>47</sup>

### *E. Proposals to Reallocate Federal Power and/or Power Revenues*

Various proposals to reallocate power and power revenues and to change repayment terms and methodologies have been proposed in bills to authorize irrigation projects and water delivery systems, or to resolve Indian water rights claims.

#### 1. Animas-LaPlata

In August, 1987, members of the Colorado and New Mexico congressional delegations introduced legislation<sup>48</sup> to reauthorize the Animas-LaPlata irrigation project. Animas-LaPlata was originally authorized in 1968 as a "participating project" of the Colorado River Storage Project.<sup>49</sup> The new legislation, entitled the Colorado Ute Indian Water Rights Settlement Act, authorized construction of a project to provide irrigation and municipal water and resolved long-standing water rights litigation between Colorado Indian tribes and non-Indian water users.

As introduced, this legislation would have changed traditional reclamation repayment policy to require power users to repay irrigation assistance costs on a thirty-year, straight-line amortization schedule. The accelerated repayment provision was similar to the repayment reform proposals the Administration repeatedly advanced for the power marketing administrations. During committee markup of the bills, the Senate Indian Affairs and House Interior Committees struck the thirty-year straight-line amortization provisions. The compromise bill was signed into law on November 3, 1988.<sup>50</sup>

#### 2. Central Utah Project Authorization Ceiling

The Colorado River Storage Project (CRSP) is a multipurpose project that includes four major storage facilities and ten "participating projects" for irrigation in Arizona, Colorado, Utah, New Mexico, and Wyoming. One such project is the Central Utah Project (CUP), which, when complete, will provide municipal, industrial, and irrigation water to residents of Utah.

In order to complete construction of the CUP, it is necessary to raise the authorization ceiling for the CRSP. Early in 1987, the Utah delegation responded by introducing legislation to authorize those funds.<sup>51</sup> The original version of both bills was a simple, straightforward authorization for a ceiling increase that had the support of the CRSP power customers.

---

47. *Id.*

48. S. 1415, 100th Cong., 2d Sess. (1988); H.R. 2642, 100th Cong., 2d Sess. (1988).

49. Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (1968).

50. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973 (1988).

51. H.R. 3408, 100th Cong., 1st Sess. (1987).

Shortly before House hearings, however, Rep. Owens (D-Utah) endorsed a draft substitute<sup>52</sup> that presented a number of problems for federal power customers.<sup>53</sup> The legislation levied a \$15 million annual surcharge on the CRSP power rates to fund fish and wildlife measures; granted a license in perpetuity to the local irrigation district to develop and sell the power from the Diamond Fork power plant without regard to preference in marketing or cost-based rates; and authorized a National Academy of Sciences study of changing the operation of the dams on the Colorado River to provide recreational and environmental benefits.

In a second attempt to draft a substitute for H.R. 3408,<sup>54</sup> Rep. Owens backed away from the perpetual license provision of his earlier draft but added another provision: a mechanism to finance the CUP irrigation features and the fish and wildlife programs by allowing the irrigation district to issue bonds backed by the CRSP power revenues. This proposal would shorten the repayment period and require the payment of interest on irrigation assistance costs repaid by power users.

The House Water and Power Subcommittee approved the second Owens substitute,<sup>55</sup> but several subcommittee members stated that they would not vote to report the bill from full committee unless consensus were reached among water and power interests in the CRSP states.

To permit construction of the municipal and industrial features of the CUP to go forward, the full Interior Committee passed a scaled-down, interim funding increase of \$45.3 million and directed the environmental, water, and power groups to meet to try to negotiate a settlement of the outstanding funding questions.<sup>56</sup> The Senate passed the interim measure, and it was signed by the President October 31, 1988.<sup>57</sup>

Legislation to authorize increased spending to complete the irrigation and environmental features is expected to be introduced by Rep. Owens early in the 101st Congress. A letter from Rep. Miller,<sup>58</sup> chair of the Water and Power Subcommittee, to the General Accounting Office requesting information on the pricing of the CRSP power may foreshadow an effort to depart from cost-based rates for federal power.

### 3. Lake Andes Wagner/Marty II

Legislation introduced in June 1987, by Rep. Johnson (D-S.D.)<sup>59</sup> and Sen. Daschle (D-S.D.),<sup>60</sup> authorized construction of two new irrigation

---

52. See Draft, March 31—CRSP Reauthorization.

53. Testimony of Thaine Michie on H.R. 3408, 100th Cong., 1st Sess., before the House Committee on Interior and Insular Affairs, May 4, 1988.

54. Amendment in the Nature of a Substitute to H.R. 3408, Offered by Rep. Owens, July 14, 1988.

55. H.R. 3408, as reported by the Subcommittee on Water and Power Resources, U.S. House of Representatives, July 14, 1988.

56. 134 CONG. REC. H7500 (daily ed. September 13, 1988).

57. Central Utah Project, Pub. L. No. 100-563, 102 Stat. 2826 (1988).

58. Letter from Rep. Miller, Chairman, Subcommittee on Water and Power Resources, to Charles A. Bowsher, Comptroller General of the United States, General Accounting Office (Oct. 6, 1988).

