

## 18.0 PROCEDURAL MATTERS

### 18.1 Evidentiary Issues

#### 18.1.1 Scope of Cross-Examination

##### Issue

*Whether the testimony of BPA witness Mark Ebberts should be stricken because the IOUs did not receive a reasonable opportunity for cross-examination.*

##### Parties' Positions

The IOUs argue that BPA violated section 7(i) of the Northwest Power Act by failing to provide parties a “reasonable opportunity for cross examination” on the issue of whether revenue taxes should be included in the industrial margin. IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 96. The IOUs believe the witness had insufficient knowledge and understanding of the issues, and as a consequence, they should have been provided an opportunity to cross-examine a BPA attorney who had advised the witness on the issue of whether revenues should be included in the margin. *Id.*

##### BPA's Position

BPA believes that the IOUs' argument is without foundation when viewed in light of the entire record in this proceeding. The witness in question was cross-examined for 14 hours over a 3-day period. Tr. 1691-2079. The IOUs were provided with every piece of evidence, factual or otherwise, to which they were entitled, and the parties were not entitled, in any circumstance, to cross-examine a BPA attorney. *Id.*

##### Evaluation of Positions

Section 7 of the Northwest Power Act provides, in part, that “the hearing officer, *in [her] 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.” 16 U.S. §839e(i)(2)(B) (emphasis added). Originally, two weeks were scheduled for cross-examination, one week for examination of BPA's witnesses, and one week for examination of the parties' witnesses. As the record shows, BPA's witnesses were cross-examined for the entire two weeks. BPA waived cross-examination of other parties.

The BPA witness at issue here, Mr. Ebberts, was on the stand during 3 of the 10 days of cross-examination of BPA's witnesses. Tr. 1691-2079. Yet, the IOUs claim that this was insufficient opportunity for “reasonable” cross-examination. When Mr. Ebberts stated that he relied, in part, on advice of counsel on the matter of whether revenue taxes were typical for purposes of the margin, the IOUs demanded to know the basis for the advice provided to the witness. Tr. 1321. While BPA protested that the sole basis for the advice was commonly

available legal authorities and that the issue should be preserved for the briefing stage of the proceeding, the Hearing Officer disagreed. *Id.* at 1324-26. She ordered that BPA provide the basis for the advice that Mr. Ebberts relied upon. *Id.* at 1328. BPA complied fully with this order. *Id.* at 1537-39.

Yet, this too, according to the IOUs, was insufficient, and they filed a motion to strike that portion of Mr. Ebberts' testimony relating to revenue taxes on the grounds that Mr. Ebberts did not qualify as an expert in the field of utility taxation or revenue taxes. BPA has been clear that the 7(c)(2) Margin Study does not require specific expertise in matters of revenue taxation. The study is conducted for purposes of calculating the typical retail margin in response to specific statutory rate directives. Ebberts, WP-02-E-BPA-22, at 2; Tr. 1696-97. The Hearing Officer denied the PacifiCorp motion, stating in part that she had "no authority to grant the relief requested by PacifiCorp." Tr. 1993.

Thereafter, the IOUs argued that, in order to satisfy the statutory provisions, they were entitled to cross-examine BPA's attorney on the issue of revenue taxes. The Hearing Officer disagreed:

HEARING OFFICER EDWARDS: I think this matter has been totally blown out of proportion and does not carry the import that Ms. Jacklin [attorney for the IOUs] seems to think it has. The special rules she just referred to are never intended to apply to legal counsel and their work . . . If what you are trying to do is establish the fact that counsel did not research every state in order to come up with the conclusion that he purportedly gave to the witness, that can be determined through your own legal work and argued as a point on your brief. There is no point in dragging this through any more to get someone to admit as to what they did, what they did not do, what they looked at, what they did not look at.

I was very concerned when I asked you before the break what you were intending to do with this testimony, and you said you intended to impeach Mr. Wright [BPA's attorney]. Now, Mr. Wright is not a witness in this case, so the only purpose for putting him on the stand would be to cause him personal embarrassment and discredit his professional reputation in a public forum. I am not going to allow you to do that for that purpose.

Attorneys are only put on the stand under very extraordinary circumstances. When that happens, they are normally required to retire as counsel of record in so doing. I see nothing here that is going to aid you in that when the issue with respect to which states impose utility revenue taxes can be answered and addressed easily by any attorney in this room . . .

You spent a lot of time examining the witness. You know what he did and you know what he did not do. You have all of the record testimony. You have numerous data requests you've entered that indicate that. If you are going to attack the underlying use and application of the typicality test, you have a lot of examination on the record to help you do that . . .

I am not going to allow you to put Mr. Wright on the stand. There is no purpose for it. It will only cause more delays. I am just not going to allow it to happen.

Tr. 2091.

Thus, there are two separate issues posed for review by the Administrator: (1) whether Mr. Ebberts was sufficiently qualified as a witness so that his testimony should not be stricken; and (2) whether the parties had any right to cross-examine Mr. Wright, a BPA attorney.

With respect to the first issue, the Administrator's decision with regard to the issue of revenue taxes, as delineated in section 15.2.1 of this ROD, indicates that the Administrator believes Mr. Ebberts was sufficiently qualified to provide testimony relevant to all of the issues surrounding the section 7(c)(2) rate directives. His qualification statement, WP-02-Q-BPA-18, indicates that Mr. Ebberts has sufficient education, skill, training, and experience to serve as a witness in that capacity. Mr. Ebberts need not have any particular expertise in utility taxation simply because one of the issues pertains to whether revenue taxes should be included in the margin. BPA has stressed from the beginning its belief that the issue must be dealt with primarily as a legal issue. To that extent, it would have been inappropriate under the procedural rules for Mr. Ebberts to offer testimony on a legal issue. *See Special Rules of Practice to Govern this Proceeding*, WP-02-O-01, at 6. For the remainder, those limited factual issues necessary to make the determination were well within Mr. Ebberts' professional expertise, and those facts were made available to the parties through testimony and exhibits.

With regard to whether the parties have a right to question a BPA attorney, the Administrator finds that the Hearing Officer acted properly. Hearing Officer Edwards articulated a number of sound reasons for her decision, as cited above. Based on that reasoning, the Administrator believes that Hearing Officer Edwards was acting properly within her statutory discretion to define the scope of cross-examination in a manner that provides a reasonable opportunity for examination without being dilatory. There is no indication that this decision interfered with the Hearing Officer's duty "to develop a complete record." 16 U.S.C. §839e(i)(2). As a consequence, arguments to the effect that the decision denied parties statutory due process are totally without substance.

In their brief on exceptions, the IOUs pursue this line of argument once again. IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 74. The IOUs "strongly object to BPA using witnesses who cannot explain the basis for the conclusions in their testimony," and go on to argue that the "witness did not perform the factual investigation and analysis that went into the testimony, nor could he explain it." *Id.* A fair reading of the record shows that such allegations are unfounded. From the outset, the IOUs have been unhappy with BPA's findings in this area, but they did not build a convincing case in support of their own conclusions. Instead, they relied on anecdotal testimony that was not entitled to significant weight or credibility. Hoff *et al.*, WP-02-E-AC/GE/IP/MP/PL/PS/-03, at 19.

The IOUs also reargue their claim that the revenue tax issue is a "factual issue." IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 75. It remains mystifying how the IOUs can continue to assert that they have somehow been denied "facts" necessary to determine how taxes

embodied in state statutes should be treated for the purpose of a single Federal statutory provision. BPA did not find that an abundance of facts was necessary to carry out what is almost purely a question of statutory interpretation. Chapter 15 of this ROD makes it clear that a very limited number of “facts” are needed to analyze this issue. Those facts were provided in testimony. The real question is why the IOUs did not provide additional facts in their own case if they truly believed those were crucial to the outcome. They certainly had ample opportunity to do so.

Finally, the IOUs maintain once again that they should have been given an opportunity to question a BPA attorney, whom they refer to as the “undisclosed witness.” IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 75. As discussed above, the right of cross-examination in a BPA rate proceeding derives from section 7(i)(2)(B) of the Northwest Power Act. 16 U.S.C. §839e(i)(2)(B). The Administrator finds that the Hearing Officer provided a reasonable opportunity for cross-examination, as required by the statute, and did not exceed or abuse her discretion by refusing to permit cross-examination of BPA’s attorney. Moreover, the Administrator does not understand why IOUs believe that BPA’s use of the Hearing Officer’s directly quoted ruling from the bench somehow “giv[es] the reader an erroneous impression.” IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at n. 245.

### **Decision**

*The Hearing Officer provided the parties a reasonable opportunity for cross-examination of BPA’s witnesses. The testimony of BPA witness Ebberts will not be stricken, nor were the IOUs entitled to compel the testimony of BPA’s attorney.*

## **18.1.2 1996 Power Rate Settlement Agreement**

### **Issue**

*Whether BPA has breached the “no precedent” provision of the 1996 Partial Power Settlement Agreement with respect to the issues of revenue taxes, DSI floor rate, and Mid-C resources.*

### **Parties’ Positions**

The IOUs argue that BPA has breached the “no precedent” provision of the 1996 Partial Power Settlement Agreement by relying on the 1996 ROD as precedent for its decision on revenue taxes, the DSI floor rate, and Mid-C resources. IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 98. *See also*, IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 77.

### **BPA’s Position**

The IOUs’ interpretation of the 1996 Partial Power Settlement Agreement is erroneous. Moreover, BPA has not relied on the 1996 ROD as precedent.

## Evaluation of Positions

The IOUs state that the 1996 Settlement Agreement contains a clause memorializing the parties' agreement "that the *matters covered* by the Settlement Agreement would not be binding upon any parties in future proceedings, including rate cases." (Emphasis added.) IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 98. The IOUs go on to conclude that BPA has violated this covenant because it has "impermissibly and repeatedly relied upon the decisions, conclusions, and methodologies of the last case to justify some of its most controversial proposals in this proceeding." *Id.* Three areas in particular are cited: (1) the issue of whether revenue taxes should be included in the industrial margin; (2) calculation of the DSI floor rate; and (3) treatment of Mid-C resources. *Id.*

The IOU argument is flawed in three respects. First, it inaccurately defines the scope of "matters covered" by the Settlement Agreement. The Settlement Agreement provides as follows:

No action taken or not taken by BPA, any party, or the Hearing Officers in accordance with matters covered by this Power Settlement Agreement shall serve to create any procedural or substantive precedent . . . .

Settlement Agreement, at 1. Thus, the "no precedent" provision applies only to matters covered by the settlement agreement. As noted by the Administrator in the 1996 ROD, only a limited number of provisions were covered by the settlement agreement:

The Power Settlement provides that the parties agreeing to it also agree to the Transmission Settlement. Attachment 2, p. 3. The Power settlement also provides that the PF rate should be established at "less than 24.4 mills per kWh as shown on line 21 of Table RDS 50 of the 1996 Final Documentation to the Wholesale Power Rate Development Study." *Id.* at 2. It contains a specific proposal for assumptions relating to any underrecovery of Utility Delivery facilities' cost due to the limit on the Delivery Charge, a proposal for the adoption of the Availability Charge, and proposals relating to the computed maximum requirement waiver and Partial Load Shaping. *Id.* at 3.

1996 ROD, WP-96-A-BPA-02, at 5. This language accurately and fully tracks the provisions of the settlement document itself. *Id.* at Attachment 2. Thus, the matters covered by the Settlement Agreement do not include the three issues raised by the IOUs: revenue taxes, DSI floor rate, and Mid-C resources. Therefore, those issues are not governed by the "no precedent" clause, and the IOU argument, consequently, has no foundation.

Second, the IOUs mischaracterize the Hearing Officer's findings with respect to the Settlement Agreement. Citing the Hearing Officer's Order in response to the IOUs' Motion to Strike, WP-02-0-16, the IOUs assert the following:

The "no precedent" clause expressly prohibits the use of conclusions from the 1996 rate case to support the reasonableness of BPA's proposal in this case, as Hearing Officer Edwards correctly concluded in her ruling on this issue . . . .

As Hearing Officer Edwards observed, the no-precedent provision does not prevent witnesses from referring to the 1996 ROD in their testimony to provide background or context, but it does prohibit reliance on the 1996 ROD as the legal basis in support of their position.

IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 99-100. The IOUs fail to point out that the Hearing Officer clarified the scope of the order at hearing:

Under my earlier ruling on the motions to strike, *I did not interpret the Settlement Agreement of 1996 with respect to either the precedential or binding nature of that agreement as to all issues contained in the ROD*. I merely pointed out that the right to contest clause could not be used for the particular purpose it was being raised for at that time. *The order was issued for reasons other than the arguments based upon the settlement agreement*.

The meaning of the settlement agreement appears to be still in dispute as to what issues are actually covered therein. This is a legal controversy which can be addressed by the participants in their briefs.

Tr. 1992 (emphasis added). Thus, the Hearing Officer clarified that the Order relied upon by the IOUs did not interpret the settlement agreement, and particularly not in the manner now relied upon by the IOUs. The IOU arguments in this vein must therefore be disregarded.

Third, the IOUs have erroneously concluded that BPA used the 1996 ROD as precedent. As indicated elsewhere in this ROD, Mr. Ebberts did not use the 1996 ROD as precedent. *See* chapter 15, *supra*. On the issue of revenue taxes, he did adopt the methodology used in 1996-- and in that sense he “relied” upon the “typicality” test used in 1996. *Id.* But he testified repeatedly during cross-examination that he did so only after reviewing historical documentation from other rate cases. Tr. 1691-2079. Thus, he exercised independent judgment and used that methodology because, in his professional judgment, it was the correct and proper way to make the determination.

Similarly, Mr. Ebberts used the IP-83 Standard rate as the basis for the floor rate, as had been done in 1996. As pointed out elsewhere in testimony, the IP-83 Standard rate has been the basis for the floor rate in every rate case since 1985. Ebberts, WP-02-E-BPA-47, at 6. Of course, it can be said that he adopted a methodology that had been used historically, but that does not mean that he used prior rate cases as precedent. In fact, when the PPC and the IOUs proposed that the Standard rate be replaced by the Premium rate, the rebuttal testimony and this ROD indicate that BPA has responded to that issue on its merits. *Id.*; *see* chapter 15, *supra*. While the Administrator has chosen to continue using the Standard rate as the basis for the floor rate, it is because, as the record shows, she has examined the evidence, listened to the arguments, and then made a reasoned policy choice to do so--not because she is bound by her predecessors’ decisions.

With respect to the treatment of Mid-C resources in the 7(b)(2) rate test, the substantive decision is moot, and that renders the issue of reliance on BPA’s 1996 rate case moot. *See* ROD section 13.5.

