

1996 TRANSMISSION TERMS AND CONDITIONS

PROCEEDING

ADMINISTRATOR'S RECORD OF DECISION

BONNEVILLE POWER ADMINISTRATION

U.S. DEPARTMENT OF ENERGY

JUNE 1996

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I. Statutory Background

The Federal Power Act, as amended by the Energy Policy Act of 1992, grants authority to FERC to order access to utility transmission systems, including access to the Federal Columbia River Transmission System (FCRTS). 16 U.S.C. §§ 824i, 824j, 824k and 824l. In general, FERC may issue an access order, after notice and an opportunity for hearing, to any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale. 16 U.S.C. § 824j(a). The Federal Power Act contains provisions specifically applicable to the FCRTS:

(1) The Commission shall have authority pursuant to section 824i of this title, section 824j of this title, this section, and section 824l of this title to (A) order the Administrator of the Bonneville Power Administration to provide transmission service and (B) establish the terms and conditions of such service.

In applying such sections to the Federal Columbia River Transmission System, the Commission shall assure that --

(i) the provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system; and

(ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section 824i of this title, 824j of this title, this section, or section 824l of this title, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.

16 U.S.C. § 824k(i)(1)(ii). The Act also provides an option for BPA to determine its generally applicable terms and conditions for transmission access in a formal regional hearing process. 16 U.S.C. § 824k(i)(2)(A). That process is to be very similar to the rates process established in section 7(i) of the Northwest Power Act, 16 U.S.C. §839e(i), except that the hearing officer

shall . . . make a recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law or discretion presented on the record; and

[the Administrator shall] make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer's recommended decision

16 U.S.C. §824k(i)(2)(A)(ii)(II).

The Act does not require BPA to file with FERC the transmission terms and conditions developed in this regional hearing process.

II. Procedural Background

A. Formal Terms and Conditions Proceeding

BPA agreed with its customers as early as January 1995 to develop generic terms, conditions and rates for network integration and point-to-point transmission services. (*See* Framework for Implementing Comparability, January 18, 1995, WP-96-E-BPA-27, Attachment A; TC-96-E-PA-05). BPA also agreed to test its proposed terms and conditions for these services in the optional formal regional hearing process described in section 212(i)(2) of the Federal Power Act, 16 U.S.C. §824k(i)(2), and to allow FERC to review the Administrator's ultimate determination of terms and conditions concurrently with its review of BPA's transmission rates. Thus, on February 14, 1995, Bonneville filed a Federal Register Notice of "Hearing and Opportunity for Public Comment; Regarding Proposed Comparable Transmission Terms and Conditions." The notice stated:

BPA will be proposing terms and conditions applicable to three transmission services over the network transmission system of the Federal Columbia River Transmission System (FCRTS) which BPA considers to be comparable to the uses BPA itself makes of such system for its own power transactions. The Federal Power Act, as amended by the Energy Policy Act of 1992, provides that BPA may institute a regional hearing process on proposed transmission terms and conditions of general applicability. By this notice, BPA is announcing such a proceeding and the dates on which the proposed transmission terms and conditions will be available.

60 Fed.Reg. 8511. Interventions were granted to forty eight intervenors. As a result of a settlement reached in BPA's 1995 rate proceeding, the transmission terms and conditions proceeding was placed on the same procedural schedule as the 1996 rate proceeding. Thus, the schedule of this proceeding and the timing of its conclusion in relation to Order No. 888 was driven by the rate case requirement to have power and transmission rates in place on October 1, 1996.

Bonneville filed its Initial Proposed Tariffs and Direct Testimony supporting those tariffs on July 10, 1996. TC-96-E-BPA-01 through -05. BPA's proposal incorporated in large part the proposed *pro forma* tariffs included in FERC's "Notice of Proposed Rulemaking on Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities." 70 FERC ¶61,357 (1995). Some changes to the proposed *pro forma* tariffs were made, however, to address BPA's and the region's needs and practices. The parties filed

their direct cases and rebuttal to BPA's Initial Transmission Tariffs on September 8, 1995. BPA made its supplemental tariffs available on November 22, 1996.¹ On December 8, 1995, BPA filed testimony rebutting the parties' direct cases and filed supplemental testimony supporting its supplemental tariffs. Discovery was provided on each filing. Cross examination on terms and conditions issues was held on February 20 and 21, 1996.² Because the rate proceeding (see description below) and the terms and conditions proceeding were tried concurrently, and because issues and evidence overlapped between the two proceedings, the Hearing Officer combined the records of both proceedings to assure that an adequate and complete record was developed and that no evidence relevant to the terms and conditions proceeding was inadvertently excluded. Briefs were filed on April 22, 1996 (two days before the issuance of FERC's Final Rule) and oral argument was held on April 30, 1996.

In the Federal Register Notice initiating this proceeding, Bonneville noted:

Though BPA and its customers have not yet concluded their discussion regarding what constitutes comparable access to the Federal transmission system, nevertheless BPA is now initiating this proceeding in order to place it on the same initial schedule as the related transmission rate case, also being noticed today. It is likely that discussions will continue before and during this proceeding, consistent with ex parte rules, in an attempt to settle outstanding issues.

60 Fed.Reg. 8512. Several noticed meetings and workshops were held during the pendency of the transmission terms and conditions proceeding with interested parties to attempt resolution of outstanding issues.³ These discussions successfully resolved many of the outstanding issues, eliminating differences with the *pro forma* tariffs in some instances, creating differences in others. In addition, terms and conditions of service were also discussed at the post-cross examination settlement meetings discussed below. The ultimate outcome of the discussions with interested parties is the Settlement Agreement discussed below.

B. Transmission Rates Proceeding

Concurrently with initiation of the transmission terms and conditions proceeding, Bonneville initiated proceedings to establish wholesale power and transmission rates for the period October 1, 1996 to September 30, 2001. Bonneville filed its Initial Proposals for Wholesale Power and Transmission Rates on July 10, 1995. The Parties filed their direct cases and rebuttal to Bonneville's Initial Proposal on September 8, 1995.⁴ Bonneville filed rebuttal

¹ The Supplemental Tariffs were also filed with the Western Regional Transmission Association (WRTA) on November 22, 1996 to comply with the WRTA Governing Agreement.

² This discussion is intended as only a brief summary of the process of the T&C proceeding.

³ October 18, 24-25 and 31, 1995.

⁴ This discussion is intended as only a brief summary of the process for the 1996 transmission rate proceeding. It does not reflect all of the stages of the hearing process, nor does it reflect those issues where

testimony and its supplemental case on December 8, 1995. Cross examination was held from February 20 through March 12, 1996. Subsequent to cross examination, Bonneville held several workshops with customers, noticed pursuant to the ex parte rule, to address various issues that had arisen during the pendency of the rate proceeding.⁵ These discussions led to a settlement of transmission issues and some power rates issues.

C. The Settlement

At a hearing held March 29, 1996, Bonneville reported to the Hearings Officers that Bonneville and the parties were making progress on settlement of issues in the rates and terms and conditions proceedings. The parties requested an additional day of hearings to be held on April 4, 1996 to memorialize the settlement agreement reached by the parties, if any. The request was granted. On April 4, 1996, the parties reported substantial progress, and, indeed, Bonneville submitted two proposed settlement agreements to the record, subject to the condition that a sufficient number of Bonneville's customers would agree to the settlement. Bonneville elected to proceed with the settlement agreements. Representatives of the following entities also executed the settlement agreements: 10 DSI companies; British Columbia Power Exchange Corporation; 6 regional investor-owned utilities; 10 individual publicly-owned utilities; Public Generating Pool (on behalf of 8 publicly-owned utilities); Public Power Council (on behalf of 114 publicly-owned utilities); Pacific Northwest Generating Company (on behalf of 15 electric cooperatives); Requirements Customer Coalition (on behalf of 52 publicly-owned utilities); Western Public Agencies Group (on behalf of 21 publicly-owned utilities); Northwest Irrigation Utilities (on behalf of 24 publicly-owned utilities); and the Full Meal Deal Utilities (on behalf of 18 publicly-owned utilities).

As a result of the settlement discussions, the parties produced two settlement documents: the "Transmission Rates and Terms and Conditions Settlement Agreement" (Transmission Settlement), WP-96-E-BPA-129, and the "Power and Transmission Partial Settlement Agreement" (Power Settlement), WP-96-E-BPA-128. Tr. 2323. *See* Attachments A and B. On April 11, 1996, the parties executed a revision to the Transmission Settlement. *See* Attachment C. The Transmission Settlement is intended by the parties to settle all issues relating to transmission rates and terms and conditions for the five year settlement period from October 1, 1996 through September 30, 2001. The Agreements contain several common substantive provisions. For example, both agreements contain a paragraph, labeled "Proposal," that specifically declares that the Agreement "represents an agreed-upon proposal" (or "agreed-upon partial proposal" in the case of the Power Settlement) and that the Administrator's final decision on the issues must be supported and made based on the record of the proceeding. Both agreements provide that no precedent, either substantive or procedural, is created by the

the hearing schedule was changed to accommodate filing of additional testimony or studies by BPA and the parties.

⁵ Workshops and settlement conferences relating to transmission terms and conditions or transmission rates issues were held on February 12, March 7, March 14, March 20, March 25-29, April 1-2, 1996. Hearings were held regarding progress on the settlement process on March 29 and April 4, 1996.

adoption of the settlement proposal. Both agreements contain a “Right to Contest” provision that defines the ability of a signing party to contest issues settled by the agreements in subsequent proceedings. Finally, both agreements contain language that specifies that the settlement agreements do not amend contracts or limit remedies available under contracts.