59. H.R. 2671, 100th Cong., 1st Sess. (1987).

60. S. 1431, 100th Cong., 1st Sess. (1987).

projects in the Pick-Sloan Missouri River Basin Program. The projects would irrigate 45,000 acres in the Lake Andes unit and 3,000 acres on the Yankton Sioux Indian Reservation. Nonfederal project beneficiaries would be expected to negotiate a cost-sharing agreement with the U.S. to cover part of the construction costs. The legislation required that construction costs for irrigation facilities be repaid by water and power users within forty years following the project development period—a change from the traditional fifty-year repayment period.

The Water and Power Subcommittee of the Senate Energy Committee held hearings on S. 1431 in December, 1987, but no further action was taken. No hearings were held in the House.

#### 4. Mni Wiconi (Lyman Jones) Project Act

The South Dakota delegation sponsored legislation<sup>61</sup> to authorize construction of three rural water supply systems and the use of federal Pick-Sloan power to deliver the water. The House Water and Power Subcommittee amended the legislation to specify that the power slated for use on the not-yet-constructed Pollock-Herreid irrigation unit be used for delivering the water under this legislation.<sup>62</sup>

Under this new law, the rate for Pick-Sloan power made available for this purpose shall be the wholesale firm power rate for the Pick-Sloan project effective at the time the power is sold. In addition, the legislation authorizes the WAPA to purchase supplemental power if it is needed to meet the pumping requirements of the water systems. The bill was signed into law on October 24, 1988.<sup>63</sup>

#### 5. San Luis Rey Indian Water Rights Settlement

After four years of effort, legislation was enacted to provide for the settlement of water rights claims of several bands of the Mission Indian tribe in San Diego County, California. As introduced in both chambers and approved by the Senate, the legislation<sup>64</sup> provided for water delivery from the federal Central Valley Project (CVP) to the reservation, which is located outside the CVP service area. The bill authorized the use of the CVP power to deliver the water, requiring the tribes to pay only operation and maintenance costs. The Senate-passed bill stipulated that the provision of the CVP power would not affect the availability of power, or the rates charged to the CVP power customers prior to the expiration of contracts in 2004.<sup>65</sup>

The House Water and Power Subcommittee introduced a very different version of the legislation. The subcommittee directed that water for the tribes come not from the CVP, but from water salvaged through lining of the All-

---

61. S. 1416, 100th Cong., 1st Sess. (1987); H.R. 2772, 100th Cong., 1st Sess. (1987).

62. H.R. Rep. No. 100-733, 100th Cong., 2d Sess. (1988).

63. Mni Wiconi Project Act of 1988, Pub. L. No. 100-516, 102 Stat. 2566 (1988).

64. H.R. 1699, 100th Cong., 1st Sess. (1987); S. 795, 100th Cong., 1st Sess. (1987).

65. S. Rep. No. 254, 100th Cong., 1st Sess. (1987); S. 795, 100th Cong., 1st Sess., 133 CONG. REC. S18,496-500 (1987).

American Canal.<sup>66</sup> The subcommittee's decision not to designate delivery of the CVP water also meant that the CVP power would not be required, thus taking care of the concerns of the power users.

As the session came to a close, tribal representatives hurried to fashion a compromise acceptable to both the House and Senate. During these negotiations, representatives for the tribe offered a substitute proposal<sup>67</sup> that allocated the CVP power to the state Department of Natural Resources. Under the proposal, the agency would resell the power at the highest possible rate, with the "profit" deposited in a trust fund for the tribe. Federal power customers strongly objected to this proposal, and it died. The final version of the legislation uses non-CVP water to meet the needs of the tribe with no impact on the CVP power.<sup>68</sup>

## 6. O'Neill Unit

Legislation introduced by Rep. Smith (R-Neb.),<sup>69</sup> sought to modify the original 1954 authorization of the O'Neill Unit of the Pick-Sloan Missouri Basin Program to irrigate 93,000 acres of land in Nebraska and to demonstrate conventional and advanced artificial ground water recharge technology. The legislation included a forty-year straight-line amortization schedule for irrigation assistance costs paid by power users. The Senate companion bill<sup>70</sup> introduced by Sen. Exon (D-Neb.), provided for repayment pursuant to existing federal reclamation law. No action was taken on either bill.

## 7. Shasta Dam Fish Curtain

Included in drought emergency assistance legislation enacted in the 100th Congress<sup>71</sup> is a provision authorizing the expenditure of \$5.5 million to build a temperature control system at Shasta Dam in California to protect the declining salmon population in the Sacramento River.

As reported by the House of Representatives,<sup>72</sup> the federal government, not water and power customers, was to pay for the installation of this fish curtain. However, the provision protecting the CVP customers was deleted during the House-Senate conference committee. The final version of the bill<sup>73</sup> requires water and power users to pay the cost of installing the system and provides no compensation for power generation lost due to releases to regulate water temperature.