## **Decision**

*The issues cited by the IOUs were not “matters covered” by the Settlement Agreement but, in any event, BPA did not use the 1996 rate case as precedent for the decisions being made in this proceeding.*

### **18.1.3      Official Notice**

#### **Issue 1**

*Whether the Hearing Officer erred in not taking official notice of certain documents designated by CRITFC/Yakama.*

#### **Parties’ Positions**

On March 17, 2000, CRITFC/Yakama filed a motion requesting that official notice be taken of certain documents referenced in their initial brief. WP-02-M-90. CRITFC/Yakama argue that the documents are official publications or reports of government agencies and, as such, are well known within the region, are within the expertise of BPA, and are not subject to reasonable dispute under the Federal Rules of Evidence. *Id.* CRITFC/Yakama claim that they will be prejudiced if the request is denied. *Id.*

The DSIs filed a response alleging that CRITFC/Yakama should have sought admission of the evidence prior to the close of the hearing. WP-02-M-96. The DSIs also argue that, contrary to the assertions of CRITFC/Yakama, the documents in question are highly controversial and hotly disputed. Thus, the DSIs argue that it would be inappropriate to foreclose the other parties from testing these documents by admitting them into evidence now. *Id.*

PPC also filed a response in opposition to the CRITFC/Yakama request, noting that the documents cited in testimony had been previously stricken as lacking relevance. WP-02-M-94. The remaining documents in the CRITFC/Yakama request were not available for cross-examination.

#### **BPA’s Position**

BPA did not file a response to the motion, and the Administrator is addressing it for the first time.

#### **Evaluation of Positions**

The Administrator fundamentally agrees with the Hearing Officer’s determination that the request for administrative notice should be denied, for the reasons articulated in Judge Edwards’ Order. *See* WP-02-0-24. The Administrator is particularly concerned that “since the proceeding is now closed, admission at this time would cause prejudice to the other parties because they have had no opportunity to explain or rebut the material or to probe its reliability in any way.” *Id.* at 2. Any danger of prejudice to CRITFC/Yakama is far outweighed by the potential

unfairness to other parties. This is particularly true in light of the fact that CRITFC/Yakama offer no reason for the delay in seeking admission of material that contains information and assertions that are clearly the subject of much dispute in this region.

### **Decision**

*CRITFC/Yakama's request that the Administrator take official notice of the designated documents is denied.*

### **Issue 2**

*Whether the Administrator should take administrative notice of IOU Exhibit B, Exhibits and Attachments of the Initial Brief of the Northwest IOUs, WP-02-B-AC/GE/IP/MP/PL/PS-01.*

### **Parties' Positions**

The IOUs argue that the Administrator should take official notice of a document styled Electric Sales and Revenue 1997, October 1998, Energy Information Administration, DOE/EIA-0540(97), table 16. IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 42; *see also*, IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 42. The DSIs argue that the request should be denied. WP-02-M-86.

### **BPA's Position**

BPA has not taken a prior position on this issue.

### **Evaluation of Positions**

At footnote No. 119 of the IOU Brief, and without further explanation, the IOUs request that official notice be taken of a document styled Electric Sales and Revenue 1997, October 1998, Energy Information Administration, DOE/EIA-0540(97), table 16. IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 42. The DSIs filed a responsive pleading on March 1, 2000. WP-02-M-86. The DSIs argue that the report "is not an appropriate subject for official notice, and the report is not immune from the 7(i) requirement that the parties be afforded an adequate opportunity to refute 'any material submitted by any other person' . . . ." *Id.* at 2.

On March 8, the IOUs responded to the DSI motion. WP-02-M-87. They argue that the Exhibit is appropriate for either judicial or official notice. *Id.* They also argue that the report in question contains no adjudicative facts regarding the parties to this proceeding that would be appropriate for hearing and cross-examination. Rather, the IOUs claim, the DOE Report is evidence that BPA has not properly calculated a "typical" margin. *Id.* at 6. The IOUs also maintain that the report is within BPA's area of expertise, and that the DSIs have had ample opportunity to challenge the material contained in the Exhibit. *Id.*

The Administrator does not find the IOU arguments persuasive for many of the same reasons the CRITFC/Yakama request was denied. The IOUs do not provide any compelling reason why the Exhibit was not provided at an earlier stage of the proceeding, nor do they make a clear case with

regard to the relevance of the material. In fact, the IOU position seems to be largely self-contradictory. The IOUs state that the Exhibit “contains no adjudicative facts regarding the Parties to this proceeding.” *Id.* Yet, in the very next sentence, they claim that the same Exhibit “is evidence that BPA has not properly calculated a ‘typical’ margin.” *Id.* Elsewhere in the same document, the IOUs purport to be offering the Exhibit in rebuttal to BPA’s margin study. *Id.*

The issue of whether BPA has properly calculated the margin is one of the many legal issues being adjudicated in this proceeding. The Advisory Committee Notes for Rule 201 of the Federal Rules of Evidence refer to “non-adjudicative” facts as “non-evidence” facts. “Adjudicative” facts are described as follows:

What, then are “adjudicative” facts? Davis refers to them as those “which relate to the parties,” or more fully:

“When a court or an agency finds facts concerning the immediate parties--who did what, where, when, how, and with what motive or intent--the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. \* \* \*

“Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their business.” 2 Administrative Law Treatise 353.

Rule 201, Advisory Committee Notes on 1972 Amendments. The exhibit proffered by the IOUs consists of facts which the IOUs seek to introduce as substantive evidence to show that BPA has not properly calculated the industrial margin and to rebut the study that BPA conducted in support of its margin calculation. Such facts are unquestionably “adjudicative” facts. The Advisory Committee Notes make clear that judicial notice of such “adjudicative” facts is extremely uncommon:

With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy . . .

This rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those ‘so universally known that they cannot reasonably be the subject of dispute,’ those ‘so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute,’ and those ‘capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.’

*Id.* The DSIs have convincingly argued that the Exhibit is not a proper candidate for judicial or administrative notice in this proceeding:

The Energy Information Administration's report is certainly not self-explanatory as to how, if at all, it relates to the issue on which the IOUs seek to offer it [*i.e.*, the appropriate level of the industrial margin]. As the overview to Exhibit B notes, the consumers reflected in the report are so small they are reclassified between the commercial and industrial sectors from year-to-year based on such things as changes in demand level. Indeed, the Energy Information Administration even classifies farms as part of the industrial sector. The inappropriateness of such data is manifest. For example, the very first utility on Exhibit C is the City of Bandon, reported as having six industrial customers with total sales of 1,842 MWh. If these figures are accurate, the average hourly consumption of the six customers is 35 kW, on a percent of the size of the smallest customer treated by BPA as 'industrial.' The so called 10 industrial customers of the City of Idaho Falls are, on average, less than one-tenth the size of the average customer of the City of Bandon. Given the obvious inverse relationship between average cost per kWh and customer size . . . use of such data to determine the margin appropriate for DSIs is improper. The IOUs then present highly misleading calculations based upon the data. IOUs have exaggerated their proposed margin by uniformly understating power and transmission costs of the utilities by pretending that all of the power sold for use by the tiny industrial customers of the utilities is purchased from BPA at a 100 percent load factor. There is no reason to believe that all power reflected in Exhibits B and C is even purchased from BPA; it almost certainly is not. Finally, the IOUs have also excluded from Exhibit C six utilities that in aggregate serve a substantial proportion of large industrial load in the region.

WP-02-M-86. The DSIs have raised substantial questions regarding the relevance of the Exhibit for the purpose for which it is being offered. Moreover, the DSIs' analysis has shown convincingly that the probative value of the Exhibit could have been tested on many levels by subjecting it to the rigors of the hearing process, where the parties would have had the opportunity to present rebuttal and conduct cross-examination. Despite the IOUs' assertions that the parties have had adequate opportunity to test the Exhibit, these traditional avenues of exploring the evidentiary facts would be totally denied to the parties were the request for taking official notice granted.

In their brief on exceptions, the IOUs make the following observation:

BPA appears to misunderstand the purpose of requesting official notice of the Electric Sales and Revenue Report. It is not offered for the purpose of establishing in this proceeding an industrial margin based on data in the report. *That margin can be set correctly using data available on taxes in the sample contained in BPA's Industrial Margin Study . . .* At a minimum, the report should officially be noticed for the limited purposes of demonstrating that there are Northwest utilities outside of Washington and Oregon with industrial load, and to

evidence that the industrial margins reported by DOE appear to be far higher than that proposed by BPA. The DOE report simply provides a basis to question the reasonableness of the margin proposed by BPA.

IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 77 (emphasis added). This statement appears to be a significant departure from the IOUs' earlier representations that the report was submitted for the purposes of "rebuttal to the data in the BPA confidential report" and as "evidence that BPA has not properly calculated a "typical" margin. Northwest IOUs' Answer to Motion of the DSIs to Strike, WP-02-M-87, at 2, 6. Regardless of this apparent inconsistency in the IOU position, the fact remains that the IOUs did not attempt to use this material during the evidentiary phase of the proceeding, or request official notice at that time, in spite of having every opportunity to do so. Instead, they waited until the evidentiary record was closed. The Administrator sees no excuse for the delay and finds that taking official notice at this stage of the process would deprive other parties of the right to present evidence in rebuttal. *United States v. Abilene & S. Ry. Co.*, 265 U.S. 274, 289 (1924); *see also, Sarria-Sibaja v. INS*, 990 F.2d 442 (9<sup>th</sup> Cir. 1993) and *Stein et al.*, Administrative Law at §25.03.

### **Decision**

*The IOUs' request that the Administrator take official notice of Exhibit B is denied.*

#### **18.1.4 Waiver of Attorney-Client Privilege**

##### **Issue**

*Whether the testimony of Burns and Elizalde, WP-02-E-BPA-37, dealing with whether there is a legal obligation to serve the DSIs, should be stricken because the witnesses waived the attorney-client privilege.*

##### **Parties' Positions**

Alcoa/Vanalco argue that the testimony should be stricken because the witnesses waived the attorney-client privilege. Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 24; *see also*, Alcoa/Vanalco Ex. Brief, WP-02-R-AL/VN-02, at 94. Moreover, as a remedy for this waiver, these parties demand that BPA adopt the position that BPA does have an obligation to serve the DSIs. *Id.*

##### **BPA's Position**

Alcoa/Vanalco are incorrect. There was no waiver of attorney-client privilege, and the requested remedy would be inappropriate in any event.

##### **Evaluation of Positions**

Alcoa/Vanalco have challenged the testimony of BPA's policy witnesses, maintaining that BPA has used the attorney-client privilege as both a "sword" and a "shield." A more accurate

characterization would simply acknowledge the challenged statements as roadmaps charting the course of the hearing from development of the factual record through briefing of legal issues. Alcoa/Valco's overly technical approach to strategy has been counterproductive in the context of this administrative rulemaking. With regard to the specific issue of attorney-client privilege, the arguments made by Alcoa/Valco do not promote an exchange of views, but only serve to make parties more wary and less open. The Hearing Officer put it well:

To begin with, I want to point out that the kinds of statutory obligations that we are talking about here with respect to Northwest Power Act and other things are obligations that have been in existence for many, many years, and have been litigated over and over again, and are currently constantly under discussion between counsel. This is not something new for which a witness' position is going to bring any kind of surprise to any other party. So the type of surprise you are talking about here is not a compelling reason to compel testimony because it is something new which counsel could not have anticipated and did not already have a well-formed opinion with respect to. The testimony references here are merely statements that counsel advised the witness with respect to a legal position taken from one of those statutes.

The questions here today, right from the beginning, objections were properly raised by BPA's counsel, from the very beginning, to the nature of this testimony. The question I permitted to be allowed was one that went to the form of the question, that is, Was your advice oral or written? That was the question I permitted. Counsel then proceeded to go into other areas, trying to force the witness to comment specifically as to those conversations, regardless of the form, and objections had been raised.

*I won't allow this line of questioning to continue. I am going to rule that BPA has not waived any privilege with respect to this matter and instruct counsel to get off this program of trying to argue legal interpretations of statutes, policymaking decisions or other such things with witnesses who are not competent to render that kind of legal analysis.*

You may disagree with the witness' conclusion, and you can argue the law in your brief, but let us not do it here through these witnesses. That is improper. Now, let us move on.

Tr. 102 (emphasis added). This ruling is clearly within the scope of the Hearing Officer's statutorily defined duties: "[T]he hearing officer, in [her] discretion, shall allow a reasonable opportunity for cross-examination, which, as determined by the hearing officer, is not dilatory . . . ." 16 U.S.C. §839e(i)(2)(B).

Apart from the issue of whether there was any waiver of the attorney-client privilege, the procedural rules are clear that the Hearing Officer cannot order BPA to disclose anything that it would not be required to disclose under the Freedom of Information Act. *Rules of Procedure Governing Rate Hearings* §1010.8(f). Clearly, the discussions that Alcoa/Vanalco wished to probe in cross-examination would be protected by the deliberative process exemption. 5 U.S.C. §552(b)(5). In ruling that certain of its communications were privileged under the deliberative process exception, FERC determined that there was “no unfairness to outside parties in the mere fact that the Commission employees who sometimes act as advisors and sometimes as trial counsel may, as a result, have greater access to policy views and discussion within the Commission.” *McDowell Co. Consumers Council v. American Electric Power*, 23 FERC ¶61,142 at 61,321 (1983). The situation at Commission proceedings is analogous to a BPA rate proceeding. BPA is ultimately the decisionmaker, but BPA officers, staff, and attorneys act as trial staff while continuing to perform other roles and carry out other duties for the agency. Similarly, there was no action by BPA or harm to Alcoa/Vanalco sufficiently serious to warrant a waiver of the deliberative process privilege. As FERC stated:

[W]e fail to see how [parties] will be prejudiced if the papers are withheld from the company. [They] will still have all the procedural rights to which parties are normally entitled in an administrative proceeding. Our final decision will, of course, be based on the record to be developed during the hearing. [Parties] will be unable to probe the internal deliberative process of [the agency], but this is precisely the purpose of the privilege.

*Id.* This reasoning applies with equal force to Alcoa/Vanalco’s assertions regarding the testimony of Burns and Elizalde. The issue of attorney-client privilege therefore must give way to the agency’s need to promote full and frank internal discussions on issues of public policy.