The Transmission Settlement was intended by the parties to settle all issues in the transmission terms and conditions proceeding and the transmission rates proceeding. It provides that the Administrator should, with certain listed exceptions, adopt Bonneville’s supplemental proposal for transmission terms and conditions. With regard to transmission rates, the Transmission Settlement provides for specific transmission rate level increases; approves BPA’s supplemental proposal to (1) apply a uniform cost allocator to IR, NT and PTP rate classes, (2) allow NT customers to remove load from NT service and (3) apply a Transmission Load Shaping charge to an NT customer’s entire load; proposes a plan for the recovery of BPA’s delivery facilities costs; and includes a proposal for the adoption of a policy by BPA for the sale of such facilities to the user of those facilities. It also provides that the costs of certain facilities formerly proposed to be included in the delivery segment instead be included in the Network segment. It provides for allocation of the costs of general transfer agreements (GTAs) to the power rates and delivery segments and proposes to treat the Northern Intertie segment as part of Bonneville’s network segment and terminate the Northern Intertie rate schedule for the settlement period. The Transmission Settlement also approves BPA’s proposal for the optional determination of PTP Billing Demand on the basis of cumulative demands at the Points of Delivery only.

A number of parties have stated that the rates, terms and conditions embodied in the Transmission Settlement meet the comparability standard. Portland General Electric, Puget Sound Power & Light, and PacifiCorp stated in their joint brief:

[A]ssuming Bonneville adopts the proposal agreed to by parties to the Transmission Settlement Agreement dated April 4, 1996 (“Transmission Settlement Agreement”), FERC should find that Bonneville’s proposed PTP and NT tariffs are comparable to the Commission’s stage-1 pro forma tariffs. Bonneville’s tariffs should satisfy FERC’s threshold requirement that a power marketer have transmission open access tariffs that provide comparable services.

PGE, Puget, PacifiCorp Brief, WP-96-B-GE/PL/PS-02, at 4-5. Similarly, the Public Generating Pool (PGP) stated

Comparability is a critical issue for all BPA customers who purchase transmission services from BPA. Much of the transmission terms and conditions testimony by PGP and others has focused on whether BPA’s proposal meets comparability requirements. . . . The proposed NT and PTP tariffs, as modified by the settlement, are a realistic approach to the needs of BPA in operating the Federal Transmission System while maximizing the customers’ ability to use the system. PGP believes that the proposed

tariffs contain terms and conditions which are generally consistent with FERC's pro forma tariffs. They appropriately balance the obligation to substantially conform to the pro forma tariffs with the specific needs of BPA's customers in the Northwest. PGP believes that NT and PTP tariffs under the Settlement Agreements are equal to or better than the FERC pro forma tariffs when considered in light of the particularities of the Northwest hydro system and the historical usage of the Federal Transmission System.

PGP Brief, WP-96-B-PG-01/TC-96-B-PG-01, at 5-6.

Though the transmission settlement represents substantial regional consensus on the terms and conditions for BPA's comparable transmission services, as litigated in Docket TC-96, it is still subject to review by the Administrator for compliance with applicable statutes, including the requirement that the Administrator's decision be made based on substantial evidence in the rule-making record. Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. § 839f(e)(2)(1982). As will be demonstrated below, the proposed agreed terms and conditions meet the substantial evidence test. The Transmission Settlement is consistent with sound business principles and comports with all applicable statutory requirements.

D. Relationship to Order No. 888

After the Settlement Agreements were executed and the briefs filed with the Hearing Officer in support,⁶ FERC issued its *Final Rule on Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Service by Public Utilities*, 61 Fed. Reg. 21,540, FERC Stats & Regs ¶31,036 (1996) (hereinafter "Order No. 888.") Though the Final Rule incorporates some of the same changes to the initial *pro forma* tariffs as did the Settlement Agreements, other differences remain. Given the awkward timing of the issuance of the Final Rule (after the settlement and shortly prior to oral argument), PacifiCorp suggested at oral argument that BPA call a meeting to discuss whether changes needed to be made to the Settlement after the parties had a chance to assess the Final Rule. Tr. 2460. On May 28, 1996, that meeting was held. The consensus of the parties was that the terms and conditions incorporated into the Transmission Settlement should be filed with FERC with no changes.

E. Hearing Officer Determination

On May 14, 1996, the Hearing Officer issued her Recommended Decision to the Administrator. With respect to comparability, she stated:

⁶ Two parties objected to the Settlement: PUD No. 1 of Clark County, Washington and the Association of Public Agency Customers (APAC). As the Hearing Officer pointed out, only APAC participated actively in the proceeding. TC-96-RD-01, at 12.

An examination of BPA's proposed tariffs shows that it, as the transmission provider, has identified itself as an Eligible Customer who will take service under the same terms and conditions as all other users. Third parties now have access to BPA's transmission system under those same terms and conditions. This mitigates any previously-held market power and results in transmission access that is neither unduly discriminatory nor anticompetitive.

TC-96-RD-01, at 34. With respect to functional separation/restructuring, she observed:

[T]he first requirement [that rates be unbundled] has been met. Separate rates that will meet the second requirement are currently pending before the Administrator. The record shows that BPA will rely on the Real-Time Information Network . . . BPA witnesses also testified that the power business and the transmission business are being separated into separate functions and the costs of each will be separately tracked . . . Thus, the requirement of functional unbundling has been met.

TC-96-RD-01, p. 35. After reviewing not only the few objections to the Settlement but also the Transmission Settlement components and the differences from the proposed *pro forma* tariffs, she stated:

The Hearing Officer concludes that BPA's transmission terms and conditions of service tariffs (as amended by the Settlement Agreement) are in compliance with the Stage 1 *pro forma* tariffs adopted by the Commission and do not violate any statutory requirements. In some respects, BPA's tariffs are superior to the *pro forma* tariffs in that they provide more flexibility to customers. Some differences are based on the unique requirements of the Northwest hydro system and the historical usage of the Federal transmission system. Other differences reflect regional concerns and the consensus of the customers in the region.

It is also concluded that the Settlement Agreement is a reasonable accommodation of the interests of BPA and its customers, does not violate any statute, is supported by the evidence of record in this proceeding, and, therefore, is in the public interest.

It is recommended that the Administrator approve, adopt, and incorporate the Settlement Agreement into the transmission terms and conditions of service and that the proposed tariffs be approved consistent with the findings made herein.

TC-96-RD-01, at 37. With respect to FERC Order No. 888, she observed:

Order No. 888 was released after this proceeding was concluded and the record closed. Therefore, BPA had completed its NOPR Stage 1 process before the Final Rule was issued.

The Hearing Officer has undertaken only a very cursory review of Order No. 888, and BPA will need to analyze this Order to determine if further modifications must be made to its open-access tariff to satisfy the Stage II requirements. The review undertaken for purposes of making this recommended decision has revealed no substantive differences that would affect the conclusion made herein that BPA is in substantial compliance with the Commission's rules and regulations and that the proposed tariffs do not violate any statutory obligations.

TC-96-RD-01, at 35-36.

III. Contested Issues

The following issues have been raised by the parties in their Briefs on Exceptions. Issues raised with regard to segmentation and the Energy Imbalance charge are addressed in the Administrator's Record of Decision on the 1996 Final Rate Proposal.

Issue #1

Whether admission of the Settlement Agreements into the record without providing further opportunity for rebuttal or cross examination violated section 7(i) of the Northwest Power Act and due process.

Parties' Positions

APAC claims that the Hearing Officers' admission of the Settlement Agreements into the record without providing opportunity for rebuttal or cross examination violated the Northwest Power Act, Federal Columbia River Transmission System Act, and the Federal Power Act. 16 U.S.C. § 839e; 16 U.S.C. §§ 838g, 838h; 16 U.S.C. § 824k(i)(1). APAC Brief, TC-96-B-PA-01, at 17-18; APAC Ex. Brief, TC-96-R-PA-01, at 8.

Clark Co. PUD (Clark) also claims that admission of the Settlement Agreements into the record violated the due process standards of section 7(i) of the Northwest Power Act. Clark Brief, TC-96-B-CP-01, at 7; Clark Ex. Brief, TC-96-R-CP-01, at 5.

Hearing Officer Recommendation.

The Hearing Officer found that the admission of the Settlement Agreements into the record without opportunity for rebuttal or cross examination did not violate APAC's or Clark's due process rights as provided by section 7(i) of the Northwest Power Act. Hearing Officer's Recommended Decision, TC-96-RD-01, at 16-20. The Hearing Officer determined that reopening the record "to explore the underpinnings of the settlement negotiation process flies in the face of the rules of law governing settlements," *id.* at 16, that "it is . . . not necessary to

repeat the hearing process merely because the settlement has revised earlier proposals," *id.* at 19, and that "it is clear that BPA provided for full input into the negotiation process." *Id.* at 18.

Evaluation of Positions

APAC claims the Transmission Settlement "was reached through a procedurally infirm process." APAC Ex. Br., TC-96-R-PA-01 at 8. Both in its Initial Brief and in its Brief on Exceptions, however, APAC fails to identify any terms and conditions (as opposed to rate) component of the Transmission Settlement with which it disagrees. The provision of the tariffs which it challenges (inclusion of the DSIs as Eligible Customers) was included in the tariffs *prior* to the settlement being reached.