---

66. S. 795, 100th Cong., 2nd Sess., 138 CONG. REC. H9441-45, (daily ed. Oct. 3, 1988).

67. See BOOKMAN-EDMONSTON ENGINEERING CO., DRAFT LEGISLATION § 106(b) (Sept. 1, 1988).

68. San Luis Rey Indian Water Rights Settlement Act, Pub. L. No. 100-675, 102 Stat. 4000 (1988).

69. H.R. 1858, 100th Cong., 1st Sess. (1987).

70. S. 1328, 100th Cong., 1st Sess. (1987).

71. Disaster Assistance Act of 1988, Pub. L. No. 100-387, 102 Stat. 924 (1988).

72. H.R. 5015, 100th Cong., 1st Sess. (1987).

73. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973 (1988).

## 8. Standing Rock Sioux and Three Affiliated Tribes Compensation Plan

Senate hearings on proposals to provide federal compensation for the Standing Rock Sioux and the Three Affiliated Tribes of the Fort Berthold reservations in North and South Dakota failed to produce legislation in the 100th Congress. Acting in response to recommendations of the Secretarial Commission,<sup>74</sup> Senate Indian Affairs Committee Chairman, Daniel Inouye (D-Haw.), held hearings in November 1987 on an informal proposal authored by him<sup>75</sup> and on a second proposal<sup>76</sup> advanced by House members George Miller (D-Cal.), Chairman of the Water and Power Subcommittee, and Byron Dorgan (D-N.D.).

The proposals included the following provisions which were objected to by preference customers in general and Pick-Sloan power users in particular: (1) a declaration that the tribes would hold a superior right to water used to generate power at the dam; (2) a grant to the tribes of a right to electricity and/or revenues from the Pick-Sloan hydropower facilities; (3) an allocation of power for use "without reimbursement" by the tribes; and (4) the authorization of payment in compensation for loss of inundated land through power revenues. The draft proposals generated considerable discussion at informal levels during the 100th Congress but did not produce legislation. The compensation issues are expected to surface in the 101st Congress.

### *F. Water Use Conflicts*

#### 1. Harry S Truman Dam & Reservoir

The Harry S Truman Dam & Reservoir (HST), located on Lake of the Ozarks in Missouri, has long been a battleground for recreation, fish and wildlife and other interests. Over the past several years, power customers have weathered several assaults on the hydropower generation capability of the project.

As authorized and constructed, HST was to consist of a 160 MW hydroelectric facility.<sup>77</sup> When the project was completed, however, recreational and environmental interests placed tremendous pressure on the local district of the Corps of Engineers to curtail the power output on the basis that testing of the project in full operation had resulted in unacceptable levels of fish kills. Responding to these pressures, the District Corps issued a Draft Report for public comment proposing to reduce the dependable capacity of the project to

---

74. The Commission was established by the Secretary of the Interior to assess the impact of the Garrison and Oahe dams on the tribes.

75. Draft Senate legislation to implement certain recommendations of the Garrison Unit Joint Tribal Advisory Committee to finance Missouri River Basin Program and for other purposes.

76. Draft House outline of legislation to implement the recommendations of the Joint Tribal Advisory Committee.

77. H.R. Doc. No. 578, 87th Cong., 2d Sess. (1962), recommended that the project provide for a 100 megawatt hydroelectric project, subject to further modification by the Chief of Engineers. In March 1967, the House and Senate Appropriations Committees were notified by the Chief of Engineers that the most feasible power plant was a 160 MW pumped storage reversal slant turbine design.

29.6 MW, purportedly to eliminate the fish kill problem.<sup>78</sup> This reduced capacity, in conjunction with an increase in the costs to be allocated to power users, would have resulted in an eight percent increase for the SWPA customers' systemwide rates.

Comments in opposition to this reduction in capacity were submitted by the SWPA and its customers,<sup>79</sup> and letters opposing the reduction were sent to Robert Dawson, Assistant Secretary of the Army, Public Works, from members of Congress in the States of Arkansas, Kansas, Texas, Oklahoma and Louisiana. One such letter was signed by 18 members of the delegations from these states.<sup>80</sup>

The District Corps finalized its Draft Report as anticipated, recommending a dependable capacity of 29.8 MW. It was forwarded to General Dominy, the Division Commander, for further action. General Dominy reversed the recommendations of the District office. He set dates certain for reaching full operation of the project's 160 MW capacity and committed the Corps to engage in active efforts to solve the fish kill problem. At the same time, he reversed the cost allocation which would have resulted in an eight percent SWPA increase, going back to the original cost allocation.

General Dominy's plan for full operation has not been fulfilled. Although the Kansas City District Corps began testing additional units in late 1987 and early 1988, these efforts were brought to a halt when Sens. Danforth and Bond and Rep. Skelton informed the Corps of their concerns with respect to this increase in operation. These legislators communicated to John O. Marsh, Jr., Secretary of the Army, a set of criteria developed by the State of Missouri for operation of the project which essentially would have rendered the HST a run-of-the-river project, costing power customers millions of dollars.<sup>81</sup>

The affected power customers responded by informing the Senators in the SWPA region outside of Missouri of the state's attempt to control operation of the project in a manner inconsistent with the Congressional authorization. Sens. Bumpers, Boren, Breaux, Pryor, Johnston, Gramm, Bentsen and Kassebaum forwarded a letter to Secretary Marsh expressing concern with the State of Missouri's operational plan.<sup>82</sup> These legislators expressed the hope that a balanced resolution of the operation issue would be developed and, in

---

78. U.S. ARMY CORPS OF ENGINEERS, A REPORT ON THE FUTURE DIRECTION OF HYDROPOWER, HARRY S TRUMAN DAM AND RESERVOIR 48 (June 1985).