Moreover, the issue of whether BPA has an obligation to serve the DSIs is a question of statutory interpretation, a pure question of law. It was not an appropriate subject for cross-examination, or a proper subject for the witnesses to deal with in testimony. *Rules of Procedure Governing Rate Hearings* §1010.8(f). It is an issue that has been argued on brief in this proceeding, and will be argued in the courts, if necessary, by those who have the proper credentials to make such arguments. This is true irrespective of whether there was a technical waiver of the attorney-client privilege. Alcoa/Vanalco’s request for relief only underscores the futility of its entire line of reasoning by asking that the Administrator “disregard any testimony or advocacy by BPA suggesting there is no obligation to serve the DSIs, and issue a ROD that confirms the obligation to sell power to the DSIs.” Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 27; *see also* Alcoa/Vanalco Ex. Brief, WP-02-R-AL/VN-02, at 94-99. The statement is a *non sequitur*. The testimony of a fact or policy witness is not necessary to support a reasonable interpretation of a statutory provision, nor can it be used to compel a specific interpretation for the benefit of one particular class.

Thus, even if the testimony were stricken, it would change nothing. Additionally, it would be improper for the Administrator to simply adopt the Alcoa/Vanalco opinion on this issue as a “remedy.” Doing so would be an inappropriate delegation of her statutory responsibility.

Furthermore, the question of whether BPA has an obligation to serve the DSIs is not a rate issue. Consequently, it need not be decided pursuant to a section 7(i) hearing. As a result, Alcoa/Vanalco are not entitled to any of the procedural requirements of section 7(i) with respect to resolution of this issue, including the right to discovery or cross-examination. It follows, as a matter of course, that since the issue is not subject to these procedural requirements, then Alcoa/Vanalco cannot be entitled to any remedy for an alleged procedural defect.

Moreover, there has been no final decision regarding the issue of whether BPA has an obligation to serve the DSIs, and such a decision can not be forced upon the Administrator through procedural maneuvering in a hearing where the issue will not be decided. Finally, the issue itself is moot for the time being because BPA is proposing to serve the DSIs. *See* ROD chapter 15.

### **Decision**

*There was no waiver of attorney-client privilege. Alcoa/Vanalco's request that the testimony of Burns and Elizalde be stricken is denied.*

## **18.1.5 Validity of Evidence Pertaining to the Industrial Margin**

### **Issue**

*Whether BPA's margin sample and the testimony of Mark Ebberts should be stricken.*

### **Parties' Position**

Alcoa/Vanalco argue that Mr. Ebberts' testimony should be stricken because he is unqualified as an expert. Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 31-32; *see also*, Alcoa/Vanalco Ex. Brief, WP-02-R-AL/VN-02, at 99-110. Moreover, Alcoa/Vanalco claim, the entire BPA margin study should be disallowed because it is flawed and biased and therefore inadmissible. *Id.*

### **BPA's Position**

BPA has not had an opportunity to take a prior position on this issue.

### **Evaluation of Positions**

Motions to strike must be raised during the hearing itself as specified in the procedural schedule. §1010.11(e). Thereafter, parties may request review of the Hearing Officer's decision by the Administrator. Alcoa/Vanalco did not raise these issues by motion during the hearing, and they are therefore waived.

Moreover, the arguments are without merit. Mr. Ebberts, as indicated elsewhere in this ROD, is qualified as an expert on the industrial margin calculation. WP-02-Q-BPA-18; *see* chapter 15, *supra*. Similarly, the margin study has been conducted in a manner that is consistent with past margin studies. Ebberts, WP-02-E-BPA-22, at 3-4. The evidence in both instances is relevant, the standard required for admission under the procedural rules. Alcoa/Vanalco's arguments

really go to the weight and sufficiency of the evidence, and such concerns can be properly framed as legal arguments. It is not proper, however, to use such issues as a vehicle to strike testimony that is obviously relevant and thereby attempt to cloud the unmistakable fact that the parties requesting relief made no serious effort to build a substantive case of their own.

In their brief on exceptions, Alcoa/Vanalco reargue this issue, alleging that Witness Mark Ebberts is unqualified and his testimony inherently biased and unreliable. With respect to Alcoa/Vanalco's attacks on Mr. Ebberts' competence as a witness, the competency of a witness to testify at an administrative hearing rarely arises and when it does, it is usually resolved as a matter of credibility or weight to be given the testimony. Stein *et al.*, Administrative Law at §27.04. The reason for this approach is that in most administrative hearings, including a section 7(i) hearing, the standard for admissibility is whether evidence is relevant, material, and not unduly repetitious.

An administrative factfinder enjoys wide discretion in assessing the probative value of expert opinion testimony. Stein *et al.*, at §28.03. Contrary to Alcoa/Vanalco's assertions, the Administrator finds Mr. Ebberts to be fully qualified to be an expert in this area. Alcoa/Vanalco draw the line so narrowly that very few people, whether at BPA or anywhere else, could qualify. Mr. Ebberts has many years of experience as a BPA employee, and his educational credentials are impressive. Yet, Alcoa/Vanalco claim that he "lacks the education and experience that one would expect." Alcoa/Vanalco Ex. Brief, WP-02-R-AL/VN-02, at 104. As to the specific examples culled from the transcript to buttress their case, the Administrator finds those inconclusive at best and at worst misleading.

### **Decision**

*The Administrator will not strike the industrial margin sample or the testimony of Mark Ebberts and finds further that they should be afforded considerable weight.*

#### **18.1.6 Admissibility of Newspaper Article**

### **Issue**

*Whether BPA should reverse the Hearing Officer's order striking limited testimony from the prefiled testimony of William A. Gaines, filed on behalf of PSE.*

### **Parties' Positions**

PSE argues that PSE's stricken testimony concerned BPA's current rate case, not BPA's 1996 rate case; that the statements were not hearsay because they were admissions of a party opponent; and that even if PSE's statements were hearsay, BPA should admit the statements anyway. See PSE Motion to Reverse Hearing Examiner's Order Striking Testimony, WP-02-M-53, at 2-6 ("PSE Motion"); PSE Ex. Brief, WP-02-R-PS-01, at 1-8.

## **BPA's Position**

BPA moved to strike a limited portion of PSE's testimony on two grounds: (1) the testimony was not relevant and, even if relevant, its prejudicial effect far outweighed its probative value; and (2) the testimony constituted inadmissible hearsay. *See* BPA's Motion to Strike Direct Testimony of PSE, WP-02-M-15 ("BPA Motion").

## **Evaluation of Positions**

In its motion, filed November 22, 1999, BPA argued that PSE's testimony should be stricken on two grounds: (1) the testimony is not relevant and, even if relevant, its prejudicial effect far outweighs its probative value; and (2) the testimony constitutes inadmissible hearsay. *Id.* PSE filed a response to BPA's motion. *See* PSE's Answer in Opposition to BPA's Motion to Strike Direct Testimony of PSE, WP-02-M-19. In its answer, PSE argued that its testimony was relevant, not unfairly prejudicial, and not inadmissible hearsay. *Id.* On December 8, 1999, the Hearing Officer issued an order striking PSE's testimony. *See* Order Granting In Part And Denying In Part Motions To Strike Testimony, WP-02-O-14, at 1-3 ("Order"). PSE did not file a motion for reconsideration with the Hearing Officer. On February 28, 2000, PSE filed a motion asking the Administrator to reverse the Hearing Officer's order. *See* PSE Motion. In the Draft ROD, BPA upheld the Hearing Officer's order because the Hearing Officer's order was well-reasoned and the facts supporting the order had not changed. Draft ROD, WP-02-A-01, at 18-13 through 18-17.

In its motion and brief on exceptions, PSE quotes its stricken testimony, the review of which again establishes that such testimony is not relevant. PSE Motion at 2-3; PSE Ex. Brief, WP-02-R-PS-01, at 3-4. The quotations in PSE's stricken testimony related solely to BPA's 1996 rate case and not the current rate case. *See* PSE Motion at 2-3. PSE's witness quoted a newspaper article written, not by the witness, but by a reporter for the Oregonian. The article paraphrases and briefly quotes a BPA employee, an employee who had not worked on the section 7(b)(2) rate test in the 1996 rate case and who otherwise had no expertise in section 7(b)(2) matters. Tr. 2173-74. The article maintains that the BPA employee described a meeting during which the BPA employee suggested that if the preference customers' rate cap were exceeded [the section 7(b)(2) rate test triggered], costs would be shifted off the preference customers and aluminum companies. In the article, the employee is quoted as saying that no one at the meeting responded verbally to his statement. While it is beyond dispute that the quoted statements were made solely in reference to BPA's 1996 rate case, PSE argues that the statements provide "background for understanding the current proceedings" and that the Hearing Officer incorrectly concluded that PSE's inadmissible hearsay testimony was a challenge to BPA's 1996 proceeding. PSE Motion at 3; PSE Ex. Brief, WP-02-R-PS-01, at 4. PSE's argument is incorrect and mischaracterizes the Hearing Officer's order. The Hearing Officer stated:

The 1996 rate case is final and cannot be reopened. Puget responds that the testimony is offered not as a challenge to the 1996 rates but to demonstrate ongoing behavior that affects the proposed rates. The problem with this argument is that Puget does not show a pattern of ongoing behavior. It takes a single

newspaper article and assumes the conduct has been “historical.” A single event does not, in and of itself, establish a pattern of behavior, nor does it create a sufficient nexus to establish relevancy in the current case.

Puget has an opportunity to test the 2002-2006 rates within the parameters of this proceeding. If it can establish its claims of “distortion” of the proposed rates, it must be done on evidence arising from this case, not the 1996 case.

Order, WP-02-O-14, at 2. It is clear that the Hearing Officer did not simply conclude that PSE’s testimony was a challenge to BPA’s 1996 rates, but rather, expressly recognized PSE’s argument that “the testimony is offered not as a challenge to the 1996 rates but to demonstrate on-going behavior that affects the proposed rates.” *Id.* The Hearing Officer also directly addressed PSE’s argument, finding that PSE’s testimony, even if offered to demonstrate ongoing behavior, “does not show a pattern of on-going behavior. It takes a single newspaper article and assumes the conduct has been ‘historical.’ A single event does not, in and of itself, establish a pattern of behavior, nor does it create a sufficient nexus to establish relevancy in the current case.” *Id.* In any event, PSE has not provided a sufficient nexus between the statement and the present rate case to show that it has any relevance to the matters under consideration here.

PSE argues that in BPA’s 1996 rate case, BPA made a number of incorrect assumptions and calculations in conducting the 7(b)(2) rate test in order to keep the DSI aluminum companies from leaving BPA. PSE Motion, at 4; PSE Ex. Brief, WP-02-R-PS-01, at 5. These allegations were thoroughly rebutted in BPA’s 1996 ROD, WP-96-A-02, at 221-268, and in the current rate case, Kaptur *et al.*, WP-02-E-BPA-56, at 2-5. PSE argues that BPA’s 1996 rate case decisions took benefits away from residential customers and gave them to DSI companies. PSE Motion, at 4; PSE Ex. Brief, WP-02-R-PS-01, at 5. These allegations also were thoroughly rebutted in BPA’s 1996 ROD, WP-96-A-02, at 221-268, and in the current rate case, Kaptur *et al.*, WP-02-E-BPA-56, at 2-5. PSE also argues that although circumstances are different, BPA continues to perpetuate its past mistakes. PSE Motion, at 4; PSE Ex. Brief, WP-02-R-PS-01, at 5. This argument lacks merit. In its brief on exceptions, PSE refers in a footnote to BPA’s testimony in its 1996 rate case and to the IOUs’ testimony in the current case as BPA’s alleged “continued mistakes.” PSE Ex. Brief, WP-02-R-PS-01, at 5, n. 8. PSE’s reference to BPA’s 1996 testimony is to an excerpt of a discussion of the DSI margin. This issue is also referenced by PSE in the IOUs’ testimony with regard to excluding revenue taxes in calculating the DSI margin. These issues are not decided in conducting the section 7(b)(2) rate test, but are decided in the development of rates for BPA’s DSI customers. PSE and the IOUs had the opportunity, and in fact used the opportunity at great length in BPA’s current rate case, to file testimony and legal briefs regarding this issue. *See Hoff et al.*, WP-02-E-AC/GE/IP/MP/PL/PS-03, at 3, 11-12; *Hoff et al.*, WP-02-E-AC/GE/IP/MP/PL/PS-10, at 1-3; *Hoff et al.*, WP-02-E-AC/GE/IP/MP/PL/PS-13, at 2-3; IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 27-47. Any decision in BPA’s current rate case on this issue will be made on the record of BPA’s 2002 rate case.

PSE’s footnote citation to the IOUs’ testimony in the current rate case leads one to a list of issues. PSE Ex. Brief, WP-02-R-PS-01, at 5, n. 8, citing *Hoff et al.*, WP-02-E-AC/GE/IP/MP/PL/PS-03, at 6-7. The first of these issues concerns BPA’s ASC

Methodology, which was developed in a separate administrative proceeding in 1984 and is not established in BPA's rate cases. This procedural issue is addressed in detail in the current proceeding. *See* ROD section 11.2. Because it is not a substantive rate case issue, it is not a continuing rate case "mistake." Another issue referenced by PSE is BPA's 1996 alleged failure to equalize cash reserve accumulations in the Program Case and 7(b)(2) Case. The IOUs did not raise this issue in BPA's current rate case. Because they have not raised the issue in the current proceeding, and it is not a contested issue, it is inappropriate to refer to it as a continuing mistake. Another issue referenced by PSE is BPA's 1996 alleged failure to limit the cash reserve accumulation. This is a revenue requirement issue and again, the IOUs did not raise this issue in BPA's current rate case. Because they have not raised the issue, and it is not a contested issue, it is inappropriate to refer to it as a continuing mistake. Another issue referenced by PSE is BPA's alleged failure to include the proper amount of section 7(g) costs as uncontrollable events in the 7(b)(2) rate test. This issue is being addressed in BPA's current rate case. The issues regarding uncontrollable events in the current case, however, are *different* issues from those addressed in BPA's 1996 rate case. The current case involves PNRR and the costs of terminated generating facilities, arguments that were not raised by any party in BPA's 1996 rate case. Draft ROD, WP-02-A-01, section 13.3. Therefore, these issues cannot be continuing mistakes, as they are new issues. Another issue identified by PSE is the issue of calculating Mid-C resource availability and costs. This issue did not affect the development of BPA's rates in 1996 in any manner whatsoever, because the circumstances for implementing this issue did not arise. In addition, this issue is moot in the current rate case. Draft ROD, WP-02-A-01, section 13.5. It is inappropriate to refer to this issue as a continuing mistake when it did not affect BPA's 1996 rates and the issue is moot in the current rate case. Another issue referenced by PSE is the inclusion of a 7(b)(2) industrial adjustment in a 7(c)(2) delta calculation. This is a COSA issue and not a section 7(b)(2) rate test issue. *See also* Draft ROD, chapter 13, section 13.5. More importantly, however, the IOUs did not raise this issue in BPA's current rate case. Because they have not raised the issue, and it is not a contested issue, it is inappropriate to refer to it as a continuing mistake.