Clark claims that admission of the Transmission Settlement into the record without affording opportunity to analyze, cross-examine and refute, deprives non-settling parties of their rights under section 7(i) of the Northwest Power Act. Clark concludes that the denial of its right to examine, analyze and rebut the proposals violates the due process standards of section 7(i). As a cure, Clark seeks exclusion of the Settlement Agreements from the record. Clark Brief, TC-96-B-CP-01, at 7-9. Clark repeats many of these arguments in its brief on exceptions. Clark Ex. Brief, TC-96-R-CP-01, at 5-10.

Parties Had Adequate Opportunity to Comment on the Settlement Negotiations.

The Federal Power Act provides that when the Administrator elects the optional regional hearing to establish transmission terms and conditions of general applicability, the hearing should be conducted according to the procedural requirements of section 7(i)(1) through (3) of the Northwest Power Act. 16 U.S.C. §824k(i)(2)(A)(ii)(II). Those subsections of section 7(i) of the Northwest Power Act provide that BPA shall use the following procedures in its rate proceedings:

- (1) Notice of the proposed rates shall be published in the Federal Register with a statement of the justification and reasons supporting such rates. Such notice shall include a date for a hearing in accordance with paragraph (2) of this subsection.
- (2) One or more hearings *shall be conducted as expeditiously as practicable* by a hearing officer to develop a full and complete record and to receive public comment in the form of written and oral presentation of views, data questions, and argument related to such proposals. In any such hearing--
 - (A) any person shall be provided an adequate opportunity by the hearing officer to offer refutation or rebuttal of any material submitted by any other person or the Administrator, and
 - (B) the hearing officer, *in his discretion*, shall allow a reasonable opportunity for cross examination, *which, as determined by the hearing officer, is*

not dilatory, in order to develop information and material relevant to any such proposed rate.

(3) In addition to the opportunity to submit oral and written material at the hearings, any written views, data, questions, and arguments submitted by persons prior to, or before the close of, hearings shall be made part of the administrative record.

16 U.S.C. § 839(e)(i)(1),(2) and (3) (emphasis added). The Ninth Circuit Court of Appeals has ruled that BPA does not need to provide additional opportunities for comment each time the Administrator makes changes to BPA's proposals during the course of the proceeding. In the first challenge to BPA's proposed rates under the Northwest Power Act, *Central Lincoln People's Utility Dist. v. Johnson*, 735 F.2d 1101 (9th Cir. 1984)(*Central Lincoln*), the parties appealed the Administrator's decision based on both substantive and procedural grounds. One of the alleged procedural defects was that BPA was required to provide new notice and opportunity for comment each time the Administrator revised the proposed rates and associated studies. The Ninth Circuit disagreed, stating that "Section 7(i) clearly requires the Administrator to hold hearings after the rates are originally proposed. Nothing in the statute, however, mandates the repetition of the hearing process each time a rate is revised." *Central Lincoln*, 735 F.2d at 1118. The Court also considered decisions of several other jurisdictions construing the Administrative Procedures Act to hold that even if a final rule contains substantial differences from the proposed rule, the agency does not automatically have to engage in a new round of notice and comment. Rather, "[t]he main concern is to ensure that the final rule is sufficiently related to the proposed rule that the challenging party had notice of the agency's contemplated action." *Id.*

Clark claims that *Central Lincoln* is not applicable here. Clark Ex. Brief, TC-96-R-CP-01, at 7-8. Clark posits *Central Lincoln* as concluding: "The fact that the final decision differed from the initial proposal did not warrant another round of hearings." *Id.* If this be the case, and if, as is demonstrated in this Record of Decision, the Administrator could have finally established terms and conditions like those provided for in the Transmission Settlement based on the terms and conditions proceeding record (*sans* the Transmission Settlement) and argument of the parties, introduction of the Transmission Settlement into the record at the time it was introduced provides dissenting parties even greater opportunities than they would otherwise have to argue why the Transmission Settlement is either unsupported by the record or contrary to law. Put another way, the parties could have gotten together amongst themselves without BPA and, based on their negotiations, filed a joint brief arguing for everything that we instead now see in the Settlement Agreements. In that case, the Administrator could have adopted the jointly-urged proposal. Here, due to the timing of the introduction of the Settlement Agreements into the record, both Clark and APAC were able to argue in their Initial Briefs why provisions of the Transmission Settlement were substantively infirm.

The Ninth Circuit has also held that the Administrative Procedures Act, ". . . does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule," and that "[u]nder 5 U.S.C. § 553(b)(3) . . . a notice of rule making is sufficient if it provides a

description of the subjects and issues involved.” *California Citizens Band Assoc. v. U.S.*, 375 F.2d 43, 48-49 (9th Cir. 1967). In that case, the FCC had adopted two orders to which the petitioners objected based on procedural grounds. The petitioners contended that for these rule changes the agency had not provided adequate notice. The court held, however, that the rule changes were within the scope of the Federal Register notice, saying “[s]ince this is also the subject matter and issue dealt with in the language added to the introductory statement of ‘Basis and Purpose’ . . . the notice was sufficient with respect to the rule change.” *Id.* at 49.

Clark refers to the Transmission Settlement as containing “new proposals.” Clark Ex. Brief, TC-96-R-CP-01, at 6. Clark, in distinguishing the proposals from the final decision which was the subject of *Central Lincoln*, rather disingenuously refers to the Transmission Settlement as “a proposal by a party to the rate proceeding.” Clark Ex. Brief, TC-96-R-CP-01, at 8. Clark persists in ignoring the significance of the Transmission Settlement. It is the result of negotiations and contains proposals to resolve issues that were fully litigated in the proceeding and supported by the evidentiary record. The fact that the Transmission Settlement represented alternative proposals that could be adopted only if they were supported by record evidence was explicitly recognized by the signing parties. See Transmission Settlement, Attachment 1, p. 1, “Proposal.” When Clark alleges that “new evidence” was entered in the record, it lists the contents of the proposals. Clark does not, however, identify any new facts, aside from the existence of the proposals themselves, that would be susceptible to elucidation by offering additional testimony or cross examination. Clark is, indeed, arguing to reopen the case and begin anew to litigate the proposals as if the year-long proceeding had never happened.

Clark also repeatedly describes the settlement negotiations as being held “off the record.” Clark Ex. Brief, TC-96-R-CP-01, at 8. It is the nature of settlement that discussions and negotiations are held “off the record.” The confidentiality of the discussions is essential to a full and open discussion of the issues and mutual determination of the best solutions to diverse interests. The fact that the discussions were held “off the record” does not mean that they were not open to all parties to participate.

BPA afforded all parties to these proceedings adequate opportunity for meaningful participation in the settlement negotiations. Commencing with the Federal Register Notice published July 17, 1995, which defined the scope of the case, BPA indicated that meetings with its customers and interested third parties could occur on a frequent basis during the course of these proceedings, and alerted all interested parties to the likelihood that such meetings or workshops could be convened on short notice. 60 Fed. Reg. 36,464, 36,468 (1995). During the hearing convened on March 12, 1996, BPA provided notice of the proposed settlement negotiations on the record. Tr. 2273-2276. BPA also sent separate notices in advance of the settlement discussions on March 12, 1996, and March 26, 1996, to all parties. Finally, at the hearing on March 29, 1996, BPA acknowledged that settlement negotiations were still pending, and would continue. Tr. 2289-2295. Neither Clark nor APAC objected to settlement discussions taking place.

Section II of this Record of Decision describes the procedural history of this rate proceeding, during which there were numerous opportunities for parties and BPA to offer evidence in support of, or in opposition to, the proposals or counterproposals of the parties. Proposals were revised based on new information, changing conditions, and testimony provided by the parties. The fundamental scope of the case, however, has remained the same throughout, and has been thoroughly litigated. The proposals contained in the Transmission Settlement represent a compromise of the opposing positions and divergent interests that were raised by the various customers and litigated during the preceding. While the compromise may arrive at different positions than any party espoused, the proposals contained in the Transmission Settlement are within the scope of the specific proposals advanced and the evidence which supports them. They represent reasonable and logical outgrowths of the positions espoused by the various parties.

APAC complains that settlement negotiations were “frenzied” and that “sufficient time was not allowed to digest the results and ramifications of these negotiations.” APAC Ex. Brief, TC-96-R-PA-01, at 9. APAC first raised formal objections to the settlement (and by implication, the negotiations) on April 4, 1996, when the Agreements were offered into the record and when it became clear that the parties were willing to proceed to settlement without APAC. All parties, including APAC and Clark, had adequate opportunity for meaningful participation in the settlement negotiations. APAC was an active participant in the settlement as it was in the proceedings, and took many opportunities to raise its concerns. APAC’s April 3, 1996, letter to Randy Roach and statements in the hearing record on April 4, 1996, demonstrate that APAC had adequate opportunity for meaningful participation in the settlement negotiations. Tr. 2335-2338; *see also*, APAC Motion, WP-96-M-72.

Similarly, Clark, although it intervened as a separate party, was also a member of the Western Public Agencies Group (WPAG). WPAG was an active party throughout all stages of the proceeding. WPAG participated in the settlement negotiations, and WPAG’s members support the settlement, with the exception of Clark. Tr. 2334. Although counsel for WPAG noted that Clark did not support the final agreement, Tr. 2421, Clark could have but did not participate in the settlement negotiations in its own right. *See also* WPAG Brief, WP-96-B-WA-01, at 1. Clark only surfaced in its individual capacity when it determined to oppose the proposed Settlement Agreements. Clark admits it received notice of the settlement negotiations. Clark Ex. Brief, TC-96-R-CP-01, at 9. APAC and Clark were apprised of and had the same access to information exchanged during the settlement negotiations as all other participants to the discussions, and had the ability to ask questions of the proposals and seek additional information in support of the proposals at the time they were being discussed in settlement negotiations. The Hearing Officers in these proceedings ruled that notice has been adequate. Tr. 2315; Tr. 2335-2336. Clark and APAC have also expressed their continued disagreement with the Transmission Settlement in their Briefs, and, for APAC, at Oral Argument.