79. See, e.g., COMMENTS ON THE DRAFT REPORT ON THE FUTURE DIRECTION OF HYDROPOWER AT H S TRUMAN DAM AND RESERVOIR, submitted by the Southwestern Power Administration, (July 25, 1985), and COMMENTS OF NORTHEAST TEXAS ELECTRIC COOPERATIVE, INC. AND TEX-LA ELECTRIC COOPERATIVE OF TEXAS, INC. (August 15, 1985).

80. See Letter from Reps. Watkins, Edwards, Brooks, Arme, Leath, Boulter, Slattery, Chapman, Barton, Hall, English, Glickman, Whittaker, McCurdy, Wilson, Anthony, Breaux, and Livingston to Robert K. Dawson, Asst. Sec. of the Army (Oct. 4, 1985); see also Letter from Rep. Arme (Oct. 3, 1985); Letter from Rep. Loeffler (Sept. 24, 1985).

81. Letter from Sens. Danforth and Bond and Rep. Skelton to John O. Marsh (Feb. 18, 1988) (discussing the project criteria).

82. Letter from Sens. Bumpers, Boren, Breaux, Pryor, Johnston, Gramm, Bentsen and Kassebaum to John O. Marsh, Sec. of the Army (June 20, 1988).

the interim, demanded project management in accordance with congressional authorization.

Since that time, meetings have occurred between the State of Missouri, the Corps of Engineers, the SWPA and affected power customers to attempt to resolve the question of operation. No final resolution has been developed.

## 2. H.R. 4254

In March of 1988, Reps. Jenkins (D-Ga.), Barnard (D-Ga.) and Darden (D-Ga.) introduced H.R. 4254,<sup>83</sup> legislation which sought to designate recreation as a project purpose at Lakes Allatoona, Hartwell, Lanier, Russell and Thurmond, and to direct the Corps of Engineers to develop a drought management plan that would include strategies for meeting all authorized purposes in times of water shortage. The Jenkins proposal threatened to cause an uncompensated loss of project benefits for power customers potentially totaling \$46 million to \$186 million. Following extensive opposition by power customers in the Southeast and elsewhere, H.R. 4254 was pronounced dead in July 1988.

## 3. Reallocation of Lake Lanier

In the wake of H.R. 4254, the focus of interest in the Southeast narrowed to the Buford Dam at Lake Lanier, a reservoir in the Atlanta area. Although authorized for flood control, navigation and power generation, Lake Lanier has long been regarded as the solution to metropolitan Atlanta's need for a long-term source of municipal and industrial water supply. Federal and local officials have planned construction of a reregulation dam downstream of Buford to fulfill this need.

Last summer a Corps of Engineers study was publicly released which concluded that the reregulation dam would yield lower net economic benefits than a partial reallocation of Lake Lanier. Although power customers disagreed strongly with the study's analysis and conclusion, they agreed to discuss a reallocation if water users assured compensation for power generation lost as a result of the reallocation.

Discussions regarding the future use of the Buford project have taken place over the last several months. These meetings have included the Georgia Department of Natural Resources (DNR), the Atlanta Regional Council (ARC), representatives of Southeastern Power customers and the SEPA.

As of this writing, power customers and water users have been unable to come to terms on important issues with respect to the reallocation. Most importantly, the DNR and ARC have declined to accept a calculation of lost hydropower generation prepared by the SEPA, but have computed a figure for lost generating capacity which the SEPA has concluded is unrealistically low in light of the actual operation of the project. Because the ARC wishes to make a single, lump sum payment to power customers for the present value of lost generation, the determination of lost generation is a critical issue.

---

83. H.R. 4254, 100th Cong., 2nd Sess. (1988).

Discussions are continuing. The Georgia delegation hopes to introduce a negotiated legislative proposal early in the 101st Congress.

#### 4. Umatilla Basin Project

Legislation was introduced in the House<sup>84</sup> by Rep. Smith (R-Or.) and the Senate<sup>85</sup> by Sen. Hatfield (R-Or.) to increase instream flows in the Umatilla River in Oregon to enhance fish habitat and provide for supplemental irrigation.

The legislation authorized the construction of a pumping project to carry water from the Columbia River to irrigators in the Umatilla Basin. This would obviate the need for diversions from the Umatilla, thereby providing increased stream flow in the Umatilla for fish. The original version of the bill would have (1) required the BPA ratepayers to absorb the capital costs for constructing the pumping facilities, (2) provided supplemental irrigation at project power rates, and (3) required power customers to pay \$100,000 per year for the pumping costs of an interim remedial program.

As reported by the Senate and enacted into law, this legislation was revised to make the capital costs of pumping facilities nonreimbursable and require irrigators to pay wholesale power rates for supplemental pumping. Power customers will pay the cost of the interim remedial measure.