In summary, PSE's argument that BPA has continued mistakes from its 1996 rate case has little merit, and thus the nexus between the newspaper article and BPA's current rate case is virtually non-existent. Insufficient facts relevant to the current rate case have been introduced to demonstrate any impropriety on BPA's part in the present proceeding. Therefore, no relevance can attach to facts from the 1996 rate case introduced to show a "pattern." *See* Fed. R. Evid. 401, 402, and 403.

PSE also fails to mention that the issue it has raised regards PSE's reliance on a newspaper article as the sole basis for this portion of its testimony. As noted above, the Hearing Officer's order expressly recognized that this newspaper article and a single event do not establish a pattern of behavior or create a sufficient nexus to establish relevancy in the current case. Order, WP-02-O-14, at 2. PSE also fails to note that PSE "has an opportunity to test the 2002-2006 rates within the parameters of this proceeding. If it can establish its claims of 'distortion' of the proposed rates, it must be done on evidence arising from this case, not the 1996 case." *Id.* In fact, PSE was permitted to raise these arguments in testimony that was not stricken. *See* Gaines, WP-02-E-PS-01, at 9-10; Hoff *et al.*, WP-02-E-AC/GE/IP/MP/PL/PS-03, at 7-8; Eakin *et al.*,

WP-02-E-02, at 3. PSE has therefore not been precluded from raising this issue in the rate case; rather, it has been required to do so with relevant evidence.

PSE next argues that the excluded statements were not hearsay because they were admissions of a party opponent. PSE Motion, at 4; PSE Ex. Brief, WP-02-R-PS-01, at 7. It should be noted at the outset that hearsay evidence is generally admissible at an administrative hearing. Stein *et al.*, Administrative Law at §26.01. However, its status as hearsay is germane to the question of whether or not the evidence is relevant and, just as important, to the question of how much weight the evidence should be given, in the event that it were admitted into the record. *Id.* at §26.02. This issue was directly addressed in BPA's motion to strike and in the Hearing Officer's order. BPA's motion to strike noted:

Rule 801 of the Federal Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The testimony BPA moves to strike is inadmissible hearsay. Indeed, PSE's testimony is triple hearsay. PSE quotes a newspaper article, which in turn quotes alleged statements made by a BPA employee, whose impressions are, in turn, predicated on his conclusion that non-verbal conduct of other persons was intended as an affirmation of his own statements. The Hearing Officer has recognized that this type of testimony is inadmissible. In BPA Docket No. FPS-96R, 1996 Firm Power Products and Services Rate Schedule Correction Proceeding, the Hearing Officer excluded testimony that quoted a regional newsletter, which in turn quoted a BPA employee. The facts in the instant case are virtually identical and PSE's hearsay testimony should be excluded for the same reasons. See Order Granting In Part And Denying In Part Motion To Strike Testimony, FPS-96R-O-08 at 3.

While PSE may argue that the triple hearsay in its testimony is an admission of a party-opponent, this argument is not persuasive. In *Horta v. Sullivan*, 4 F.3d 2 (1<sup>st</sup> Cir. 1993), a newspaper article bearing a striking factual similarity to the one in question here was stricken. The plaintiff attempted to introduce a newspaper account reporting statements of one of the defendants which contradicted an affidavit submitted in support of the motion for summary judgment. *Id.* at 8. On appeal, the court ruled that the article should have been stricken and could not be used to show there was a genuine issue of material fact:

The account is hearsay, inadmissible at trial to establish the truth of the reported facts. In fact, the newspaper account is hearsay within hearsay. See Fed. R. Evid. 805. Even were appellee Chief Mello the sole source of the article's information, so that his statements could be regarded as the nonhearsay admissions of a party opponent, see Fed. R. Evid. 801(d)(2), the article itself constitutes inadmissible out-of-court statements, by unidentified persons, offered to prove the truth of the matter asserted. See Fed. R. Evid. 801(c).

*Id.* Similarly, PSE offers a newspaper article that sparingly quotes a BPA employee's statements. These statements leap to an inference of bad motive based only on a temporal sequence of events that involved no oral or written assertions whatsoever. BPA has no

opportunity to test the credibility of the reporter or the accuracy of his perceptions. Moreover, there is no indication that the non-verbal conduct upon which the BPA employee based his conclusions was in any way intended to constitute consent or acquiescence to his statement. BPA Motion at 5-6. BPA also noted that:

As the courts have recognized, “[t]hat a statement of fact appears in a daily newspaper does not of itself establish that the stated fact is ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” *Cofield v. Alabama Public Service Commission*, 936 F.2d 512 (11<sup>th</sup> Cir. 1991).

*Id.* at 6. More importantly, the Hearing Officer concluded that PSE’s argument was not persuasive:

Puget makes additional arguments concerning unfair prejudice and admissions that are not inadmissible hearsay. Puget claims the hearsay testimony must be allowed because it cannot compel the appearance of the reporter or of Mr. Revitch who was quoted in the news article. This does not help Puget’s case because it does not have the right witness to authenticate the newspaper article or to prove the truth of the contents . . . Puget’s witness was not involved in the creation of the news release and cannot testify as to whether the article accurately repeats statements made by Mr. Revitch or whether the statements were taken out of context for some other purpose.

A newspaper article, presented for the truth of the facts contained therein, without substantiation, has no foundation and no probative value whatsoever. Because of this, any evidentiary value is substantially outweighed by the danger of unfair prejudice. Rule 403, Federal Rules of Evidence.

Order at 3. As noted by the Hearing Officer, PSE could not provide a witness to authenticate the newspaper article in any manner. *Id.* In this instance, PSE’s witness did not testify to having any personal knowledge regarding the Oregonian reporter who attributed certain remarks to a BPA employee, Mr. Revitch, or any personal knowledge regarding the reporter’s development of the newspaper article. In addition, PSE’s witness did not profess to have any connection with Mr. Revitch’s statements to the Oregonian reporter, particularly with respect to how Mr. Revitch interpreted a BPA officer’s non-verbal conduct. Furthermore, PSE’s witness did not claim to have any personal knowledge regarding the non-verbal conduct attributed to the other BPA employee who, by his silence, allegedly acted upon Mr. Revitch’s statements. While it is true that hearsay evidence may be admissible in an administrative proceeding, common sense dictates that it should have some reasonable basis. In this situation, where PSE’s witness is three steps removed from the original declarant and can offer no independent basis for the reliability of the statement, the testimony is not proper.

PSE also argues that while Mr. Revitch was a witness in BPA’s 1996 rate case, he was not a witness in BPA’s current rate case, and therefore PSE was prevented from cross-examining him. PSE Motion, at 5; PSE Ex. Brief, WP-02-R-PS-01, at 7. The reason Mr. Revitch was not a

witness in BPA's current rate case is because he had not worked on the current rate case or any other rate development for some years. Indeed, Mr. Revitch was not performing *any* work regarding BPA's rate development at the time of his alleged statements, so the alleged statements were not a matter within the scope of Mr. Revitch's employment at that time. Mr. Revitch is employed in the Corporate Division of BPA as a computer specialist. Mr. Revitch's change of position does not excuse PSE's failure to provide a witness to authenticate the newspaper article or to prove the truth of its contents. PSE also argues that if the newspaper misquoted Mr. Revitch, BPA could have called Mr. Revitch as a rebuttal witness to explain or refute his statements in the article. PSE Ex. Brief, WP-02-R-PS-01, at 6. This argument begs the question of whether the evidence is relevant and therefore admissible. As noted at great length above, such evidence is not relevant.

Finally, PSE argues that even if the statements were hearsay, they should be admitted in the interests of justice. PSE Motion, at 5; PSE Ex. Brief, WP-02-R-PS-01, at 7-8. PSE first attempted to support this argument by citing a series of questions and answers that only established that a newspaper article was written about BPA's 1996 rate case and a person named Mr. Revitch once worked for Mr. Keep. PSE Motion, at 5. This does not overcome all of the foregoing shortcomings of PSE's testimony. PSE also argues that when a statement is material, probative, and the interests of justice are served by admission, a court has the discretion to admit such a statement into evidence. PSE cites Fed. R. Evid. 807, which provides:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) the general purposes of these rules and the interests of justice will be served by the admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

First, it must be noted that the alleged statement is *not* more probative on the point for which it is offered than any other evidence which the proponent could have procured through reasonable efforts. There is no evidence that PSE ever asked the reporter or the BPA employee to appear as a witness at the hearing. Such requests could have been made through reasonable efforts. Such testimony would have been more probative than PSE's reliance on a witness relying on a newspaper article relying on statements by another person in the article relying in turn upon non-verbal actions of another party. In addition, the general purposes of these rules and the interests of justice will not be served by the admission of the statement into evidence given the nature of the statement as described previously. Finally, Fed. R. Evid. 807 states that "a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently *in advance of the trial or hearing* to provide the adverse party with a fair opportunity to meet it, the proponent's intention to offer the statement and the particulars

of it, including the name and address of the declarant.” (Emphasis added.) In this instance, PSE did not make its intended testimony known to BPA, the adverse party, sufficiently in advance of the hearing to provide BPA a fair opportunity to meet it. Indeed, PSE did not provide the statement to BPA in advance of the hearing *at all*. The hearing began on August 24, 1999, and PSE did not make the statement available to BPA until PSE filed testimony on November 2, 1999. Consequently, in addition to PSE’s failure to provide the statement to BPA before the hearing, PSE did not provide BPA with PSE’s intention regarding the statement, the particulars of the statement, or the name and address of the declarant. Clearly, PSE has not satisfied the standards for application of Fed. R. Evid. 807. In summary, PSE’s testimony is inadmissible for the foregoing reasons, and the Hearing Officer’s order should not be reversed. To the extent that the Hearing Officer may have been in error, the probative value of the article is so tenuous that it would not be entitled to significant weight even if it were admitted.

### **Decision**

*PSE’s motion to reverse the Hearing Officer’s order striking PSE’s testimony is denied. The Hearing Officer’s order is well-reasoned, and the facts supporting the order have not changed. PSE’s additional arguments are not persuasive for the reasons noted above.*

## **18.2            Procedural Due Process**

### **18.2.1        Subscription Strategy Record of Decision**

#### **Issue**

*Whether the Subscription Strategy public process should be “recommended in a way that allows discovery and evidence on any and every issue decided in the Subscription ROD” and correspondingly, whether every decision made in the Subscription ROD should “be declared non-final and open for decision in the newly commenced proceeding.” Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 18.*

#### **Parties’ Positions**

Alcoa/Vanalco contend that “the Subscription ROD announced decisions on many items that should be decided in a section 7(i) rate case.” Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 17; Alcoa/Vanalco Ex. Brief, WP-02-R-AL/VN-02, at 111. Alcoa/Vanalco further argue that although BPA took the position that matters decided in the Subscription ROD were impermissible subjects for the rate case, BPA also took the position that most of the issues decided in the Subscription ROD are not final. Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 17. According to Alcoa/Vanalco, “BPA created a situation whereby it made decisions in the Subscription ROD outside the 7(i) process, reversed field to say it would amend those decisions, obtained dismissal of court challenges to its practice on the ground it had not taken final action, yet throughout has forbidden any testimony on those decisions.” *Id.* at 18. As a result, Alcoa/Vanalco argue, the Subscription Strategy public process must be recommended to allow for discovery and evidence on every matter decided in the Subscription ROD, and the ROD must be declared nonfinal.

Alcoa and Vanalco were the only parties to raise this issue.

### **BPA's Position**

In response to allegations by witnesses for Alcoa/Vanalco, BPA witnesses addressed a number of issues in rebuttal testimony regarding the scope of the rate case and BPA's Power Subscription Strategy. Burns and Elizalde, WP-02-E-BPA-37, at 12–19. However, BPA did not take a specific position on whether to “recommence” the Subscription Strategy public process, because determinations made in the Subscription Strategy ROD and public process were expressly excluded from reconsideration in the rate case.

### **Evaluation of Positions**

The arguments raised by Alcoa/Vanalco, as well as the relief requested, relate solely to the Subscription Strategy ROD and public process. This rate proceeding is not the proper forum for BPA to provide such relief, especially given the fact that BPA expressly stated that determinations made in the Subscription Strategy ROD would not be revisited in the instant section 7(i) process.

It is clear that the Subscription Strategy ROD provides important background and context for the rate proceeding. It is equally clear, however, that the Subscription Strategy and the Subscription Strategy ROD did not establish any rates. As emphasized in the Subscription Strategy ROD:

BPA's Subscription Strategy does not establish any rates or rate designs. The establishment of rates and use of rate design can be determined only in a formal hearing under section 7(i) of the Northwest Power Act. The comments and questions referenced above will be addressed in BPA's power rate development process, which includes extensive opportunities for public involvement. While final rate design decisions are not being made in the Subscription Strategy, rate design approaches identified in the Subscription Strategy will be part of BPA's initial power rate proposal, which is expected to be published early in 1999.

Subscription ROD, at 115, WP-02-E-AL-01, at 122; *see also* Burns and Elizalde, WP-02-E-BPA-37, at 15 (quoting same passage).

As such, Alcoa's and Vanalco's arguments have no merit. Although BPA may have made decisions in the Subscription ROD that were “outside the 7(i) process,” those decisions were not rate decisions and therefore a section 7(i) process was neither necessary nor appropriate. Moreover, unsupported assertions that BPA took one position then “reversed field” to take a different position is of no avail. BPA “obtained dismissal of court challenges” primarily because the relief requested by Alcoa and Vanalco was to immediately enjoin the rate case, which was an ongoing administrative proceeding. Consistent with well-established principles of administrative law, and following extensive briefing, the Ninth Circuit rejected Alcoa's and Vanalco's arguments and correctly ruled that it lacked jurisdiction over their claims. *Alcoa et al. v. Bonneville Power Administration*, Nos. 99-71188 & 99-71189; *Goldendale Aluminum Co., et al. v. Bonneville Power Administration*, Nos. 99-70268 *et seq.*

If Alcoa and Vanalco believe there was some infirmity related to the Subscription Strategy ROD and public process, then it was incumbent upon Alcoa and Vanalco to raise their concerns in that forum. *See, generally, Vermont Yankee Nuclear Power Co. v. NRDC*, 435 U.S. 519, 553-54 (1978). As participants in the Subscription Strategy public process, Alcoa and Vanalco had every opportunity to present their views and concerns in that proceeding. The Subscription Strategy ROD was issued in December 1998, more than 16 months ago. There is no basis for Alcoa and Vanalco to collaterally attack in the instant rate proceeding the Subscription Strategy ROD long after it was issued.