Parties Had Adequate Opportunity To Offer Refutation Or Rebuttal Material

APAC relies on *California Energy Resources Conservation and Development Commission v. Bonneville Power Administration*, 754 F.2d 1470 (9th Cir. 1985) (*CEC*) to argue that “without a right to challenge an alleged failure to follow required procedures, the right to participate in such procedures could be rendered meaningless.” APAC Brief, TC-96-B-PA-01, at 18. APAC’s reliance on *CEC* is misplaced. There, the Ninth Circuit Court found that because the CEC had a right to participate in the rate making procedure it had standing to argue that BPA had failed to follow its statutory ratemaking procedures. *CEC*, 754 F.2d at 1473. The CEC had challenged a BPA power sale on the grounds that the sale was made at a rate that was less than the established rate for such power sales. Concurrent to the challenged power sale, BPA initiated a rate proceeding to establish a rate that would permit such sales at a lower price. Accordingly, the CEC claimed the transaction constituted a power sale at a price that modified BPA’s rates without adherence to the ratemaking procedures mandated by the Northwest Power Act. While the Ninth Circuit Court of Appeals found that the transaction was a sale of energy that ordinarily would require modifications to the rate schedule through BPA’s statutory ratemaking procedures, it concluded that, due to the unusual circumstances, BPA was not required to follow its statutory ratemaking procedures in this case. *CEC*, 754 F.2d at 1474.

Here, however, BPA has complied with its statutory procedures and conducted a formal proceeding, including providing ample opportunity to participate and develop the issues. Section 7(i)(2) of the Northwest Power Act provides that BPA’s rate “hearings will be conducted as expeditiously as practicable . . . to develop a full and complete record” and “the hearing officer shall (A) provide adequate opportunity to refute or rebut material submitted by BPA or others, and (B) exercise discretion to allow reasonable opportunity for cross examination that is not dilatory to develop information or matter relevant to such proposal.” 16 U.S.C. § 839e(i)(2). Section 7(i)(2)(A) should not, however, be read to require BPA to allow parties an opportunity to refute or rebut its proposal each time BPA adjusts its position in the course of the hearing. Such a reading of the statute would lead to rate proceedings that would never end. Indeed, as stated by Congress:

It is the clear intent of the Committee that no one may use these procedures to frustrate the Act or to delay rate revisions. The BPA must act fairly to ensure full public and customer input, but dilatory tactics must be avoided. Few relish rate changes that result in higher rates, but often they cannot be avoided. The burden is on BPA to justify increases. These procedures should ferret out unjustified or inadequately supported changes.

H.R. Rep. No. 976, 96th Cong., 2d Sess., pt.1, at 69-70.

This issue has also been decided with regard to BPA rate cases by the Ninth Circuit in *Central Lincoln*, where the Court held that:

[s]ection 7(i)(2)(A) ensures that BPA creates a complete administrative record, allowing all interested parties to participate in a meaningful way. *This does not mean, however, that each time BPA adjusts the conclusions to be drawn from the record, new notice and comment must begin.*

Central Lincoln, 735 F.2d at 1118 (emphasis added). Thus, the right of a party to obtain additional discovery or offer refutation or rebuttal to a proposal must be tempered by a rule of reasonableness. In this proceeding, ample opportunity has been given for all parties to thoroughly explore the issues. The Transmission Settlement represent a compromise proposal that is directly based on, or is a logical and reasonable outgrowth of, evidence already on the record. That evidence was thoroughly tested through almost nine months of direct and rebuttal testimony, clarification and discovery, and cross-examination. The Administrator's final decision, however, must still be supported by and made based on the record in the proceeding. APAC and Clark, through its representative WPAG, were active parties in BPA's proceeding and participated in the hearings and settlement discussions in a meaningful way. The overwhelming majority of the active parties found the proposals in the Transmission Settlement to be in their best interest and they executed it, Attachment 1, pp. 6-23. APAC and Clark, however, were the only two parties to object to the Transmission Settlement.

Decision. *The proposals contained in the Transmission Settlement represent a compromise of the opposing positions raised during the proceeding, and are within the scope of the issues litigated in this proceeding. APAC and Clark had ample opportunity to participate in settlement negotiations and, during negotiations, to request and examine information on the proposals being considered and raise their concerns. The proposals are directly based on, or are a logical and reasonable outgrowth of, existing record evidence that has been thoroughly developed and tested throughout this proceeding. The non-settling parties are not entitled to reopen the hearing for additional discovery, rebuttal testimony and cross examination. Neither APAC nor Clark's due process rights under section 7(i) were violated. The Settlement Agreements were appropriately admitted into the record.*

Issue #2

Whether the Administrator's public statements regarding the Settlement Agreements constitute a premature decision prior to the close of the hearing record.

Parties' Positions

Clark alleges that the Administrator's public statements at a meeting with Pacific Northwest utility executives indicate a premature decision of the issues contained in the Settlement Agreements in violation of section 7(i) of the Northwest Power Act. Clark Brief, TC-96-B-CP-01, at 10-11; Clark Ex. Brief, TC-96-R-CP-01, at 10-11.

Hearing Officer's Recommendation.

The Hearing Officer found that "there is no evidence contained in the record to either support or refute this allegation; and, therefore, no findings can be made on this issue by the Hearing Officer." Hearing Officer's Recommended Decision at 19.

Evaluation of Positions

Clark claims that the Administrator made statements at a meeting between BPA and public power executives on April 2, 1996, about the Settlement Agreements, and these statements indicate that BPA staff communicated staff's positions on the Settlement Agreement to the Administrator. Clark argues that staff's communications with the Administrator constitute improper *ex parte* contacts. Clark also claims that the Administrator's statement that "he had approved a settlement which would cost Bonneville \$50 million"⁷ indicates that he made "a final decision prior to the close of evidence which was not based on the final record" in violation of the procedural requirements of Section 7(i). Clark argues that the Transmission Settlement must be excluded from the record. Clark Ex. Brief, TC-96-R-CP-01, at 10-11.

Communications Between BPA Staff And The Administrator Do Not Constitute Ex Parte Communications.

The general rule on *ex parte* communications in BPA's Procedures provides that

. . . no party or participant in any hearing shall submit *ex parte* communications to the Administrator or any BPA employee regarding any matter pending before BPA in the hearing. Neither shall the Administrator nor any BPA employee request or entertain such *ex parte* communications.

Procedures, Section 1010.7(a). The Procedures further provide that a "party" is a person who intervenes in the rate hearing, may engage in discovery and file testimony in the hearing, and may participate in cross examination. Procedures, §§ 1010.2(h), 1010.4, 1010.8, 1010.11, and 1010.12. On the other hand, a "participant" is a person who submits oral or written comments in legislative-style hearings. Procedures, §§ 1010.2(g) and 1010.5. The rule on *ex parte* communications in BPA's rate proceedings is clear on its face that the communications that are barred are the exchanges *between* parties or participants and BPA, not the exchanges between BPA staff and the Administrator. Moreover, a section 7(i) rate proceeding is a rulemaking proceeding on the record. *Central Lincoln*, 735 F.2d at 1119. While section 554(d) of the Administrative Procedures Act prohibits *ex parte* contacts between prosecutors and administrators in adjudications, the same separation-of-function provision does not apply in either an informal or formal rulemaking. *Hercules, Inc. v. Environmental Protection Agency*,

⁷ The \$50 million reference is to the proposed rate settlement, not the transmission terms and conditions.

598 F.2d 91 (D.C. Cir. 1978); *see also* *Burke v. Bd. of Gov. of Fed. Reserve*, 940 F.2d 1360 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1957 (1992). Accordingly, BPA staff are not barred from briefing the Administrator on matters of substance relative to the merits of issues in a pending 7(i) rate proceeding

Administrator's Statements Did Not Constitute A Final Decision On Matters At Issue.

Clark's allegations that the Administrator's public statements indicated that he had made a final decision, and had a closed mind to consider alternative arguments in oral argument and in briefs, are not supported by any evidence in the record. Clark asserts that the Administrator made the described statement and concludes that the statement proves that he made a premature decision, in violation of the procedural requirements of section 7(i). Prejudgment, however, does not result just because the Administrator expresses support, in public, for a proposed settlement. Clark must show that the Administrator has formed a *final* judgment on the issues; that the judgment concerned the facts pending in the case rather than matters of policy or law; and that the Administrator is not capable of judging the issue on the basis of its own circumstances. *See C&W Fish Co. Inc. v. Fox*, 931 F.2d 1556 (D.C. Cir. 1991) [hereinafter *C&W Fish Co.*], which held that an individual should be disqualified from rulemaking "only when there has been clear and convincing showing that [he] has an unalterably closed mind on matters critical to the disposition of the proceeding," *quoting Association of National Advertisers v. Federal Trade Commission*, 627 F.2d 1151, 1170 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Such a showing cannot be made based on a single statement that the Administrator knew of the settlements and believed they would provide substantial regional benefit.