#### 5. Libby Dam Amendment

The Senate-passed version of the Water Resources Development Act of 1988<sup>86</sup> contained an amendment authored by Sen. Baucus (D-Mont.) to require the Corps of Engineers to operate the Libby Dam, located in Montana, for recreation and fish and wildlife enhancement purposes. The catalyst for this effort was the significant drawdown on Lake Koocanusa behind Libby Dam due to the severe drought in the Pacific Northwest. The drawdown resulted in water levels well below the reach of recreation boat ramps, creating serious concerns for the recreation industry.

According to the BPA, raising lake levels to accommodate recreation and fish and wildlife enhancement would cost Northwest ratepayers an average of \$12-49 million per year and as much as \$125 million in a critical water year.

A compromise amendment was crafted in the House by Reps. Williams (D-Mont.) and DeFazio (D-Or.) to meet the concerns of recreation interests without changing the project purposes or affecting power users. The compromise, which was included in the final conference committee version of the water resources bill,<sup>87</sup> authorizes the Corps to improve low water access for recreation and provide additional recreation sites.

---

84. H.R. 4093, 100th Cong., 2nd Sess. (1988).

85. S. 1613, 100th Cong., 2nd Sess. (1988).

86. S. 2100, 100th Cong., 2nd Sess. (1988).

87. H.R. 5247, 100th Cong., 2nd Sess. (1988).



## 6. Recreation Mitigation for Repairs and Rehabilitation.

Section 106 of the House-passed water resources legislation<sup>88</sup> required the Corps of Engineers to restore to its prior condition any recreational uses adversely affected by maintenance, repair, rehabilitation, or construction work at a Corps facility. The provision stipulated further that if restoration work could not be accomplished, then alternative opportunities for comparable recreational use were to be provided. Under this provision, the costs incurred for this mitigation work would have been allocated among the existing authorized purposes.

According to House committee staff, this provision was designed to address a situation in the Great Lakes where a pier was redesigned in a manner that failed to provide the same recreational opportunities as existed before the reconstruction. However, the implications of the provisions are much broader. Under this proposal, authorized project purposes, including power, could have been required to pay for mitigation work benefitting an unauthorized project purpose that is incidental to the operation of the project and did not contribute to the repayment of the project.

These concerns were presented to the House and Senate public works committees, and the provision was dropped from the final version of the legislation. However, committee staff has stated that this issue will likely be revisited next year.

## 7. Rahall Bill

In February 1988, Rep. Rahall (D-W.Va.) introduced a bill<sup>89</sup> that would have designated recreation as a project purpose at all Corps of Engineers projects with no reallocation of costs. As ultimately adopted, the legislation simply authorized recreation as a project purpose at several West Virginia, Pennsylvania and Maryland dams. None of these projects contain federal power features.

## 8. Corps of Engineers Emergency Drought Legislation

This summer the U.S. Army Corps of Engineers launched an effort to obtain emergency drought authority. The Corps submitted to Congress proposed legislation that would have provided the Corps with broad authority, upon gubernatorial request, to reallocate water use or storage during periods of water shortage. This initiative was defeated after opposition by the PMA customers.

## 9. Fowler Bill

During the last session, the Water Conservation bill, an initiative of Sen. Fowler and Rep. Atkins, was introduced in Congress.<sup>90</sup> If enacted, the bill

---

88. *Id.*

89. H.R. 3894, 100th Cong., 2nd Sess. (1988).

90. Sen. Fowler introduced the Senate version of the bill, S. 2904, on October 14, 1988. Rep. Atkins introduced the House version on October 11, 1988. Neither bill was reported out of committee. H.R. 5496, 100th Cong., 2nd Sess. (1988).

would have declared water conservation was a policy of the United States and required that specific actions in accordance with such a policy be taken by certain federal agencies. Agencies affected by the bill included those "considered to substantially affect the supply, management, or use of water resources," such as the Departments of Agriculture, the Army, Commerce, Housing and Urban Development, and the Interior, as well as the Environmental Protection Agency and the Tennessee Valley Authority. The bill would have required that water resource studies be conducted and water conservation be considered in actions taken by certain agencies involved in water resources. In addition, the bill (1) directed the Secretary of Agriculture to conduct research in drought-resistant crops, (2) directed the EPA to establish a clearinghouse for water conservation information, and (3) required the U.S. Geological Survey to study depletion of the nation's major aquifers. At this point, it is unclear whether the bill will move in the 101st Congress.

#### 10. Corps Due Process Legislation

In many of the examples noted above concerning disputes between power customers and other users of federal water resource projects, power customers have been confronted with the problem of decisionmaking by the Corps of Engineers that did not allow for reasonable and timely input by all affected parties. This was due to the fact that there were no statutory provisions mandating the Corps to seek such input, as, for example, the PMA's are required to do in developing power allocation plans. The Corps is not bound by the "notice and comment" procedures required for informal agency rulemaking under section 553 of the Administrative Procedure Act.<sup>91</sup> In cases concerning similar Corps' actions, the courts have held that the Corps is exempt from these requirements due to the "public property" and "procedural rules" exceptions in section 553.<sup>92</sup>

Section 5 of the Water Resources Development Act<sup>93</sup> passed by the 100th Congress provides a statutory requirement of procedural due process for certain Corps activities: "Before the Secretary [of the Army] may make changes in the operations of any reservoir which will result in or require a reallocation of storage space in such reservoir or will significantly affect any project purpose, the Secretary shall provide an opportunity for public review and comment."<sup>94</sup>

### III. PMA POLICIES AND RATE PROPOSALS

This section reports on the PMA policies and rate proposals, to the extent they have not been covered elsewhere in this report.