### **Decision**

*BPA will not recommence the Subscription Strategy public process as requested by Alcoa/Vanalco.*

## **18.2.2      Fish and Wildlife Issues**

### **Issue 1**

*Whether BPA properly excluded from the section 7(i) process testimony and argument on the 13 Fish and Wildlife Alternatives, the equal weighting of those 13 Alternatives, and the range of fish and wildlife costs adopted in the Principles.*

### **Parties' Positions**

The IOUs allege that “BPA has arbitrarily assumed that the 13 fish and wildlife scenarios are equally likely to occur.” IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 91. The IOUs argue that “the Administrator has prohibited parties from offering evidence on the assumption that all 13 of the Fish and Wildlife Alternatives are equally likely to occur. BPA has arbitrarily concluded that each of the alternatives has an equal probability of occurring. BPA will not allow inquiry on whether this assumption is justified. By this unrealistic assumption BPA precludes an inquiry into the costs of the most probable outcome.” *Id. See also*, IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 72-73.

### **BPA's Position**

BPA is implementing the Principles in the 2002 rates. DeWolf *et al.*, WP-02-E-BPA-13, at 7. The Principles were adopted in the fall of 1998 after extensive regional discussion and coordination with concerned executive branch agencies. *Id.* The Principles were published on September 16, 1998, and Vice President Gore announced the establishment of the Principles on September 21, 1998. DeWolf *et al.*, WP-02-E-BPA-39, at 21-22. The 13 Fish and Wildlife Alternatives represent, in the Clinton Administration's judgment and based on extensive regional input, a reasonable range within which the costs of eventual decisions on system reconfiguration and related operations can be expected to fall. DeWolf *et al.*, WP-02-E-BPA-13, at 9. It was well understood at the time the Principles were adopted that cost estimates would continue to evolve as the analysis, planning, and decision process for system reconfiguration and related actions progressed. *Id.* at 10. But the range of costs established by these 13 Fish and Wildlife

Alternatives is deemed by the Executive Branch to be sufficiently high and broad for BPA ratesetting and Subscription purposes. *Id.*

The Principles recognize that BPA is setting wholesale power rates and initiating Subscription before decisions on system reconfiguration and other fish and wildlife recovery actions are made. DeWolf *et al.*, WP-02-E-BPA-13, at 9. For this reason, the Principles are intended to “keep the options open” for future decisions by: (1) specifying that each of the 13 Fish and Wildlife Alternatives should be treated by BPA as equally likely to occur; and (2) establishing a high cost-recovery goal, expressed as an 88 percent/five-year TPP goal. *Id.* Thus, the 13 Fish and Wildlife Alternatives represent a set of assumptions, a forecasting convention, to establish capital investment and O&M levels, system operations assumptions, and risk analysis assumptions for purposes of setting rates. *Id.* It would be impractical and serve no policy purpose for BPA to resurrect and explore once again the myriad issues that have already been fully aired and addressed in these other public review processes. DeWolf *et al.*, WP-02-E-BPA-39, at 25.

### **Evaluation of Positions**

The IOUs state that “[t]he assumptions regarding BPA’s future fish and wildlife costs have a significant effect on BPA’s revenue requirement in this proceeding. The range of assumed annual costs of the 13 alternatives is from \$100 million to \$179 million.” IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 91.

The IOUs state that “[m]ost of the alternatives involved the breaching or removal of dams,” and argue that “[b]y assuring that dam breaching was as likely as not, BPA assumed a huge cost impact.” *Id.*

The IOUs allege that “[b]y making an arbitrary assumption that all 13 alternatives are equally likely, BPA has prevented its customers from being able to adequately address estimates [sic] BPA’s fish and wildlife costs and BPA’s assumptions about the uncertainties surrounding these costs.” *Id.* at 93.

As discussed in more detail in ROD section 2.3, *supra*, the Principles were developed in an extensive public involvement process that included numerous Federal agencies (including the NMFS, USFWS, Reclamation, COE, and EPA), state agencies, the Northwest Congressional delegation, Columbia Basin Tribes, public interest groups, BPA customers, and interested members of the public. 64 Fed. Reg. 44318, 44321 (1999).

It was clearly understood at the outset of the Fish and Wildlife public involvement process that the results from this process would guide BPA’s ratemaking process. The public involvement process focused on providing guidelines for structuring BPA’s approach to Subscription in order to ensure that BPA could meet its financial obligations, including those for fish and wildlife. DeWolf *et al.*, WP-02-E-BPA-39, at 21. Of necessity, BPA must move forward in setting rates for the post-2001 rate period, in large part because it must negotiate new power sales contracts for the post-2001 rate period. *Id.* at 22-23. The Principles recognized the impossibility of accomplishing either of these tasks if uncertainties about fish and wildlife funding costs remained. *Id.* at 23. For this reason, a range of alternatives and associated costs is specified in the Principles. *Id.*

The IOUs contend that BPA made an “arbitrary assumption that all 13 alternatives are equally likely,” thereby preventing BPA’s customers from being able to adequately address estimates of BPA’s fish and wildlife costs and BPA’s assumptions about the uncertainties surrounding these costs. IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 93. To the contrary, the fact that there is still no consensus on a fish and wildlife recovery strategy reinforces the need to “keep the options open.” Equal weighting is a reasonable strategy for addressing this uncertainty. Through such a strategy, BPA can address the broad range of potential costs for fish and wildlife recovery during the FY 2002-2006 rate period. As stated in the Federal Register notice:

In the absence of a consensus on a post-2001 fish and wildlife recovery strategy by mid-1998, concerned Federal agencies and regional stakeholders agreed that a strategy and mechanism were needed to establish post-2001 fish and wildlife funding assumptions for Subscription and ratemaking purposes. This strategy is directed at “keeping the options open” for future decisions on long-term configuration of the FCRPS, including the potential drawdown of reservoirs behind the four Lower Snake River projects and John Day Dam on the mainstem of the Columbia. Without such a strategy and mechanism, BPA could not proceed with its Subscription process for post-2001 power sales or its FY 2002-2006 power rates process because BPA could not provide the necessary cost certainty to its potential post-2001 power sales customers, nor assure adequate funding for fish and wildlife recovery efforts.

64 Fed. Reg. 44318, at 44321 (1999).

It was reasonable and prudent for BPA to implement the Principles’ strategy of “keeping the options open.” To do otherwise would have arbitrarily foreclosed potential fish and wildlife recovery options.

The Principles that were developed as a result of the extensive fish and wildlife public involvement process addressed several issues. As a result, the Federal Register Notice appropriately identified those policy decisions, commitments, and assumptions that would not be at issue in this power rate proceeding:

Included among the policy decisions, commitments, and assumptions that are not at issue in this rate proceeding are: (1) The Administration’s decision to extend the existing terms of access to the FCCF and to roll over the existing formula for calculating section 4(h)(10)(C) credits from the current rate period to FY 2006; (2) the content, merits, or level of costs for the fish and wildlife recovery strategies reflected in each of the 13 alternatives; (3) the decision to include the full range of costs for all 13 alternatives for the purposes of BPA’s repayment study, revenue requirement, revenue forecast, and risk management studies and strategies; (4) the TPP goal of 88 percent over the five-year rate period with a “floor” of 80 percent; (5) the policy objective that rates and contracts be designed to position BPA to achieve similarly high TPP post-2006; (6) the incorporation of the full range of costs using the same probabilistic method BPA uses for other

cost and revenue uncertainties in its ratemaking; (7) the assumption that all 13 alternatives are equally likely to occur; (8) the assumption that BPA's annual fish and wildlife operations and maintenance costs have an equal probability of falling anywhere within the range of \$100 million and \$179 million; (9) the adoption of a flexible approach in order to respond to a variety of different fish and wildlife cost scenarios, and in particular, the 35 to 45 percent goal of total post-2001 sales in contract-term lengths of three years or less, in short-term surplus sales, and/or in cost-based indexed sales; and (10) the goals of adopting rates and contract strategies that are easy to implement and administer.

64 Fed. Reg. 44318, at 44322-23 (1999).

It would be impractical and serve no policy purpose for BPA to resurrect and explore once again the myriad issues that have already been fully aired and addressed in the fish and wildlife public involvement process. *Id.* at 25.

On the other hand, the Federal Register Notice also described several issues that were not addressed in the Principles and that would be addressed in the rate proceeding:

Fish and wildlife issues that will be addressed in this rate proceeding include: (1) how the terms of access to the FCCF are modeled in the rate proposal and their impact on TPP and rates; (2) how section 4(h)(10)(C) credits are modeled in the rate proposal and their impact on TPP and rates; (3) the calculation and treatment of operations and maintenance and capital investment in repayment studies and the revenue requirement; (4) the selection, design, terms and conditions, assumptions, treatment, and impact of planned net revenues for risk, CRAC, indexed power sales contracts, stepped rates, and targeted adjustment charge; (5) the RiskMod, NORM, and Tool Kit model design, operation, inputs and outputs, and use of results; (6) the level of TPP that is targeted, from the range of potential TPP targets established in the Principles; and (7) the design, terms and conditions, assumptions, and treatment of the DDC, including the threshold for triggering a dividend distribution, the conditions under which a dividend is distributed, and the mechanism used to distribute dividends to certain power customers.

64 Fed. Reg. 44318, at 44322 (1999).

To subject the Principles to an evidentiary hearing in a BPA rate proceeding would not only serve no useful purpose, but would undermine the integrity of the prior public process that fully afforded all interested parties ample opportunity to provide comments.

### **Decision**

*BPA properly excluded from the section 7(i) process testimony and argument on the 13 Fish and Wildlife Alternatives, the equal weighting of those 13 Alternatives, and the range of fish and wildlife costs adopted in the Principles. It was reasonable and prudent for BPA to implement the*

*Principles' strategy of "keeping the options open." It would also be impractical and serve no policy purpose for BPA to resurrect and explore once again the myriad issues that have already been fully aired and addressed in the fish and wildlife public involvement process.*

## **Issue 2**

*Whether BPA provided the parties with an opportunity to fully and fairly examine all fish and wildlife issues that should be examined in ratesetting, thus allowing the development of a full and complete record in this section 7(i) proceeding.*

## **Parties' Positions**

The IOUs state that "[t]he Federal Register Notice for this proceeding . . . identified several areas that the [BPA] Administrator has designated as off-limits in this rate proceeding." IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 90. The IOUs argue that "[b]y declaring so many subjects out-of-bounds (including particularly the estimates of future risks and cost levels), we believe the Administrator has precluded BPA and its customers from fully and fairly examining the issues that should be examined in setting rates and prevented the development of a full and complete record in this proceeding in violation of sections 7(i)(2) and (3) of the Northwest Power Act." *Id.*

In its brief on exceptions, the IOUs object to BPA's exclusion of the 13 Fish and Wildlife Alternatives from the 7(i) process. The IOUs state that the Draft ROD purports to decide that equal weighting is necessary to "keep the options open," but the IOUs argue that this is a rate case decision on an issue excluded by BPA from the rate case. IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 72-73.

CRITFC/Yakama also argue in their brief on exceptions that BPA then "limited the discussion in the FRN scope of the rate case and proudly states they are following the FRN." *Id.* They go on to say that "CR/YA has been nothing but consistent throughout the discussions in the development of the Principles and in the rate case and Bonneville has ignored or refused pertinent information at every stage of the process. This is arbitrary and capricious." *Id.*

ICNU alleges that "BPA is circumventing its statutorily required ratemaking procedures by establishing rates outside of this rate case." ICNU Brief, WP-02-B-IN-02, at 2.

The PPC claims that "[b]y prohibiting relevant information concerning fish and wildlife from entering the rate case record, BPA has effectively steered the rate case away from information that could have an impact on the development of a full and complete justification of the final rates by the Administrator. This violates both the spirit and the letter of the Northwest Power Act." PPC Brief, WP-02-B-PP-01, at 46-47.

The PPC also argues that "BPA's preemptive actions essentially impair the rights of BPA's customers to present the information necessary to justify lower or revised rates. This in turn is in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution . . . ." *Id.* at 47; *see also* PPC Ex. Brief, WP-02-R-PP-01, at 10.

In its brief on exceptions, PPC argues that “[m]aterial and argument on the strategy and Principles are directly relevant to the development of a full and complete justification of the final rates. It is essential to allow parties to present testimony regarding the validity of the strategy and Principles to test their impact on the proposed rates.” PPC Ex. Brief, WP-02-R-PP-01, at 9.

Alcoa/Vanalco and Energy Services alleged that “BPA is attempting to limit the scope of this rate case and to exclude testimony from the record that could be used to support rate decisions significantly different than BPA’s initial rate proposal.” Speer *et al.*, WP-02-E-AL/VN/EG-02, at 3. Alcoa/Vanalco and Energy Services argued that “[t]here are so few remaining issues to be decided within the formal rate process that it makes a mockery of the process Congress provided for setting BPA’s cost-based rates.” *Id.* at 9. Alcoa/Vanalco argue that “[f]ish and wildlife costs are properly rate case issues, and the rate case record must be reopened to allow BPA to provide its justification, if any, for base costs, and to allow all parties to submit testimony and cross-examination.” Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 22.

Alcoa/Vanalco argue in their brief on exceptions that “BPA forbade any evidence on the 13 Fish and Wildlife Alternatives, the equal weighting of those Alternatives, and the range of fish and wildlife costs adopted in the Principles . . . [B]y excluding evidence referred to above, BPA prevents a major issue from being decided in the rate case, in violation of Due Process, the Administrative Procedures Act, §7(i), and law forbidding the Administrator to act on issues with a closed mind.” Alcoa/Vanalco Ex. Brief, WP-02-R-AL/VN-01, at 112.

### **BPA’s Position**

In the Federal Register Notice announcing the power rate proceeding, BPA described with particularity the nature and scope of the proceeding. 64 Fed. Reg. 44318 (1999). BPA explained that four major public involvement and review processes had been undertaken by BPA in the past five years, and that the rate case would implement policy decisions reached in those processes. *Id.* at 44319-23. The four major public processes referred to are the Business Plan public process, the Cost Review process, the Subscription Strategy process, and the Principles process. *Id.* BPA stated that it would not revisit in the rate case any policy determinations previously made in any of these forums. *Id.*

In the case of the Principles, BPA directed the Hearing Officer to exclude material which attempts to revisit the policy merits or wisdom of the Principles or of the strategy to “keep the options open.” 64 Fed. Reg. 44318, 44322. In general, BPA’s approach during the rate proceeding was to incorporate the results of these processes, as appropriate, into the rate proceeding and provide an opportunity for the parties to test the impact of those policy determinations on BPA’s rates.