As a Federal power marketing agency, BPA must continue to engage in regular business dealings with its customers, including conducting contract negotiations independent of the formal administrative proceedings. *Central Lincoln*, 735 F.2d at 1119. As part of its regular business dealings, and concurrent with this proceeding, BPA has been in negotiations regarding its power sales contracts to either continue or modify its business relationships with its current requirements customers. The April 2, 1996 meeting referenced by Clark was a meeting with Pacific Northwest utility executives to discuss BPA's strategy for these contract negotiations. Some of the same customers that also participated in this proceeding, and who support the Transmission Settlement, were in attendance. The focus of the meeting was to discuss strategies for determining the level of load commitment that BPA would require from its customers, in exchange for a level of power supply diversification, 5-year rate certainty and 5-year stranded investment protection. In response to questions from customers seeking greater power supply diversity, the Administrator commented that he approved the parties' efforts to negotiate a settlement and that the settlement seemed to accommodate the concerns of many of the customers in the meeting. The Administrator noted, however, that the settlement would cost BPA about \$50 million to implement. The Administrator's statements were made to underscore that BPA would be unable to grant its customers greater power supply diversity and, at the same time, achieve the rate certainty they sought through the rate case settlement. The

Administrator did not state or intend to state that he had adopted the Settlement Agreements. Indeed, in a hallway conversation prior to the meeting with the general manager of Umatilla Electric Cooperative, the Administrator was careful to comment that he retained the ability to accept or reject the Settlement Agreements following a review of the record. Moreover, these statements are consistent with BPA's April 5, 1996, press release, which characterizes the Settlement Agreements as proposals and states, "this is a tentative agreement, subject to the final approval by the BPA Administrator, and ultimately by FERC."

Clark ignores the provision in the Transmission Settlement that, consistent with section 7(i)(5), provides that "[t]he Administrator's final decision in the Dockets must be supported by and made based on the records in the Dockets." Attachment 1, p. 1, "Proposal."

Finally, in its Initial Brief, Clark asserts that the Administrator has a closed mind to consider arguments that may be presented in oral argument or in briefs. At the close of Oral Argument on April 30, 1996, the Administrator made the following statements:

I want to assure you that I'm approaching all of these issues with an open mind and that what's been said today, together with the entire record, will be taken under very careful consideration by me before making final decisions on any of the issues in these proceedings, including ultimately whether to adopt the transmission and power settlements and the terms and conditions settlements, which are in a sense, recommendations that the Hearing Officer will render . . . its judgment on and ultimately will make final decision on. So I'm taking all of those things into account. And I'm approaching this with an open mind, and I want to assure you that both as a result of the proceedings today, the readings that I've done of a fair amount of some of the testimony that you have provided and the process that we go through with BPA staff in responding to the various arguments that have been raised, that I will weigh those carefully before reaching any final decisions.

Tr. 2498-2499. During Oral Argument, the Administrator heard from a majority of the parties that they supported the Transmission Settlement. The Administrator also heard from APAC, which, like Clark, opposed the Transmission Settlement. Clark, however, did not appear at Oral Arguments, and presented no arguments to the Administrator why he should not adopt the proposals in Transmission Settlement.

Clark urges that "[t]he only means by which this procedural violation can be purged from this record is to exclude from the record the Settlement Agreements." Clark Ex. Brief, TC-96-R-CP-01, at 10-11. Clark's assertion is contrary to law. The remedy in the event of prejudgment is recusal or disqualification, not the withdrawal of evidence in the record. See *C&W Fish Co.*, 931 F.2d at 1565. However, Clark has not shown sufficient evidence that the Administrator cannot be an impartial decision maker.

Decision. *The Administrator's April 2, 1996, statements, considered in context, do not evidence a closed mind or prejudice by the Administrator.*

Issue #3

Whether Allowing BPA To Provide A Bundled Product To Certain Small Customers As An Eligible Customer Under The NT Tariff Violates Comparability.

Parties' Positions

Clark objects to the Transmission Settlement provision which allows BPA to be an Eligible Customer for NT Service for "power sales . . . to 1) a direct-service industrial customer or 2) a Bonneville power customer whose total retail load is equal to or less than 50 aMW during calendar year 1995." Clark protests that this provision is inconsistent with BPA's earlier elimination of any native load priority for itself and "permits Bonneville to dispense with the execution of a transmission agreement with such customers, roll in transmission charges applied to such customers, and generally treat them in a manner fundamentally different than other transmission customers." Clark Ex. Br, TC-96-R-CP-01, at 11-12. Clark concludes that this provision "will give Bonneville substantial competitive advantages." *Ibid.*

Hearing Officer's Recommendation.

The Hearing Officer found that the Transmission Settlement "does not violate the FPA, the Commission's rules or any other statute." Hearing Officer's Recommended Decision at 26.

Evaluation of Positions.

In BPA's initial and supplemental proposals, BPA was included as an Eligible Customer for NT service. This is not inconsistent with the FERC proposed tariffs and the Final Rule Tariff which allow the Transmission Provider to be an Eligible Customer for NT Service. The Transmission Settlement provides that BPA may be an Eligible Customer for its own NT service in order to serve only certain small customers. Therefore, BPA is deviating from its proposals during the case and from FERC's policies by *limiting* its flexibilities. BPA is not aware of and Clark has provided no evidence of any other transmission provider that has placed any limitations on its eligibility to be an NT customer.

If BPA were not an Eligible Customer for its own NT service, then a current requirements power sales customer could not receive a new requirements contract from BPA without either signing a separate transmission agreement that includes the NT tariff and the System Operating Agreement or entering into a Designated Agent agreement with BPA. For BPA's small customers, this requirement would be a significant burden. Tr. 183-214. Thus, as the Hearing officer states, "BPA's decision to continue bundled service to its very small all-requirements

customers recognizes the unique needs of those customers in the Pacific Northwest and is appropriate in these circumstances.” TC-96-RD-01, at 31.

Many of BPA's wholesale power customers are interconnected with regional Investor Owned Utilities. Those IOU' s will be Eligible Customers for NT service under their own NT tariff. They would thus be able to offer a bundled wholesale product to BPA's customers whereas, under Clark's proposal that BPA not be an Eligible Customer, BPA could not offer a bundled product, *i.e.*, BPA could not be the NT customer in competing for a new requirements power sales contract with these long-standing preference customers. To take service from BPA, the requirements customer itself would have to become the transmission customer, either directly or through a Designated Agent.

Clark misstates the impact of BPA being an Eligible Customer when it says that BPA could treat these small wholesale customers in a manner fundamentally different from other transmission customers. Clark Ex. Br., at 12. BPA would offer, in a single contract, power and transmission services. The transmission provisions in the contract would be consistent with the NT tariff. Tr. 194. The customer would be charged the NT-96 rate for its transmission services, and that would be a separate line item on the customer' s bill, consistent with the requirement in FERC' s Final Order. The billing determinant in the NT-96 rate schedule, *i.e.*, contribution to BPA's transmission system peak, was chosen in part because the whole equals the sum of the parts. Thus, there is no rate advantage to BPA being the NT Eligible Customer for a number of utilities, as there would be if the billing determinant were noncoincidental demand, for example. The bill for the combined NT service is equal to the sum of the bills resulting from applying the NT rate to each individual customer.

Decision. *BPA's ability to purchase NT Service to deliver a bundled product to certain small customers does not violate comparability requirements.*

Issue #4

Whether the "no points of interconnection" option to the calculation of PTP billing determinants violates comparability requirements.

Parties' Positions:

Clark asserts that the Transmission Settlement provision which establishes an option for PTP customers to have only their Transmission Demands at the Points of Delivery counted as their billing demand establishes "differing treatment" of BPA and other transmission customers. Clark Ex. Br., TC-96-R-CP-01, at 13. Clark argues that, because BPA "controls who gets redispached and when, there is a lack of comparable service between Bonneville and other transmission customers." *Id.* at 14.

Hearing Officer's Recommendation:

The Hearing Officer made no recommendation on this proposal, concluding that it was a rates provision over which she had no authority.

Evaluation of Positions:

This proposal provides for an exception to the Commission's approach of establishing and cumulating transmission demands at both the Points of Interconnection (POI) and the Points of Delivery (POD) and charging on the basis of whichever cumulation is greater. It eliminates transmission demands at POIs from the calculation of the Billing Demand if the resources at those points are within BPA's Control Area and are redispatchable by BPA. It is available to any PTP customer and therefore complies with comparability requirements.

The problem which is addressed by this proposal flowed from the Bonneville commitment in the Framework for Comparability to treat each power customer as if it were a separate transmission customer. TC-96-E-BPA-13 at 2, *ll.* 2-4 and 10-12. This commitment threatened to preclude BPA from using the same transmission and generation bundling flexibilities available to its wholesale PTP competitors to flexibly and economically serve multiple customers, *e.g.* BPA could not use Transmission Demands at multiple POI's to flexibly serve all of its PTP customers but would have to designate a separate POI Transmission Demand for each power customer. BPA witnesses Metcalf and Gilman explained that BPA considered a Single Point of Interconnection approach (*i.e.*, BPA would consider its system as a single POI) available only for itself to address the competitive disadvantages. *Id.* at 6, *ll.* 12-16 and 20-22. Some parties objected to the separate treatment. Black, *et al.*, WP/TC-96-E-PG-06, at 11. But the BPA witnesses explained that, if the objecting parties had their way and BPA were to be treated like any other PTP customer, BPA should be able to make use of the same short-distance discounts, at-site generation and other mechanisms which other PTP customers may use to significantly reduce their transmission costs. This would have consequent rate impacts on other transmission customers. *Id.*

In cross-examination, PacifiCorp pointed out that a single BPA POI was appropriate if BPA had an obligation to redispatch its resources under the NT and PTP tariffs to avoid transmission constraints. Tr. 69-72. No particular transmission path was needed because BPA resources could be redispatched if necessary to ensure service to all loads. In contrast, a resource outside of BPA's load control area required a firm transmission path because it could not be redispatched to avoid transmission constraints and should pay for each interconnection.