---

91. Administrative Procedure Act, 5 U.S.C. § 553 (1982) [hereinafter APA].

92. *See, e.g.,* Story v. Marsh, 732 F.2d 1735 (8th Cir. 1984).

93. Water Resources Development Act of 1988, Pub. L. No. 100-676, 102 Stat. 4012 (1988).

94. *Id.* at 4022.

### A. *Western Area Power Administration*

#### 1. Boulder Canyon Project

On May 18, 1988, the FERC approved a proposed rate increase for the Boulder Canyon Project for the period June 1, 1987, through September 30, 1991.<sup>95</sup> Another rate increase for the Boulder Canyon project was proposed by the WAPA on June 22, 1988.<sup>96</sup>

By letter dated May 3, 1988, the Arizona Power Authority and the Colorado River Commission of Nevada submitted a proposal to the Bureau of Reclamation and the WAPA to study the feasibility of additional hydropower development at Hoover Dam. The WAPA and the Bureau of Reclamation published notice of receipt of the proposal on July 15, 1988.<sup>97</sup> By notice published on November 14, 1988,<sup>98</sup> the Bureau of Reclamation and WAPA announced their intent to contract with the Arizona Power Authority and the Colorado River Commission for the feasibility study.

#### 2. California-Oregon Transmission Project

WAPA was the lead federal agency for the preparation of an environmental impact statement (EIS) for the California-Oregon Transmission Project (COTP). Notice of availability of the final EIS for the COTP was published on March 4, 1988.<sup>99</sup> WAPA published its record of decision to participate in the COTP on May 18, 1988.<sup>100</sup>

#### 3. Central Valley Project

On March 2, 1988, the Under Secretary of the Department of Energy confirmed and approved on an interim basis the power and transmission rates for the Central Valley Project, pending the FERC's review and approval. Notice of the approval was published on March 14, 1988.<sup>101</sup> The FERC approved the rates for the period May 1, 1988 through April 30, 1993 by an order issued October 21, 1988.<sup>102</sup>

#### 4. Colorado River Storage, Collbran, and Rio Grande Projects (Salt Lake City Area Integrated Projects)

The FERC approved the power rate for the Salt Lake City Area Integrated Projects for the period from the first day of the October, 1987 billing

95. Boulder Canyon Project, 43 F.E.R.C. ¶ 61,262 (1988).

96. Notice of Proposed Power Rate, *Boulder Canyon Project Power Rate*, 53 Fed. Reg. 23,446 (1988).

97. Notice of Receipt of a Proposal's Requests for Comments or Additional Proposals, *Hoover Powerplant Modification, Boulder Canyon Project, Arizona/Nevada*, 53 Fed. Reg. 26,893 (1988).

98. Notice of Intent to Contract, *Hoover Powerplant Modification, Boulder Canyon Project, Arizona/Nevada*, 53 Fed. Reg. 45,826 (1988).

99. Notice of Availability, *Availability of the Final Environmental Impact Statement for the California-Oregon Transmission Project*, 53 Fed. Reg. 7019 (1988).

100. Notice of a Record of Decision, *California-Oregon Transmission Project*, 53 Fed. Reg. 17,749 (1988).

101. Notice of a Rate Order, *Central Valley Project, CA. Power and Transmission Rates*, 53 Fed. Reg. 8268 (1988).

102. Central Valley Project, 45 F.E.R.C. ¶ 62,021 (1988).

period to the last day of the September, 1992 billing period by order issued December 24, 1987.<sup>103</sup> By notice published December 7, 1988, the WAPA proposed to adjust the Colorado River Storage Project transmission rates.<sup>104</sup>

#### 5. Falcon and Amistad Projects

On April 1, 1988, the Under Secretary confirmed and approved on an interim basis the power rates for the Falcon and Amistad projects, pending the FERC's review and approval.<sup>105</sup> The FERC approved the rates for the period June 8, 1988 through June 7, 1993.<sup>106</sup>

#### 6. Fryingpan-Arkansas Project

The FERC approved rates for the Fryingpan-Arkansas Project for the period from the first day of the full billing period on or after June 20, 1987, to the last day of the full billing period ending on or before June 20, 1992, by order issued April 21, 1988.<sup>107</sup>

#### 7. Navajo Generating Station

The WAPA withdrew its proposed allocation criteria, allocations and rate for interim power from the Navajo generating station in March 1988.<sup>108</sup> By notice published May 13, 1988, the WAPA requested applications for long-term power from Navajo.<sup>109</sup>

#### 8. Parker-Davis Project

On November 30, 1988, the WAPA published notice of its proposal to extend the existing Parker-Davis project power and transmission rates.<sup>110</sup>

#### 9. Pick-Sloan Missouri Basin Project

In a notice published April 18, 1988, the WAPA announced its allocation of firm power to the former Corps of Engineers town sites of Fort Peck, Mont., Riverdale, N.D., and Pickstown, S.D.<sup>111</sup> Notice of a proposed rate increase for the Pick-Sloan Missouri Basin program also was published this year.<sup>112</sup>

---

103. Salt Lake City Area Integrated Projects, 41 F.E.R.C. ¶ 62,300 (1987).

104. 53 Fed. Reg. 49,357 (1988).