Policy level determinations and program levels are not properly the subject of a section 7(i) hearing. Section 7(i) of the Northwest Power Act is applicable to the establishment of rates only, not broad policy or program level determinations such as program goals and objectives, processes, priorities, and allocation of resources that may impact rates. The Principles do not establish monetary charges for the sale of electric power. Rather, they are a set of principles intended to “keep the options open” for future fish and wildlife decisions. These are strictly

policy and program level determinations. Further, a section 7(i) rate process is not the appropriate forum for debating either the policy reasons for, or biological merits of, potential strategies for fish and wildlife recovery.

In addition, the Principles were not developed by BPA alone. Rather, they were developed in a public process that included virtually all stakeholders throughout the region, and the Principles were ultimately endorsed and announced by Vice President Gore. Nothing in the Northwest Power Act requires BPA to subject these Principles to an evidentiary hearing in a BPA rate proceeding. Moreover, to do so would not only serve no useful program or policy purpose, but would undermine the integrity of the public process that led to the Principles.

### **Evaluation of Positions**

The IOUs argue that “BPA’s exclusion of testimony and cross-examination of the assumptions underlying the revenue requirement (such as the assumptions regarding the 13 Fish and Wildlife Alternatives) exceeds the discretion of the Administrator and is contrary to the provisions of Section 7 of the Northwest Power Act.” IOU Brief, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 93.

The IOUs argue that “[a] full and complete record . . . cannot be developed if the Administrator has removed certain issues from the parties’ review and the parties are not allowed to present testimony or briefs on these issues, or cross examine BPA’s witnesses.” *Id.*

ICNU argues that “BPA has excluded consideration of all operating costs, including fish and wildlife obligations.” ICNU Brief, WP-02-B-IN-02, at 3. Therefore, ICNU alleges that “as a result of the exclusion of certain significant costs from consideration in this case, any rates approved by the Administrator will be set contrary to the ratemaking procedures required by law.” *Id.*

Alcoa/Vanalco argue that “BPA unlawfully delegated rate-making decisions to the Administration of President Clinton, and more specifically, Vice President Gore . . . .” Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 18. Alcoa/Vanalco state that “Congress directed that these decisions should be made by the BPA Administrator, not the Administration.” *Id.* Alcoa/Vanalco allege that “BPA erred in adopting this rate decision by the Administration because Congress intended BPA to make this decision based on is [sic] independent judgment in the § 7(i) rate process.” *Id.*

Alcoa/Vanalco argue in their brief on exceptions that:

BPA first excluded all evidence from the rate case regarding the 13 Fish and Wildlife Alternatives and then stated that “there is no consensus regarding which alternative should be implemented, or even which alternative is most likely to result in better salmon recovery” to support its equal weighting on the 13 Alternatives. (DeWolf *et al.*, WP-02-E-BPA-39, at 28.) BPA cannot have it both ways. BPA has extended the “keep the options open” policy to such an extent that decisions that must be made during the rate case now cannot be made until some indefinite period in the future, long after the Administrator must issue

her rate case ROD. In short, BPA is refusing to do exactly what Congress intended it to do; predict its future costs and then set rates to meet those costs. That is an abuse of discretion in violation of the Administrative Procedures Act, the Due Process clause, and the Northwest Power Act, especially §7(i).

Alcoa/Vanalco Ex. Brief, WP-02-R-AL/VN-01, at 17.

Alcoa/Vanalco is mistaken about the timeline surrounding the development of the Principles (and the 13 Fish and Wildlife Alternatives) and the Federal Register Notice initiating this power rates proceeding. The Principles were developed *prior* to the initiation of these power rate proceedings, not *after* the Federal Register Notice was published. The Principles were developed specifically because the region could not reach consensus on a fish and wildlife recovery strategy post-2001. It was only subsequent to the establishment of the Principles that BPA initiated this rate proceeding. BPA did not first exclude all evidence regarding the 13 Fish and Wildlife Alternative, thus chilling any further debate, as alleged by Alcoa/Vanalco. BPA fails to see how BPA testimony acknowledging the lack of consensus in the region surrounding a fish and wildlife recovery strategy in any way translates into a refusal by BPA to predict its future costs and set rates. To the contrary, there is ample evidence on the record to support BPA's efforts to accommodate the uncertainty surrounding this lack of regional consensus on a fish and wildlife recovery strategy and BPA's efforts to address this uncertainty in its risk mitigation package.

Alcoa/Vanalco state that “[i]n the 1983 rate case and ROD, fish and wildlife program costs were addressed as revenue requirement issues,” and “[i]n the 1985 rate case, BPA again addressed fish and wildlife program levels as a revenue requirement issue.” Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 19. Alcoa/Vanalco state that “[t]he issue was squarely raised [in the 1985 ROD] whether the §7(i) rate process was the appropriate forum to address BPA's decision to fund specific fish and wildlife projects and BPA's estimate of the costs of implementing such decisions.” *Id.* at 19-20. According to Alcoa/Vanalco, “[t]he Administrator found that the decisions to fund specific projects are not an issue in the rate filing, but that projected fish and wildlife costs must be included in the rate case to substantiate BPA's revenue requirement. Specifically, the ‘actual dollars included in BPA's revenue requirements [for fish and wildlife programs] remain proper subjects of testimony and cross-examination in the rate filing. BPA is not required to address program decisions in the rate filing.’” *Id.* at 20.

Alcoa/Vanalco state that “[t]he parties cannot use the § 7(i) process to ‘ferret out unjustified or inadequately supported’ [quoting from the legislative history of the Northwest Power Act] rate increases if program costs are not subject to rate case testimony and cross-examination.” Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 20.

Alcoa/Vanalco state that the Administrator's 1983 and 1985 decisions apply to the present case. Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 20; *see also* Alcoa/Vanalco Ex. Brief, WP-02-R-AL/VN-01, at 112-13. Alcoa/Vanalco argue that “[t]he fish and wildlife costs are not based on any specific program decisions because there has [sic] been no fish program decisions for the 2002-06 period. Those costs are just an estimate of the ‘actual dollars (that BPA

proposes) to be included in revenue requirement' and thus, are properly rate case issues." *Id.* at 20-21.

Alcoa/Vanalco state that in the 1993 rate case, "BPA staff argued that pursuant to §11(b) of the Transmission System Act, BPA was authorized to set program levels subject only to Congress' directive in the budget process, and that public forums other than the §7(i) rate case were more appropriate forums for deciding program levels. The Administrator agreed, but without discussion of the prior specific interpretation of the Act [in the 1983 and 1985 rate cases] with regard to fish costs." Alcoa/Vanalco Brief, WP-02-B-AL/VN-01, at 21. Alcoa/Vanalco argue that the Administrator's reliance on section 11(b) of the Transmission Act is without merit, and that "[t]he suggestion that Congress by deciding spending levels in Transmission Act §11(b) – thereby precludes a determination in the §7(i) process [sic] estimates of spending levels is wrong." *Id.*

Section 7(i) of the Northwest Power Act Governs Development of Rates, Not  
Policy Decisions or Program Levels.

Section 7(i) of the Northwest Power Act governs BPA's rates. Section 7(a)(1) requires the Administrator to establish rates "to recover . . . the costs associated with the acquisition, conservation and transmission of electric power." 16 U.S.C. §839e(a)(1). Section 7(i)(2) provides that the hearing officer in the rate case shall "develop a full and complete record and . . . receive public comment . . . related to [the] proposed rates." 16 U.S.C. §839e(i)(2). Section 7(i)(5) requires the Administrator to issue a decision establishing rates which shall be "based on the record . . . [and] shall include a full and complete justification of the final rates." 16 U.S.C. §839e(i)(5).

Section 7(i) is a procedural statute. It begins by providing that "[i]n establishing rates under this section, the Administrator shall use the following procedures . . . . "Its purpose is to "set[] . . . forth detailed procedures BPA must follow in establishing rates." H.R. Rep. 976, Part II, 96<sup>th</sup> Cong., 2d Sess. 53 (1980).

Nothing in the Northwest Power Act or its legislative history states that the procedural requirements of section 7(i) apply to policy decisions or the establishment of program levels. The argument that such program levels are subject to a section 7(i) hearing appears to be derived from a belief that the requirement to develop a "full and complete record" justifies this process. However, the obligation to develop a "full and complete record" does not mean that program levels or policy decisions are "rates" under section 7(i). These are two different issues. The rate case record can be "full and complete" by incorporating the results of earlier processes into the rate proceeding, and relying on the results from those earlier processes to form the background or context for the actual rate proposal. Otherwise, the earlier processes run the risk of becoming futile exercises.

If section 7(i) allows the parties to litigate the structure and content of BPA's program levels and policy decisions, then the rate case becomes a forum not just for establishing BPA's rates, but for deciding how the agency and other entities of the FCRPS will conduct their business. Moreover, if, as in the instant case, specific program levels were established following an extensive public

involvement process, then the section 7(i) process is either redundant of the earlier process, or is converted into a forum to reconsider or nullify determinations made in the prior process. This is not what Congress stated or intended when it enacted section 7(i).

In *APAC v. Bonneville Power Administration*, 126 F. 3d 1158 (9<sup>th</sup> Cir. 1997), the Ninth Circuit noted that “the section 7(i) proceeding is appropriate only when BPA is establishing a true rate.” 126 F. 3d at 1177. The Court observed that the Northwest Power Act does not define “rate,” and therefore “[a]bsent a statutory imperative, we must defer to BPA’s definition if reasonable.” *Id.* at 1176. The Court turned to BPA’s rules of procedure, stating:

Since at least 1986, BPA has defined “rate” in the context of section 7(i) proceedings as follows:

“Rate” means the monetary charge, discount, credit, surcharge, pricing formula or pricing algorithm for any electric power or transmission service provided by BPA . . .

*Procedures Governing Bonneville Power Administration Rate Hearings* §1010.2(j), 51 Fed. Reg. 7611, 7615 (1986). BPA thus defines a “rate” as a monetary charge for the sale of electric power.

Clearly, the Principles do not establish monetary charges for the sale of electric power. Rather, they are a set of principles “intended to ‘keep the options open’ for future fish and wildlife decisions that are anticipated to be made . . . on reconfiguration of the hydrosystem and . . . on the Northwest Power Planning Council’s Fish and Wildlife Program.” Revenue Requirement Study Documentation, Vol. 1, WP-02-E-BPA-02A, at 354. These are strictly policy and program level determinations. Contrary to the IOUs’ allegation in their brief on exceptions that “[t]he Administrator ignored the argument raised by the DSIs that in previous rate cases fish and wildlife program costs were addressed within the 7(i) process,” IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 73, BPA has explained in detail why the section 7(i) rates process does not apply to the Principles.

A section 7(i) rates process is not the appropriate forum for debating either the policy reasons for, or the biological merits of, potential strategies for fish and wildlife recovery. At this time, there is no consensus regarding which Fish and Wildlife Alternative should be implemented, or even which Alternative is most likely to result in better salmon recovery. Evidence of this lack of consensus can be found in disparate arguments presented by various parties to this rate case. For example, CRITFC/Yakama claim that Fish and Wildlife Alternative 13u [involving dam breaching] is the most similar to the Nez Perce, Umatilla, Warm Springs, and Yakama tribes’ comprehensive salmon recovery plan. CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 20. On the other hand, PPC claims that “the likelihood that dam breaching will be approved by federal agencies in 2000 and implemented prior to 2006 has been significantly reduced in the last few months.” PPC Brief, WP-02-B-PP-01, at 48. Further, “the failure of fish and wildlife agencies to identify a way to increase harvest while increasing survival of protected fish is an indication that they are not close to a realistic plan yet.” *Id.*

Other parties acknowledge that this rate proceeding is not the appropriate forum to discuss fish and wildlife alternatives. In oral argument, UCUT states that “[it] does not want the Fish and Wildlife Alternatives debated in the rate case. Those issues are better debated in forums where we have experts and a number of different people able to comment and help us with that decision.” Oral Tr. 172. Ongoing discussions among the various fish and wildlife agencies, Indian tribes, and other interested parties in other forums will form the basis for future fish and wildlife decisions.

Since these Principles represent strictly policy and program level determinations, BPA decided there is no obligation to subject these Principles to the ratemaking procedures of section 7(i) of the Northwest Power Act.

Section 4(h)(10) of the Northwest Power Act Does Not Subject Fish and Wildlife Funding Determinations to a Section 7(i) Hearing.

Section 4(h) of the Northwest Power Act reinforces the conclusion that the Principles were properly excluded from reconsideration in the rate case. 16 U.S.C. §839b(h). Section 4(h)(10) contains extensive provisions regarding proposed fish and wildlife projects and describes BPA’s responsibilities for funding these projects. 16 U.S.C. §839b(h)(10). Although section 4(h)(10) contains a detailed discussion of BPA’s fish and wildlife funding obligations, there is no language stating or implying that BPA’s fish and wildlife program determinations are subject to a section 7(i) hearing. On the contrary, section 4(h)(10) acknowledges that BPA’s fish and wildlife program funding determinations are ultimately subject to a separate level of review. These determinations are reviewed by Congress as part of BPA’s overall budget.

Section 4(h)(10)(A) of the Northwest Power Act states, “[t]he Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this [Act] and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife . . . .” 16 U.S.C. §839b(h)(10)(A). Section 4(h)(10)(B) states that “[t]he Administrator may make expenditures from such fund which shall be included in the annual supplementary budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act [16 U.S.C. §838 et seq.]” 16 U.S.C. §839b(h)(10)(B).

In 1974, the Transmission System Act made BPA self-financing by establishing the BPA fund (hereinafter referred to as the “fund”) in the U.S. Treasury. 16 U.S.C. §838i. The fund includes all of BPA’s receipts from the sale of power and transmission services and all proceeds from BPA’s sale of bonds to the Treasury. *Id.* Congress made a permanent appropriation of this fund to BPA, authorizing BPA to make expenditures from the fund which have been included in its annual budget submitted to Congress, subject only to specific Congressional directives or limitations. *Id.* In the instant case, given the specific language of section 4(h)(10), there is no doubt that the Federal budget process, not the BPA rate case, is the proper forum for review of program level determinations related to BPA’s fish and wildlife program.

In section 4(h)(11)(B), Congress envisioned that BPA, in carrying out its fish and wildlife responsibilities under section 4(h), would coordinate with state and Federal fishery agencies, Indian tribes, and others:

The Administrator and such Federal agencies shall consult with the Secretary of the Interior, the Administrator of the NMFS, and the State fish and wildlife agencies of the region, appropriate Indian tribes, and affected project operators in carrying out the provisions of this paragraph and shall, to the greater extent practicable, coordinate their actions.