During settlement negotiations, this issue was discussed further. Parties recognized that specific firm transmission paths were not needed for resources that were in BPA's load control and that were redispatchable by BPA. Constraints on the transmission system could be avoided by redispatching resources which would allow the most efficient use of the transmission system. Therefore, the amount of firm transmission capacity required for a transaction for which the resource at the POI was in BPA's load control and dispatchable by BPA was determined by

the POD demand. This resulted in the “no POI” proposal: though the PTP billing factor is the greater of the sum of the POD demands or the sum of the POI demands, resources at POIs that are in BPA’s control area and are redispatchable by BPA do not count in the sum of the POI calculation. Resources not dispatchable by BPA require a firm path that must be available for use at all times; it made sense to calculate a billing factor using a POI demand for each such resource. The parties agreed that this proposal is comparable because any customer can put its resource in BPA’s control area and allow BPA to redispatch the resource in order to obtain the POD-based Billing Demand. PacifiCorp reiterated this reasoning in oral argument. Or. Tr. 2461-2463.

Clark disagrees with the “no POI” proposal for two reasons. First, Clark argues that transmission customers with resources in BPA’s control area would be “economically coerced” into surrendering redispatch rights to BPA. Second, Clark argues that BPA is treated differently from other transmission users which is inconsistent with the comparability standard in the NOPR. Clark presents no evidence beyond its mere assertions. Nothing in the “no POI” proposal would “coerce” a transmission customer into allowing BPA to redispatch its resources. The customer has a choice just like the BPA power business has a choice. Both the customer and BPA could choose to reserve transmission paths for PTP service and not subject PTP resources to redispatch. Both could choose to have their resources redispatched by the transmission business and receive the benefits of a POD-based Billing Demand. No transmission customer is subjected to non-comparable treatment according to FERC’s definition of comparable treatment:

[A]n open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider’s uses of its system.

Order No. 888 at 21,548.

Clark's implication that BPA will redispatch non-federal resources in a discriminatory manner is also unsupported. BPA has elsewhere committed to complying with FERC's policies on redispatch. Transmission Settlement at 5 and Attachment A. Discriminatory application of the tariffs should be addressed by complaint in fact-specific circumstances.

Decision. *The “no point of interconnection” proposal does not provide special treatment to BPA but is available to all PTP customers. BPA has also elected to clarify in its PTP tariff that this option exists. See PTP tariff, §2.7(c).*

Issue #5

Whether the Northern Intertie may be included in the Network while the Southern and Eastern Interties are retained as separate segments?

Parties' Positions:

Clark argues that BPA must treat all of its interties similarly. Clark Ex. Br., TC-96-R-CP-01 at 17-18. However, its main implication seems to be that BPA is maintaining the Southern Intertie to "advantage its power marketing activities." *Id.* at 18.

Hearing Officer's Recommendation:

The Hearing Officer found that "the inclusion of the Northern Intertie eliminates service distinctions and contributes to the achievement of comparability of service under the tariffs." Hearing Officer's Recommended Decision at 23.

Evaluation of Positions:

The segmentation decisions made in these proceedings, being primarily rate issues, have been addressed in the Administrator's Record of Decision, 1996 Final Rate Proposal (section 12.2). It should be noted here, however, that Clark, other than contending that BPA will use the Southern Intertie to its advantage, provides no economic or policy rationale for the necessity of treating all of the interties alike. In other words, as with many of its other objections to the Transmission Settlement, Clark describes no interest of its own that is implicated by the challenged proposal.

With respect to Clark's assertion that BPA will use the Southern Intertie to advantage its power marketing activities, BPA has agreed in this proceeding that implementation of the tariffs and application of the PTP tariff to the Southern Intertie will eliminate the Long Term Intertie Access Policy (LTIAP). TC-96-E-BPA-09, at 3. That policy has provided BPA and Northwest utilities with priority access to the Southern Intertie in specified situations and Clark certainly never objected to it. In this proceeding, BPA proposed to eliminate the LTIAP even though language in the legislative history of EPA'92 would prohibit FERC from changing the policy's rules on allocation of intertie capacity for short-term economy energy trades.

BPA's short-term transmission service allocation methodology for economy energy trades is also unaffected by the FERC's new authority to order access to transmission controlled by BPA.

H.R. 102-1018, 102d Cong., 2d Sess 388 (October 5, 1992). After BPA described the termination of the LTIAP but before the Northern Intertie was eliminated in the Transmission Settlement, no party raised further concerns regarding comparable treatment on the Southern Intertie even though it was plain that the Southern Intertie was proposed to continue. Why the elimination of the Northern Intertie in the Transmission Settlement affects practices on the

Southern Intertie is not explained by Clark. Whether discriminatory treatment will occur on the Southern Intertie under the PTP tariff is pure speculation.

Decision. *Southern Intertie capacity will be allocated under the PTP Tariff and the LTIAP will be eliminated. No evidence of intended discriminatory or preferential treatment on the Southern Intertie under the PTP Tariff has been presented.*

Issue #6

Whether BPA's System Operations Agreement must be developed in this docket if it is to be submitted to FERC as part of the NT Tariff.

Parties' Positions.

Clark asserts that BPA cannot legally include its System Operations Agreement in the NT Tariff without giving parties the right to examine and offer refutation on the record. Clark Ex. Br., TC-96-R-CP-01 at 19-20.

Hearing Officer's Recommended Decision.

The Hearing Officer found that "the Settlement leaves the parties' rights intact to take any position with respect to a System Operations Agreement when it is proposed by BPA." Hearing Officer's Recommended Decision at 25.

Evaluation of Positions.

As a result of discussions at one of the workshops of the parties' objections to BPA's proposed System Operations Agreement, Bonneville moved to withdraw the proposed System Operations Agreement from the proceeding to allow the parties to further develop its content and application and resolve technical issues outside of the strictures of the proceeding. TC-96-M-27. This occurred after the filing of BPA's supplemental tariff proposals which included the System Operations Agreement. The motion included the commitment of BPA that, if agreement could not be reached on the contents of the System Operations Agreement by the end of April, 1996, the outstanding issues would be submitted to dispute resolution under the Northwest Regional Transmission Association dispute resolution mechanism rather than in the TC-96 proceeding. This was to insure that resolution of the issues would occur in time for the Agreement to be filed with FERC along with BPA's tariffs. After the motion was noticed to all parties and no objections were heard, the Hearing Officer approved the motion. TC-96-TPH-05 at 6. BPA properly noticed a meeting on April 12, 1996 to attempt resolution of the outstanding issues. The participants reached agreement which was subsequently reported to the Hearing Officer. Tr. 2495. At oral argument (which Clark did not attend) and in response to

the Hearing Officer's question, BPA stated its intent to file the System Operations Agreement with FERC with its proposed tariffs. *Id.* At no time did Clark object to this approach. Clark long ago missed its opportunity and its objection should not now be heard.

This regional proceeding is entirely optional for BPA. BPA could just as well develop and publish its tariffs without this proceeding and lodge them with FERC for non-jurisdictional approval. The same is, of course, true for the System Operations Agreement, particularly when the parties to the proceeding agree. Contrary to Clark's assertion, although BPA has attached the System Operations Agreement to the Final NT Tariff, it is not making decisions about it in this Record of Decision, other than to remove it from the PTP Tariff consistent with its agreement with the parties. It may thus be filed with FERC, consistent with its understanding with the parties, along with the NT Tariff. If Clark has objections to the System Operations Agreement, it may raise them with FERC at that time.

Decision. *The System Operations Agreement may be filed with FERC along with the NT Tariff without violating Clark's due process rights.*

Issue #7

Whether transmission customers can be required to provide BPA access to third party transmission systems as a condition of service.

Parties' Positions.

Clark objects to the requirement in the tariffs that, in certain narrowly-defined instances, transmission customers who do not own or control transmission facilities must obtain agreement from their transacting partner to provide reciprocal service to BPA over the transacting partner's transmission facilities. Clark Ex. Br., TC-96-R-CP-01, at 21-22.

Hearing Officer's Recommendation.

The Hearing Officer found that "this requirement is more lenient than that contained in the *pro forma* tariff." Hearing Officer's Recommended Decision at 29.

Evaluation of Positions.

If the customer does not own or control transmission facilities itself, Bonneville proposes to require the customer's partner in the transaction to provide to Bonneville a commitment to reciprocal service *if it owns or controls transmission facilities, unless it is subject to FPA section 211 of the Federal Power Act or is a member of a FERC-approved regional transmission association.* §7.3, PTP Tariff; §3.5, NT Tariff; TC-96-E-BPA-16, at 24, *ll.* 12-17; TC-96-E-BPA-15, at 12, *ll.* 17-21. This provision is primarily aimed at extranational entities whose transmission facilities are not subject to the Commission's authority and who may

decline to join (or who terminate their membership in) regional transmission associations certified by the Commission, but nevertheless do business in this country. It is a provision which supports a level playing field for all entities owning transmission facilities and conducting business in this country.