105. Public Notice, *Intent to Prepare an Environmental Assessment and Conduct Scoping Meetings; Sidney-North Yuma 230-KV Transmission Line Project*, 53 Fed. Reg. 12,584 (1988).

106. Amistad & Falcon Projects, 44 F.E.R.C. ¶ 62,058 (1988).

107. Fryingpan-Arkansas Project, 43 F.E.R.C. ¶ 62,065 (1988).

108. Notice of Withdrawal, *Withdrawal of Proposed Allocation Criteria, Allocations, and Rates for Interim Power from the Navajo Generating Station*, 53 Fed. Reg. 8264 (1988).

109. Notice of Request for Applications, *Long-Term Power from the Navajo Generating Station, AZ*, 53 Fed. Reg. 17,102 (1988).

110. Notice of Proposal, *Parker-Davis Project; Proposed Power and Transmission Rate Extension*, 53 Fed. Reg. 48,306 (1988).

111. Notice of Allocation, *Firm Power Allocations Pick-Sloan Missouri Basin Program*, 53 Fed. Reg. 12,727 (1988).

112. Notice of Rate Adjustment, *Pick-Sloan Missouri Basin Program; Proposed Power Rate Adjustment*, 53 Fed. Reg. 44,945 (1988).

## 10. Resource Coordination Program

On December 4, 1987, the Under Secretary confirmed and approved on an interim basis the rates for the Resource Coordination Program, pending the FERC's review and approval. Notice of the approval was published on December 10, 1987.<sup>113</sup> The FERC has approved the rates for the period November 30, 1987, through September 30, 1989.<sup>114</sup>

### B. Bonneville Power Administration

#### 1. Long-term Intertie Access Policy

On May 17, 1988, the BPA finalized its long-term policy for the Pacific Northwest-Pacific Southwest Intertie.<sup>115</sup> The Intertie had been authorized by Congress to provide a market for surplus BPA power, thereby providing greater assurance of repayment to the U.S. Treasury. The Intertie also was intended to allow non-federal utilities in the Northwest and California to take advantage of the diverse load patterns and resource types between the two regions. However, unfettered access to the Intertie by such utilities had resulted in a significant loss of revenues for the BPA and therefore hampered the BPA's ability to make payments to the U.S. Treasury.

In issuing the Long-Term Intertie Access Policy (LTIAP), the BPA stated that the LTIAP accomplishes the following objectives:

- (1) It assures BPA of reasonable access to the Intertie to sell both firm and non-firm energy, thereby enhancing its ability to make repayments to the U.S. Treasury.
- (2) The policy provides a reasonable and effective means of safeguarding BPA's investment in fish and wildlife protection.
- (3) It balances the competing demands for non-federal utilities for Intertie access to sell, exchange or purchase both firm power and non-firm energy.
- (4) It provides the basis for greater planning certainty to utilities.
- (5) It allows for efficient use of generating resources in the Northwest and California.
- (6) It specifically addresses the competitive concerns between the Northwest and California.
- (7) It strikes a balance between the Northwest and California among generating and non-generating utilities, other BPA customers, environmental interests and federal taxpayers.<sup>116</sup>

Under the policy, access to the Intertie varies according to the type of sale involved.

Appeals of the BPA's decision on the LTIAP have been filed in the U.S. Court of Appeals for the Ninth Circuit and have been consolidated under the name *California Energy Commission v. Bonneville Power Administration*.<sup>117</sup>

---

113. Notice of Extension, *Order Confirming and Approving an Extension of Power Rate Schedule RCP-1*, 52 Fed. Reg. 46,833 (1987).

114. Resource Coordination Program, 43 F.E.R.C. ¶ 62,250 (1988).

115. Notice of Policy, *Long Term Intertie Access Policy*, 53 Fed. Reg. 24,483 (1988).

116. *Id.* at 24,484.

117. *California Energy Comm'n v. Bonneville Power Admin., appeal docketed*, No. 88-7280 (9th Cir. 1988).

## 2. Long-term Sale to Southern California Edison Company

The BPA has concluded a long-term firm power sale agreement with Southern California Edison Company which it has been negotiating for a five year period. The contract provides the sale of 250 MW of firm power for a twenty year period. The BPA believes that this agreement will improve its relations with California. Southern California Edison has filed the contracts and the BPA has filed the contract rates with the FERC for approval.<sup>118</sup> Very little opposition to the agreements has been exhibited.