16 U.S.C. §839b(h)(11)(B).

This, of course, is precisely what BPA did in the instant case.

The Principles were not developed by BPA alone. Rather, they were developed in a public process that included virtually all stakeholders throughout the region and were ultimately endorsed and announced by Vice President Gore. Nothing in the Northwest Power Act requires BPA to subject these Principles to an evidentiary hearing in a BPA rate proceeding. Moreover, to do so would not only serve no useful purpose, but would undermine the integrity of the public process that led to the Principles.

The United States Court of Appeals for the Ninth Circuit has recognized on many occasions that “[i]t is the responsibility of the Administrator to manage the complex relationship among these various aspects of [BPA’s] statutes.” *APAC*, 126 F. 3d at 1180. BPA believes that its decision to exclude testimony on the policy merits or wisdom of the Principles is consistent with and supported by the express language of sections 7(i) and 4(h)(10) of the Northwest Power Act.

Limiting the Scope of Fish and Wildlife Issues to be Addressed in the Power Rate Proceeding Does Not Violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

The IOUs argue in their brief on exceptions that “[e]xclusion of the 13 Fish and Wildlife Alternatives from this case constitutes legal error and violates the parties’ statutory due process rights under Section 7(i).” IOU Ex. Brief, WP-02-R-AC/GE/IP/MP/PL/PS/EN-01, at 74.

The PPC argues that “BPA’s preemptive actions [excluding discussion of certain fish and wildlife information] essentially impair the rights of BPA’s customers to present the information necessary to justify lower or revised rates. This in turn is in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution . . .” PPC Brief, WP-02-B-PP-01, at 47.

The PPC also claims that “[i]t is persuasive that not only do BPA’s customers believe they have been deprived of due process of law by the limitations imposed by BPA in the rate case, but that the Hearing Officer herself shared the same concerns. *See* Tr. 674.” PPC Brief, WP-02-B-PP-01, at 47.

PPC’s due process argument is without merit. As discussed in more detail in the introduction to ROD section 2.3, *supra*, the Principles were developed in an extensive public involvement process that included numerous Federal agencies (including NMFS, USFWS, Reclamation, COE, and EPA), state agencies, the Northwest Congressional delegation, Columbia Basin Tribes,

public interest groups, BPA customers, and interested members of the public. 64 Fed. Reg. 44318, 44321 (1999).

The public involvement process focused on providing guidelines for structuring BPA's approach to Subscription in order to ensure that BPA could meet its financial obligations, including those for fish and wildlife. DeWolf *et al.*, WP-02-E-BPA-39, at 21. Of necessity, BPA must move forward in setting rates for the post-2001 rate period, in large part because it must negotiate new power sales contracts for the post-2001 rate period. *Id.* at 22-23. The Principles recognized the impossibility of accomplishing either of these tasks if uncertainties about fish and wildlife funding costs remained. *Id.* at 23. For this reason, a range of alternatives and associated costs are specified in the Principles. *Id.* It would be impractical and serve no policy purpose for BPA to resurrect and explore once again the myriad issues that have already been fully aired and addressed in these other public review processes. *Id.* at 25.

Notwithstanding the implication that BPA allowed no discussion of fish and wildlife issues in this rate proceeding, the Federal Register Notice specifically described several issues that were not addressed in the Principles and would be addressed in the rate proceeding:

Fish and wildlife issues that will be addressed in this rate proceeding include: (1) how the terms of access to the FCCF are modeled in the rate proposal and their impact on TPP and rates; (2) how section 4(h)(10)(C) credits are modeled in the rate proposal and their impact on TPP and rates; (3) the calculation and treatment of O&M and capital investment in repayment studies and the revenue requirement; (4) the selection, design, terms and conditions, assumptions, treatment, and impact of planned net revenues for risk, CRAC, indexed power sales contracts, stepped rates, and targeted adjustment charge; (5) the RiskMod, NORM, and Tool Kit model design, operation, inputs and outputs, and use of results; (6) the level of TPP that is targeted, from the range of potential TPP targets established in the Principles; and (7) the design, terms and conditions, assumptions, and treatment of the DDC, including the threshold for triggering a dividend distribution, the conditions under which a dividend is distributed, and the mechanism used to distribute dividends to certain power customers.

64 Fed. Reg. 44318, 44322 (1999).

Nothing in the Northwest Power Act requires BPA to subject the Principles to an evidentiary hearing in a BPA rate proceeding. Moreover, to do so would not only serve no useful purpose, but would undermine the integrity of the prior public process that fully afforded all interested parties ample opportunity to provide comments.

### **Decision**

*BPA has provided the parties with an opportunity to fully and fairly examine all fish and wildlife issues that should be examined in ratesetting, thus allowing the development of a full and complete record in this section 7(i) proceeding. Nothing in the Northwest Power Act requires BPA to subject the Principles to an evidentiary hearing in a BPA rate proceeding. Moreover, to*

*do so would not only serve no useful purpose, but would undermine the integrity of the public process that led to the Principles.*

### **Issue 3**

*Whether issues pertaining to including increased funding for cultural resource protection in BPA's revenue requirement are within the proper scope of the rate case.*

### **Parties' Positions**

UCUT argues that \$3.5 million has been budgeted in years past for cultural resource protection, and that this amount has historically and consistently been inadequate to complete program requirements and comply with Federal law. Osterman, WP-02-E-UC-01, at 2; UCUT Brief, WP-02-B-UC-01, at 9. UCUT argues that BPA must include a revenue requirement for cultural resources that is adequate to meet Federal law and BPA's fiduciary trust obligation to act with a high degree of care and responsibility to the Indian tribes of the region. UCUT Brief, WP-02-B-UC-01, at 10.

UCUT disagrees in its brief on exceptions with BPA's statement that there are no rate case issues pertaining specifically to funding of programs for cultural resource protection and that the issue is outside the scope of the rate case. UCUT Ex. Brief, WP-02-R-UC-01, at 2.

The Shoshone-Bannock Tribes state that "the Upper Columbia United Tribes have set forth the concerns of the Tribes regarding the inadequacy of funding for cultural resource concerns . . . ." Shoshone-Bannock Brief, WP-02-B-SH-01, at 9. Therefore, the Shoshone-Bannock Tribes support and join in the position taken by the UCUT in its initial brief. *Id.*

CRITFC/Yakama state that "Bonneville must include a revenue requirement for cultural resources which is adequate to meet federal law and its fiduciary trust obligation to act with a high degree of care and responsibility to the Indian tribes of the region." CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 36. "CRITFC/Yakama hereby incorporate by reference the arguments and evidence put forward by the Upper Columbia United Tribes in its initial brief regarding BPA's legal obligation to include increased funding for cultural resources in its revenue requirements study." *Id.*

### **BPA's Position**

BPA shares the Federal Government's trust obligations to Indian tribes. Neither Congress nor the Executive branch has delegated BPA specific trust-related duties to manage an Indian resource on behalf of Indian beneficiaries. *See* BPA's discussion of its trust responsibilities, *supra*. BPA is responsible for the power-related cultural resources costs of COE and Reclamation.

In the Federal Register Notice announcing the power rate proceeding, BPA described with particularity the nature and scope of the proceeding. 64 Fed. Reg. 44318 (1999). BPA explained that four major public consultation and review processes had been undertaken by BPA in the past

five years, and that the rate case would implement policy decisions reached in those processes. *Id.* at 44319-23. The four major public processes referred to are the Business Plan public process, the Cost Review process, the Subscription Strategy process, and the Principles process. *Id.* BPA stated that it would not revisit in the rate case any policy determinations previously made in any of these forums. *Id.*

BPA's approach during the rate proceeding was to incorporate the results of these processes, as appropriate, into the rate proceeding and provide an opportunity for the parties to test the impact of those policy determinations on BPA's rates. Policy level determinations and program levels are not properly the subject of a section 7(i) hearing. Section 7(i) of the Northwest Power Act is applicable to the establishment of rates only, not broad policy or program level determinations such as program goals and objectives, processes, priorities, and allocation of resources, that may impact rates. These are strictly policy and program level determinations. Further, a section 7(i) process is not the appropriate forum for debating the policy reasons for specific funding levels necessary for cultural resources. *See Issue 2, supra.*

*See also* ROD section 5.3.2, entitled "Fish and Wildlife and Cultural Resources Expenses," *supra.* BPA has not yet developed program levels for the FY 2002-2006 rate period. It has, however, developed an estimate of costs sufficient for the purpose of setting rates.

### **Evaluation of Positions**

UCUT argues that BPA, COE, and Reclamation have numerous obligations to protect historic places, burial sites, archaeological sites, traditional cultural properties, and human remains. UCUT Brief, WP-02-B-UC-01, at 6. These obligations exist when new Federal actions are initiated and are continuing obligations after sites are identified. *Id.* Existing river operations from COE and Reclamation actions can wash out or impact existing cultural sites. *Id.*

BPA's responsibility is limited to the power-related costs of COE and Reclamation. 16 U.S.C. §839d-1. As BPA's witness stated:

Q. . . . To your knowledge BPA is responsible for the power-related costs and other agreed-upon costs of the COE and Reclamation, including the cultural resources protection costs, and these costs should be reflected in the revenue requirements study?

A. (Ms. Lefler) To the extent they are allocated to power purposes they would be.

Tr. 507.

In a response to a data request from UCUT (which UCUT has included as an exhibit), BPA described where in the generation revenue requirements its funding levels for cultural resources are reflected. The O&M direct funding agreements BPA has with COE and Reclamation include funding for cultural resources. UCUT Exhibit, WP-02-E-UC-02 (BPA Data Response to Request No. UC-BPA:015). During the rate period, the direct funding agreement with COE includes \$2.5 million per year (for cultural resources compliance), and the direct funding

agreement with Reclamation includes \$1 million per year. *Id.* Additionally, the BPA fish and wildlife budget includes \$200,000 per year of administrative expenses associated with the \$3.5 million. *Id.* Additional funds for cultural resource management associated with fish and wildlife projects are assumed embedded within individual project budgets as a miscellaneous administrative expense and will vary considerably from one project to another. *Id.* The amount needed will depend on each project's potential to affect cultural resources (in many cases, there may be no potential to affect cultural resources) and the project's particular circumstances (such as amount of land area involved and resource protection needs). *Id.* There is no separate budget line item for cultural resource management in the fish and wildlife program. *Id.*

Further, the Principles do not establish a budget for the 2002-2006 period, and BPA is not picking a single number for the rate case. Volume 1, Attachment 1, Revenue Requirement Study Documentation, WP-02-E-BPA-02A, at 354. The 13 Fish and Wildlife Alternatives "represent a set of assumptions, a forecasting convention, to establish capital investment and O&M levels, system operations assumptions, and risk analysis assumptions for purposes of setting rates." DeWolf *et al.*, WP-02-E-BPA-13, at 10. Cost estimates will continue to evolve as the analysis, planning, and decision process for system reconfiguration and related actions progress. *Id.*

UCUT does not object to the inclusion of BPA's cultural resource funding obligations in COE and Reclamation O&M line items; UCUT merely argues that the amount included is not adequate--the \$3.5 million that has been budgeted in years past for cultural resource protection has historically and consistently been inadequate to complete program requirements and comply with Federal law. Osterman, WP-02-E-UC-01, at 2; UCUT Brief, WP-02-B-UC-01, at 9.

UCUT also argues that BPA must include in its revenue requirement an amount for cultural resource protection that is adequate to meet Federal law and BPA's fiduciary trust obligation to the Indian tribes of the region to act with a high degree of care and responsibility. UCUT Brief, WP-02-B-UC-01, at 10. UCUT introduces evidence suggesting that "\$10.5 million per year is a reasonable sum for bringing the existing cultural resources protection program into compliance with law." *Id.* UCUT derived this number "by doubling the current budget of \$3.5 million (since \$3.5 million has been historically and consistently inadequate to comply with federal law). We then added an additional \$3.5 million to 'catch up' on the cultural resources programs which were foregone during the last rate period due to Kennewick Man." *Id.* In addition, UCUT states that an inadvertent discovery fund totaling \$5 million for the rate period should be created. *Id.* CRITFC/Yakama support UCUT's suggestion to include \$10.5 million per year in BPA's budget for cultural resources. CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 36. UCUT also states that "BPA should review the cultural resources budgets for the 13 alternatives and increase those budgets as necessary to continue a practice of compliance with federal cultural resources law." UCUT Brief, WP-02-B-UC-01, at 10.

BPA and the other parties to this rate case were given no opportunity to examine and rebut UCUT's suggestion that BPA should include these significant additional amounts in its generation revenue requirements for cultural resources protection, or the basis underlying these additional amounts. Furthermore, it is beyond the scope of this power rate proceeding for UCUT to argue the appropriateness or reasonableness of BPA's decisions on spending levels. Nevertheless, BPA disagrees with UCUT's suggestions. As BPA stated *supra*, the O&M direct

funding agreements BPA has with COE and Reclamation include funding for cultural resources. UCUT Exhibit, WP-02-E-UC-02 (BPA Data Response to Request No. UC-BPA:015). These amounts are reflected in BPA's generation revenue requirements. However, these amounts are subject to change in the agencies' budget processes. These amounts may also be changed by Congress in the appropriations process. BPA recognizes that there is risk and uncertainty associated with COE and Reclamation direct funding. The NORM was developed to capture risks other than operational risks in the ratesetting process. Conger *et al.*, WP-02-E-BPA-15, at 17. These non-operating risks include uncertainties in the capital costs, expenses, and BPA's direct program O&M costs associated with the 13 Fish and Wildlife Alternatives. *Id.*

UCUT also discusses selected case law, statutes, executive orders, regulations, and policies (including BPA's Tribal Policy) that show UCUT's view of BPA's fiduciary trust obligation to them. UCUT Brief, WP-02-B-UC-01, at 6-8. As discussed in more detail *supra*, the Federal Government recognizes the "undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). BPA shares the Government's trust responsibility to Indian tribes. Neither Congress nor the Executive branch has delegated BPA specific trust-related duties to manage an Indian resource on behalf of Indian beneficiaries. When such a specific trust responsibility is established, an agency must fulfill this responsibility as a "moral obligation [] of the highest responsibility" to "be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). BPA fulfills its trust responsibility by working with the PNW region's tribes in the manner prescribed by DOE and BPA tribal policies and by fully complying with the laws governing its activities.