Clark asserts that this requirement is inconsistent with Order No. 888. In fact, Order No. 888 imposes a greater reciprocity obligation than does BPA's requirement. *See* 61 Fed. Reg. 21,540, 21,615 (May 10, 1996). FERC requires that "any entity that owns, controls or operates transmission facilities that uses a marketer or other intermediary to obtain access" must provide a reciprocity commitment to the transmission provider. *Id.* (emphasis added). This requirement pertains *regardless* of whether the intermediary owns, controls or operates transmission facilities.

Decision. *BPA's third party reciprocity requirement is an appropriate mechanism to ensure that all participants in the open access wholesale power market provide reciprocal services.*

Issue #8

Must BPA provide an opportunity for binding dispute resolution?

Parties' Positions.

Clark claims that the absence of a binding dispute resolution process for transmission customers which are not members of regional transmission associations violates comparability. Clark Ex. Br., at 22-23.

Hearing Officer's Recommendation.

The Hearing Officer made no findings on this issue.

Evaluation of Positions.

A transmission customer may join a regional transmission association. Nothing of which BPA is aware prevents Clark or any other utility from joining the Northwest RTA or the Western RTA. If a customer elects not to join an RTA and cannot agree on a dispute resolution mechanism with BPA, the customer may use its Federal Power Act rights under section 211. Clark's demand for binding dispute resolution for non-RTA members would provide greater rights to entities which elect *not* to join an RTA than are provided to RTA members. RTA dispute resolution results are not binding, *i.e.*, they may be appealed to FERC.

Decision: *The absence of a binding dispute resolution mechanism for non-RTA members does not violate comparability.*

Issue #9

Should BPA be permitted to disclaim any obligation to provide service for voluntary retail wheeling arrangements between a utility and its customers?

Parties' Positions.

Clark claims that BPA's clarification that it is not obligated under the tariffs to provide retail wheeling ("direct delivery to end-users"), even when statutorily required or voluntarily provided, "strikes at the very heart of comparability and open access" and represents "a perverse use of the NT and PTP Tariffs." Clark Ex. Br., at 24-25. Clark also asserts that BPA's position is "contrary to FERC Order No. 888." *Id.* at 25.

Hearing Officer's Recommendation.

The Hearing Officer found that this provision is "consistent with Order No. 888 in that the definition does not prohibit voluntary retail wheeling." Hearing Officer's Recommended Decision at 27.

Evaluation of Positions.

BPA proposes a clarification that it is not obligated under the tariffs to deliver power directly to end use consumers where FERC is prohibited by the Federal Power Act from ordering such service. The Federal Power Act prohibits FERC from requiring the transmission of electric energy directly to an ultimate consumer. 16 U.S.C. §824k(h)(1). Although an end-user is not itself an Eligible Customer, in the absence of this clarifying language it might nevertheless be directly served through a wheeling agreement obtained from BPA by an eligible power supplier wishing to supply that end-user. The clarification is therefore necessary to address that possibility and to avoid the interpretation that BPA, by its silence, agreed to provide direct delivery to an end-user through a wheeling agreement with an eligible power supplier.

BPA's clarification does not prohibit voluntary wheeling transactions. It clarifies that BPA has *no obligation* under the tariffs to provide service for such transactions. Bonneville witness Metcalf testified that federal and state law regarding direct access of end-users is evolving and that BPA is monitoring those developments. Tr. 121. He stated that BPA's decision to provide service to end-users depends, in part, on the particular state "clearly mov[ing] to open the . . . wholesale marketplace to end-users," *id.*, and that BPA "intended to follow national and state policy as it evolves." Tr. 219.

Clark misinterprets Order No. 888. FERC clearly has enacted a similar policy in its Final Rule.

We therefore clarify that our decision to eliminate the wholesale customer eligibility requirement does not constitute a *requirement* that a utility provide retail transmission service. Rather, we make clear that if a utility chooses, or a state lawfully requires, unbundled retail transmission service, such service should occur under this tariff unless we specifically approve other terms.

61 Fed. Reg. 21,572 (1996); *see also* 61 Fed. Reg. 21,708, Pro Forma Open Access Transmission Tariff, §1.11 ("Eligible Customer"). Even if Clark's assertion were true that FERC is encouraging voluntary retail wheeling arrangements between utilities and their customers, FERC agrees that there is no obligation of transmission providers to provide that service.

Decision: *BPA's statement in its tariffs that it is not obligated to provide direct delivery to end-users is an appropriate clarification of its obligations and is consistent with FERC policy and the law.*

Issue #10

Does BPA's decision to include its DSI customers as Eligible Customers under the tariffs constitute undue discrimination against other end-users?

Parties' Positions.

APAC claims that BPA's inclusion of the DSIs as Eligible Customers under the tariffs, while disclaiming any obligation to provide service to other end-users, illegally discriminates against other end-users. APAC Ex. Br., at 3-8. It objects to the conclusion that the DSIs have a special status with regard to obtaining transmission service for nonfederal supplies. PPC objects to any conclusion that the DSIs have a statutory right to obtain transmission services from BPA. PPC Ex. Br., TC-96-R-PP-01, at 12-14.

Hearing Officer's Recommendation.

The Hearing Officer found that the "unique differences between the DSIs and other end-users permits different treatment." Hearing Officer's Recommended Decision at 14. She specifically listed the following differences: (1) the DSIs are BPA's own customers under a distinct statutory classification; (2) the DSIs have contract rights to convert existing transmission service to service under the new tariffs; and (3) BPA obtained the continued right, provided under the terminating 1981 BPA-DSI power sales contracts, to interrupt their *nonfederal* power supplies for stability reserves in exchange for providing the transmission service. *Id.*

Evaluation of Positions.

APAC cites only to section 6 of the Federal Columbia River Transmission System Act to support its allegation of illegal discrimination. Clearly, the language of section 6 prohibits BPA from discriminating only between "utilities."

The Administrator shall make available *to all utilities* on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

16 U.S.C. §838d (emphasis added). Industrial entities are not "utilities." The legislative history more broadly states that "[t]he Administrator of the Bonneville Power Administration shall not discriminate *among classes of customers* in making agreements to transmit electric power over Federal transmission lines." S. Rep. No. 1030, 93rd Cong., 2d Sess. 10 (1974)(emphasis added). Non-DSI industrial entities are not "customers" of BPA.

APAC argues that a DSI purchasing nonfederal power is no different from any other industrial end-user wishing to do the same. To the contrary, there is an entirely different present and potentially future contractual relationship between BPA and the DSIs than there is between BPA and other industrial end-users. Regardless of whether they are described as "wholesale"⁸ or "retail" customers, the DSIs have been BPA "customers" for many decades. Other Northwest industrial entities have not. Rather, they have purchased their power supplies from their local utilities. The DSIs are defined as BPA's "customers" in the Northwest Power Act, 16 U.S.C. §839a(7), and BPA has *continuing* authority and intention to sell power directly to them. 16 U.S.C. §839c(d). Congress has, however, placed restrictions on BPA's ability to sell directly to other industrial end-users. 16 U.S.C. §839c(d)(2). These are significant differences which distinguish the DSIs from other industrial end-users. *See Central Louisiana Electric Company*, 70 FERC ¶63,015, 65,084 (1995)(if "a principle and relevant difference . . ." exists between the parties being compared, they will not be considered similarly situated.).

That the DSIs will use the transmission service to purchase power from suppliers other than BPA does not place them in the same category as other industrial entities wishing to do the same. The transmission agreements offered by BPA to the DSIs in the Spring of 1995, and extended in late Summer, 1995, were the product of business decisions which addressed the direct business relationship between BPA and the DSIs. That relationship was characterized at the time by the stated intention of most DSIs to terminate their existing BPA power sales contracts and arrange alternate power supplies, either through self-generation or in the bulk power market through buy-sell arrangements with their local utilities. Either route would have eliminated BPA's continuing access to the DSI plant loads as stability reserves. Making the DSIs eligible for transmission services under the IR Agreements preserved for BPA access to these important stability reserves. Tr. 218. In the absence of this arrangement, as perfectly stated by APAC itself, "[the DSIs] are under no obligation to supply transmission system reserves from any non-federal power wheeled over BPA's transmission system." APAC Ex. Br., at 6, fn. 8.

BPA must be able to address and resolve the unique business problems which arise in its contractual relationship with the DSIs without having to extend the same resolution to others not similarly situated. These business judgments and decisions are not applicable to entities which are not BPA's customers.⁹ Indeed, different state-level political, economic and regulatory issues are involved in any decision to provide transmission services to end-use consumers of local utilities. BPA reasonably avoided forcing the issue on state governments and utilities.

BPA's decision not to include other end-use consumers as Eligible Customers does not mean that utilities' end-use consumers are permanently precluded from obtaining such services. How to institute direct access to the bulk power market for utilities' end-use consumers is currently

⁸ BPA sales to private persons or agencies are described as "wholesale" by the Bonneville Project Act, 16 U.S.C. §832d(a).

⁹ Some recent retail wheeling proposals of transmitting utilities provide for service only to specified customers.

being addressed as a regional issue. The Comprehensive Regional Review is a focused effort, initiated by the region's four governors, to address major issues related to restructuring of the electric industry in the Pacific Northwest. One of the issues being addressed is retail wheeling for end-use consumers in the region. In this context, it is important to note that BPA has testified that it will defer to the decisions of state legislative and regulatory bodies with respect to direct retail access for customers of utilities in those states.¹⁰ Tr. 121. BPA's deference to state retail wheeling decisions with respect to customers of utilities in those states is a reasonable approach in light of the state policy and regulatory implications that flow from such arrangements.