## 3. FERC Rejection of the BPA's Long-term Surplus Firm Power Rate

On April 6, 1988, the FERC issued an order rejecting the BPA's long-term surplus firm power rate (SL-87), which would have permitted the BPA to establish each year an upper and lower range of rates that would form the basis for individual contracts to be negotiated.<sup>119</sup> The rates would have ranged between the BPA's opportunity costs and its highest cost resources. The FERC held the rate was not sufficiently specific to constitute a rate schedule. The FERC approved a modified SL-87 rate on an interim basis on November 30, 1988.<sup>120</sup>

### C. *Southwestern Power Administration*

#### 1. New Rates

The FERC approved new rates for the isolated Sam Rayburn Dam Project effective July 1, 1988, through September 30, 1991.<sup>121</sup> The FERC noted that the concern over the SWPA's pass through of the Army Corps of Engineer's annual O&M estimates was being addressed by a newly formed working group of the SWPA, the Corps, and customers.

In November, 1987, the SWPA first proposed a system-wide average rate increase of 4.3% but, responding to customer comments, lowered its proposal to 3.2%. The Under Secretary of Energy, in Rate Order SWPA-21, approved the revised proposal and placed the rates in effect on an interim basis effective July 1, 1988 through September 30, 1991. The interim rates are currently before the FERC awaiting final approval.

The rate proposal includes a new alternative, energy-based transmission rate for delivery of economy energy and a customer credit to be applied to the purchased power adder to limit the buildup of revenues resulting from a succession of good water years. The SWPA also proposed to disallow or defer collection as plant-in-service the non-revenue-producing portion (56%) of the Harry S Truman Project. This amount would be transformed back into construction work in progress.

---

118. Docket Nos. EF88-2061-000 and ER89-52.

119. Bonneville Power Admin., 43 F.E.R.C. ¶ 61,032 (1988).

120. Bonneville Power Admin., 45 F.E.R.C. ¶ 61,358 (1988).

121. Sam Rayburn Dam, 45 F.E.R.C. ¶ 62,025 (1988).

## 2. Allocation Policy for Non-Federally Funded Projects

The SWPA continues to pursue the Reagan Administration's policy to require private non-federal funding of new federal hydroelectric power projects. As part of the implementation of that policy, the SWPA issued a proposal for the allocation of power that becomes available for marketing from existing and new hydroelectric power projects.<sup>122</sup> According to that policy, ten percent of any new power available for allocation will be allocated to new customers selected on a "first requested-first served" basis. Preference will be given to "public bodies" and applicants will be required to provide specific information on their ability to use and receive the allocation through designated transmission paths.

The SWPA has been coordinating with the Cherokee Nation of Oklahoma in an effort to develop a project through the use of private funds. The Cherokee Nation has been authorized by Congress to construct hydroelectric generating facilities at the existing W.D. Mayo Lock and Dam No. 14, located on the McClellan-Kerr Arkansas River Navigation System.<sup>123</sup> SWPA is authorized to market excess power produced by the project and to reimburse the Cherokee Nation for its costs incurred in designing and constructing the project. The Cherokee Nation and the Oklahoma Municipal Power Authority (OMPA) have preliminarily agreed to an arrangement whereby the OMPA will act as the Cherokee Nation's agent in the financing and oversight of the construction of the project. In return, the OMPA would be allocated fifty percent (or 15,000 kw) of the marketable power from the proposed project at system rates.

The SWPA has noticed its intent to allocate the remainder of the power from the project.<sup>124</sup> According to the proposed allocation, one-half of the project will be divided among the six states in the SWPA's marketing area based on the ratio of the existing SWPA customer load in each state to the total SWPA load. Ten percent of the available power will be set aside for new customers and an equalization adjustment will be applied to each state's allocation. The final allocation of the power generated by W.D. Mayo is conditioned upon certain factors, including a final agreement between the Cherokee Nation and the OMPA and transfer of the project to the United States after final completion.

### D. Southeastern Power Administration

The SEPA has proposed a rate adjustment for its Georgia-Alabama System of Projects for the period June 1, 1989 through September 30, 1990.<sup>125</sup> Three years of extreme drought conditions have caused the SEPA to purchase replacement energy and have reduced revenues. The proposed increase is

---

122. Notice of Proposed Policy, *Federal Hydroelectric Power; Proposed New Customer Selection Policy*, 53 Fed. Reg. 27,387 (1988).

123. Water Resources Development Act of 1986, Pub. L. No. 99-662, § 1117, 100 Stat. 4082 (1986).

124. Intent to Allocate Power, W.D. Mayo Project, 53 Fed. Reg. 51,316 (1988).

125. Notice of Proposed Rate Adjustment, *Proposed Rate Adjustment, Public Forum, and Opportunities for Public Review and Comment*, 53 Fed. Reg. 47,864 (1988).

designed to recoup these added costs by increasing the SEPA's energy charge from 4.88 mills to 8.50 mills per kwh.

Nancy A. Wodka, *Chairman*  
J. Cathy Fogel, *Vice Chairman*

S. Eason Balch  
Roy L. Eiguren  
Michael S. HacsKaylo  
Mark A. MacDougall  
Susan Rester Miles  
Michael D. Oldak  
Richard K. Pelz

Sherry A. Quirk  
Alan H. Richardson  
Christine Ryan  
Channing D. Strother, Jr.  
Clinton A. Vince  
Larry J. Wallace