Decision. *BPA has not illegally discriminated against other end-users by establishing its own DSI customers as Eligible Customers under the tariffs.*

Issue #11

Whether BPA's analysis of the "sham transaction" limitation is correct?

Parties' Positions.

APAC challenges BPA's right to be "the initial arbiter" of what constitutes a "sham transaction," APAC Ex. Br., at 9-10, and claims that BPA cannot refuse a request on that basis unless it first applies to FERC for an order "sanctioning its refusal to provide service." It claims that "the determination of 'sham transaction' can only work as a defense for BPA and is not an affirmative grant of authority to BPA." *Ibid.*

Hearing Officer's Recommendation.

The Hearing Officer held that "[BPA] may decide whether or not a particular wheeling request would result in a sham transaction; and if the customer believed its request had been wrongfully denied, it is the *customer* (not the transmitting utility) who must seek an Order under Section 211. It is only when a proper application is filed pursuant to Section 211 that the Commission need review the matter and determine whether or not the transmitting utility's claim of a sham transaction can be upheld." Hearing Officer's Recommended Decision, at 16.

¹⁰ BPA would also have to determine on a case-by-case basis whether release of utilities' loads would violate its rights under current BPA-utility requirements power contracts.

Evaluation of Positions.

It is not clear what APAC is asserting or why it perceives a difference between BPA applying to FERC for an order sanctioning its refusal to provide service and the customer applying to FERC for an order overturning BPA's refusal. Either way, BPA makes the initial determination and FERC reviews it. Clearly, sections 211 and 212 of the Federal Power Act establish the latter method as the proper mechanism to follow.

In FERC's Final Rule, it has added to the definition of "Eligible Customer" a specific reference to sham transactions not being eligible for service under the tariff. *See* §1.11 of Final Rule Tariff (transactions under section 212(h)(2) of Federal Power Act not eligible).

Decision. *BPA may legitimately respond to particular service requests with a denial based on its determination that the transaction represents a "sham transaction" under the Federal Power Act.*

Issue #12

Should this Record of Decision express an opinion respecting the dispute between Washington Water Power (WWP) and BPA in connection with WWP's request for transmission service to Clark PUD?

Parties' Positions.

WWP urges BPA not to address the issue of the legitimacy of WWP's request for transmission service to Clark PUD in this Record of Decision. WWP argues that a decision on this issue is unnecessary and would be in violation of the Settlement Agreement. WWP Ex. Br., at 3.

Hearing Officer's Recommendation.

The Hearing Officer opined that "BPA may refuse to wheel if the service would displace its own existing power sales agreement." TC-96-RD-01, at 13.

Evaluation of Positions.

The Hearing Officer's finding was an opinion on whether the Federal Power Act required BPA to provide service to transactions which would violate its own power sales contracts. The Hearing Officer made no determination specifically about the WWP-Clark transaction which is the subject of the WWP-BPA dispute.

Decision: *BPA agrees that the particular facts and circumstances of the WWP request for service to Clark PUD are not the subject of this proceeding and therefore no determination is made in this Record of Decision on that issue.*

IV. NEPA Analysis

Consistent with the strategic decision to focus on relationships of BPA to the market, the Business Plan Final EIS (BP FEIS) identified a range of six alternative “relationships” that would allow the Agency to meet its obligations and compete in today’s energy market. These six alternative relationships are identified in the BP FEIS as follows: Status Quo, Market Influence, Market-Driven, Maximize Financial Returns, Minimal BPA Marketing and Short-Term Marketing. The transmission component of the Market-Driven alternative “would treat non-Federal loads comparably to Federal power loads.” BP-FEIS, p. 4-32. These alternatives were designed to present an underlying goal and a range of actions that BPA might take in its power marketing and transmission activities. Additionally, each alternative was designed such that “BPA could take action on one of more than twenty major policy issues that fall into 5 broad categories: 1) Products and Services; 2) Rates; 3) Energy Resources; 4) Transmission; and 5) Fish and Wildlife Administration. Also, in direct response to comments on the Draft EIS, BPA developed “modules” for Fish and Wildlife Administration, Rate Designs, Service to DSIs and Acquisition of Conservation and Renewable Resources, which addressed key policy issues to be integrated with the various alternatives.

Among twenty major policy issues identified, eight are related to transmission services: 1) Unbundling of Transmission and Wheeling Services; 2) Transmission and Wheeling Pricing; 3) Transmission System Development; 4) Transmission Access; 5) Assignability of Right Under BPA Wheeling Contracts; 6) Retail or DSI Wheeling; 7) Customer Service Policy and Subtransmission; and 8) Operations, Maintenance, and Replacement of the Transmission System. Table 2.4-1 of the BP FEIS demonstrates how each of twenty major policy issues reacts under the six different alternatives.

Section 4.2 of the BP FEIS identifies four types of market responses: resource development, resource operation, transmission development and operation, and consumer behavior. The market responses, summarized for the key policy issues on Table 4.2-1 in the BP FEIS, determined the environmental impacts. The environmental impacts addressed in the BP FEIS relate to the physical environment, including air quality, water quality, land use, and human health and safety. They also include those related to the socioeconomic environment, such as the effects of changes in products, services and rates on end-users of electricity, including BPA's DSI customers. The market responses are described both in general terms and in terms specific to each alternative.

Table 4.3-1 details the quantity of emissions in tons/average megawatt of SO₂, NO_x, CO₂, Particulates, and CO for all resources including old and new CTs. Section 4.4 then builds upon the information detailed in section 4.3 and applies it to each of the six alternatives addressed in the BP FEIS, under two bookend hydro-operational scenarios.

As BPA ultimately selected the Market-Driven alternative, the market responses and associated environmental impacts regarding this particular alternative are qualitatively described in section 4.4.2.3 of the BP FEIS, and quantitatively detailed in Section 4.4.3. Specifically, in Table 4.4-19 of the BP FEIS, the tons of SO₂, NO_x, TSP, CO, and CO₂ associated with each alternative are quantified with respect to a particular hydro operation scenario.

The BP FEIS found that environmental impacts would be caused for the most part by the responses to BPA's marketing actions, rather than by the actions themselves. *See* BP FEIS, page 4-1. The potential environmental impacts fell within a fairly narrow band, and several of the key impacts are virtually identical across alternatives. In addition, the costs of environmental externalities differ only slightly between alternatives.

BPA's Final Transmission Terms and Conditions decision is consistent with BPA's Business Plan, the BP FEIS (DOE/EIS-0183, June 1995), and the Business Plan Record of Decision (ROD) (August 15, 1995). The BP EIS and ROD were intended to guide BPA in a series of related decisions on various issues and actions. Before taking specific action on any of these issues, BPA stated that the Administrator would review the BP FEIS to ensure that a particular action was adequately covered within the scope of that EIS and, if appropriate, issue a tiered record of decision. Consistent with the Business Plan ROD, the Administrator has reviewed the BP FEIS to determine whether the proposed final action on BPA's Transmission Terms and Conditions was adequately covered within the scope of that analysis.

In addition, FERC has also conducted its own NEPA analysis of the potential environmental impacts of its proposed open access transmission terms and conditions. In issuing a Final EIS on its proposal, 61 Fed. Reg. 17263 (April 19, 1996), FERC determined that its open access rule would have only a slight impact on the environment even under a worst cast scenario.

Finally, the transmission tariffs which are the subject of this proceeding do not commit BPA to any particular wheeling transaction but rather contemplate a request and response process related to specific service requests. Each request will be handled by BPA as a separate action under NEPA. *See e.g.*, §§9.6 and 9.7 of PTP Tariff.

V. Participant Comments.

Participants are persons and organizations who comment on BPA's rates/terms and conditions proposals but do not take part in the formal proceeding. Their comments are made part of the Official Record of the proceeding. Eight field hearings were held September 14-28, 1995 throughout the region on both the rates and the transmission terms and conditions proposals. These sessions were transcribed. A total of 137 persons presented comments at the field hearings. BPA also received 609 pieces of correspondence and documented telephone calls related to the proposals during the public comment period which officially ended October 2, 1995. An additional 197 pieces of correspondence were received after the conclusion of the

official public comment period. Copies of these comments are available for inspection in BPA's Public Reference Room.

Relatively few comments were received which addressed non-rate transmission access issues. The following topics were raised:

1. BPA is offering two very unappealing and incomplete transmission alternatives. (Field hearing comment)

BPA's proposals were developed based on the two types of service incorporated by FERC in its proposed *pro forma* tariffs. In addition, customers with existing IR or FPT service may continue service under those agreements if they conclude that those are more appropriate to their needs. Finally, a customer may request a different service under section 211 of the Federal Power Act.

2. Our public utility needs more access to the marketplace.

BPA is providing access to the marketplace under existing transmission agreements and intends to also provide service under the PTP and NT Tariffs. However, a utility's existing power sale contract obligations to BPA, if any, must be addressed prior to obtaining additional access.

VI. Conclusion

On the basis of the Official Record compiled in this proceeding, including the Transmission Settlement, I accept the Hearing Officer's determination that the Final Point-to-Point and Final Network Integration Service tariffs are in compliance with the Stage 1 *pro forma* tariffs adopted by FERC, do not violate any statutory requirements, are supported by the evidence of record and are in the public interest. I have also concluded that this action is consistent with the Business Plan Record of Decision and the Business Plan Final EIS and that proposed transactions under the tariffs will be individually assessed under NEPA.

Issued at Portland, Oregon, this 20th day of June, 1996.

Administrator