With respect to limitations on BPA's responsibilities, UCUT quotes one of BPA's witnesses for the proposition that "BPA is responsible for the power-related costs of the Corps of Engineers and the Bureau of Reclamation." UCUT Brief, WP-02-B-UC-01, at 6. UCUT does not object to BPA's interpretation of its responsibilities. BPA cannot direct fund more than the share of cultural resource costs on the FCRPS allocated to power, because to do so might violate principles of appropriations law. *See* 31 U.S.C. §1532 and §1301(a). In addition, BPA is generally not considered a hydrosystem operator or Federal land manager. BPA does not have direct control over the impacts of the FCRPS on cultural resources. This responsibility resides with COE and Reclamation.

Section 7(i) of the Northwest Power Act is applicable to the establishment of rates only, not broad policy or program level determinations. BPA has not developed program levels for the FY 2002-2006 rate period. Further, the cost estimates used in setting rates do not constrain BPA from meeting its legal responsibilities in the future.

### Decision

*While BPA shares the Federal Government's trust obligations to Indian tribes, neither Congress nor the Executive branch has delegated BPA specific trust-related duties to manage an Indian resource on behalf of Indian beneficiaries. BPA's legal obligations for funding cultural resource protection are met through payment of its power-related share of costs in COE and Reclamation*

*O&M direct funding agreements. Thus, issues pertaining specifically to funding of programs for cultural resource protection are not within the scope of the rate case.*

#### **Issue 4**

*Whether the initial rate proposal complies with BPA's tribal trust and fiduciary obligations.*

#### **Parties' Positions**

CRITFC/Yakama state that "Bonneville, like the federal government and its agencies, is subject to the United States' fiduciary responsibilities to tribes. *See e.g., Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy*, 898 F.2d 1401 [sic], 1411 [citing to headnotes] (9<sup>th</sup> Cir. 1991) . . ." CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 7.

CRITFC/Yakama claim that:

Bonneville, as an agency of the United States, has a clear and distinct treaty-based obligation to preserve and ensure that Columbia River salmon are available to support the tribes' fisheries. *See Confederated Tribes of the Umatilla Indian Reservation v. Callaway*, No. 72-211 (D.Or. August 17, 1973)(consent decree). In *Callaway*, the court ordered the Department of the Interior and the COE to manage and operate the FCRP's peak power operations in a manner that did not "impair or destroy" the tribe's treaty fishing rights. The Administrator also has a fiduciary duty to protect and preserve the tribes' fisheries.

CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 19.

CRITFC/Yakama state that "Bonneville's actions are subject to scrutiny under the most exacting fiduciary standards," CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 20, and cite *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) for the proposition that "[the Government's] conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards." CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 20.

CRITFC/Yakama state in their brief on exceptions that "[a]fter reviewing the Draft Record of Decision it appears that Bonneville has addressed one of the 34 issues raised in our brief. We do not believe that Bonneville's treatment of the numerous issues we raised in our brief comes anywhere close to addressing Bonneville's Treaty, trust, and fiduciary obligations to our tribes." CRITFC/Yakama Ex. Brief, WP-02-R-CR/YA-01, at 2.

The Shoshone-Bannock Tribes state that BPA, as a Federal agency, has the same trust responsibility to Indian tribes as any other agency of the Federal Government. Shoshone-Bannock Brief, WP-02-B-SH-01, at 8. The Shoshone-Bannock Tribes argue that "BPA has failed to demonstrate that the [Keep the Options Open] policy will indeed protect the resources and interests of the Tribes. Ten (10) Indian Tribes have believed it necessary to

intervene in this rate case . . . in order to show where BPA has been found lacking in carrying out its trust responsibilities.” *Id.* at 9.

UCUT states that BPA (and COE and Reclamation) have a legal trust responsibility to the region’s Indian tribes when tribal cultural, spiritual, or important sites are involved in Federal actions. UCUT Brief, WP-02-B-UC-01, at 7.

### **BPA’s Position**

Given the strictly legal nature of the parties’ arguments regarding BPA’s tribal trust and fiduciary obligations, BPA witnesses did not address this issue in testimony. As a Federal agency, BPA shares the Government’s trust responsibility to Indian tribes. BPA fulfills its trust responsibility by working with the PNW region’s tribes in the manner prescribed by DOE and BPA tribal policies and by fully complying with the laws governing its activities.

### **Evaluation of Positions**

UCUT in its brief on exceptions argues that:

BPA uses the lack of a specifically delegated trust property managed by BPA on behalf of Indian beneficiaries to disclaim any trust responsibility to the region’s tribes. Instead, it characterizes its responsibility as “working with” tribes and “fully complying with the laws governing its activities.” BPA cites no treaty, Federal statute or case law establishing a “working with” standard.

UCUT Ex. Brief, WP-02-R-UC-01, at 2.

UCUT acknowledges that BPA lacks any specifically delegated trust property that it manages on behalf of Indian beneficiaries. However, UCUT then tries to weave an argument that in some way BPA has disclaimed any trust responsibility to the region’s tribes because BPA has no such delegated trust property. This could not be further from the truth. BPA expressly acknowledges that it shares the Government’s trust responsibility to Indian tribes. It is also difficult to understand UCUT’s assertion that BPA errs in some way because BPA does not cite to any treaty, Federal statute, or case law establishing a “working with” standard. There is simply no reason for BPA to cite to any such authority, because BPA makes no such allegation that it is complying with UCUT’s so-called “working with” standard.

The Shoshone-Bannock Tribes state that “[i]t is well established that the United States has a solemn trust obligation to Indian people.” Shoshone-Bannock Brief, WP-02-B-SH-01, at 5. “The source of the federal government’s trust responsibility is established by the provisions of treaties, agreements, statutes, and ‘reinforced by the undisputed existence of a general trust relationship between the United States and Indian people.’ *United States v. Mitchell*, 463 U.S. 206, 226 [sic] (1983).” *Id.*

CRITFC/Yakama state that “Bonneville, like the federal government and its agencies, is subject to the United States’ fiduciary responsibilities to tribes. *See e.g., Pyramid Lake Paiute Tribe of*

*Indians v. United States Department of the Navy*, 898 F.2d 1401 [sic], 1411 [citing to headnotes] (9<sup>th</sup> Cir. 1991) . . .” CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 7.

CRITFC/Yakama also state that “Bonneville’s actions are subject to scrutiny under the most exacting fiduciary standards,” CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 20, and cite *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) for the proposition that “[the Government’s] conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.” CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 20.

CRITFC/Yakama allege that “Bonneville’s fiduciary responsibilities to the tribes’ [sic] and their treaty secured interest dictate that a higher standard of care must be exercised in this proceeding as it affects these tribal interests.” CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 7.

The Federal Government recognizes the “undisputed existence of a general trust relationship between the United States and the Indian people.” *United States v. Mitchell*, 463 U.S. 206, 225 (1983) [hereinafter *U.S. v. Mitchell*]. BPA shares the Government’s “general” trust responsibility to Indian Tribes. In *U.S. v. Mitchell*, the Supreme Court required the elements of a common law trust be present to make the trust responsibility enforceable. The elements of a trust are: (1) a trust property; (2) managed by a Federal agency under specific statutory guidance; (3) on a behalf of Indian beneficiaries. *Id.* at 220-22. In its brief on exceptions, CRITFC/Yakama argue that “Bonneville’s position is based upon and [sic] incomplete analysis of *Mitchell* and citation to authority that is not controlling in the Ninth Circuit Court of Appeals . . .” CRITFC/Yakama Ex. Brief, WP-02-R-CR/YA-01, at 31. CRITFC/Yakama quote *U.S. v. Mitchell* for the proposition that the court does recognize that a trust relationship may exist even where there is no specific statutory delegation of trust duties.

Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) *even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary commitment.*

*U.S. v. Mitchell*, 463 U.S. 206, 225 (1983) (emphasis added, citations omitted).  
CRITFC/Yakama Ex. Brief, WP-02-R-CR/YA-01, at 31.

The law regarding the government’s trust responsibility is well-established. Nothing the parties or BPA say here will alter the law. No amount of briefing in this rate case will change BPA’s trust responsibility, nor is this rate proceeding the appropriate forum for determining BPA’s treaty and trust obligations. Further, it is not treaty and trust law at issue in this rate case; rather, it is how the tribes believe BPA should integrate this established body of law into its risk analysis. Therefore, BPA has not attempted to respond to every one of CRITFC/Yakama’s arguments regarding its interpretation of BPA’s treaty and trust responsibilities.

Notwithstanding CRITFC/Yakama's interpretation of *U.S. v. Mitchell*, the tribes can cite to no evidence on the record regarding trust assets or properties controlled or managed by BPA on behalf of Indian beneficiaries.

Federal agencies and tribes look to Congress and the Executive Branch to delegate specific trust duties to agencies through statutes or executive orders. Neither Congress nor the Executive Branch has delegated BPA specific trust-related duties to manage an Indian resource on behalf of Indian beneficiaries. Therefore, BPA fulfills its trust responsibilities by working with the PNW's tribes in the manner prescribed by the DOE and BPA tribal policies, and by fully complying with the laws governing its activities. *See, generally, United States v. Mitchell*, 463 U.S. 206, 225 (1983); *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).

CRITFC/Yakama argue in their brief on exceptions that:

BPA owes the tribes a fiduciary trust responsibility independent of statute. *Pyramid Lake Paiute Tribe v. Dept. of Navy*, 898 F.2d 1410, 1420 (9<sup>th</sup> Cir. 1990). BPA can not fulfill that responsibility simply by analyzing its own Northwest Power Act and determining that by complying with the Northwest Power Act that it is fulfilling its "highest and best fiduciary" responsibility to the Yakama and CRITFC Tribes.

CRITFC/Yakama Ex. Brief, WP-02-R-CR/YA-01, at 33.

BPA does not agree that *Pyramid Lake* stands for the proposition that BPA owes the tribes a fiduciary trust responsibility independent of statute. Furthermore, the citation CRITFC/Yakama references does not describe any such responsibility. BPA is not persuaded by this unsupported allegation.

In their brief on exceptions, CRITFC/Yakama also argue that:

BPA has a trust responsibility to the tribes and it cannot discharge its trust responsibilities simply by complying with its governing statutes. *See Nance v. Environmental Protection Agency*, 645 F.2d 701, 710-11 (9<sup>th</sup> Cir. 1981) (holding that in designating airshed quality under the CLA, the Federal Government owes a trust responsibility to the tribe beyond the statutory and regulatory obligations owed to the general public). Rather, BPA must specifically consider the tribes' interests and act affirmatively to protect those interests. BPA may not, as it has done, balance tribal interests in order to effect a compromise.

CRITFC/Yakama Ex. Brief, WP-02-R-CR/YA-01, at 32.

BPA believes that *Nance v. EPA* stands for the proposition that "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes." *Id.* at 711. However, as discussed in numerous Ninth Circuit and other cases, absent statutory, regulatory, or judicial guidance, it is unclear exactly what more, if anything, an agency must do in a particular circumstance to fulfill its trust responsibility. *See Inter Tribal Council of Arizona, Inc. v.*

*Babbitt*, 51 F.3d 199, 203 (9<sup>th</sup> Cir. 1995), where the court cites to the *U.S. v. Mitchell* standard that the Federal government can incur specific fiduciary duties toward particular Indian tribes when an agency manages or operates Indian lands or resources. *See, also, Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569 (9<sup>th</sup> Cir. 1998). Here the court stated:

. . . [A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the Government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.

*Id.* at 574.

In *United States v. 1020 Electronic Gambling Machines*, 38 F.Supp.2d 1219 (E.D. Wash. 1999), the court examined the question whether a general trust obligation can support the existence of a specific fiduciary duty, and found in the affirmative, but went on to say:

. . . but only where there are statutes or regulations that clearly impose such a duty. *Mitchell II*, 463 U.S. at 225, 103 S.Ct. at 2972. By itself, a general trust duty is not enough to establish the existence of a specific duty. *United States v. Mitchell*, 445 U.S. 535, 546, 100 S.Ct. 1349, 1355, 63 L.Ed.2d 607 (1980) (*Mitchell I*).

*Id.* at 1225.

BPA is not persuaded by CRITFC/Yakama's argument given the absence in the evidentiary record of any trust assets or properties controlled or managed by BPA on behalf of Indian beneficiaries.

UCUT joins the legal argument of CRITFC/Yakama regarding the trust responsibility. UCUT Ex. Brief, WP-02-R-UC-01, at 2.

CRITFC/Yakama claim that Fish and Wildlife Alternative 13u is the most similar to the Nez Perce, Umatilla, Warm Springs, and Yakama Tribes' comprehensive salmon recovery plan. CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 20. CRITFC/Yakama argue that BPA's approach gives a very low probability to the alternative that would implement the tribes' salmon recovery plan "on a schedule that might provide any chance of an improved Treaty fishery within the next generation of tribal members (Alternative 13u)." *Id.* CRITFC/Yakama also argue that BPA's approach gives low weight "to the alternative most likely to achieve survival and recovery of Snake River spring/summer chinook listed under the ESA and meet Bonneville's Treaty and trust obligations (Alternative 8u)." *Id.* at 20-21. CRITFC/Yakama allege that "Bonneville's assumption is clearly inconsistent with federal Treaty and tribal trust obligations. It is also inconsistent with Bonneville's stated policy of keeping the options open." *Id.* at 21.

CRITFC/Yakama state that “Alternative 13u, if chosen, would put Bonneville’s Treasury Payment Probability at about 65% which would violate Fish and Wildlife Funding Principle #3 . . . Furthermore, there is a high likelihood that a Treasury Payment Probability (TPP) of 65% would mean that, under the current Proposal, Bonneville would not be able to fully fund the fish and wildlife measures. This would be a violation of Fish and Wildlife Funding Principle #1 and a violation of the tribes’ treaty rights.” CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 21-22. CRITFC/Yakama argue that “[b]ecause the Proposal, as it exists, fails to address this fact and because the Proposal does not address the risk that alternative 13u is the most likely to provide for fish and wildlife recovery, the Proposal is deficient and should be changed to comply with Principles #1 and #3 and with the tribes’ treaty rights.” *Id.* at 22.

Although CRITFC/Yakama favor Alternative 13u, this Alternative differs from Alternative 13a only with respect to timing. Also, Alternative 13a has a conditional TPP that is substantially higher than the 65 percent TPP that CRITFC/Yakama cite for Alternative 13u. DeWolf *et al.*, WP-02-E-BPA-39, Attachment 4, at 5. The timing assumptions supporting Alternative 13u are, for all intents and purposes, no longer supportable. Alternative 13u assumes that Congress will authorize breach of the four lower Snake River Dams, modify John Day Dam to create natural river conditions, and implement measures to bring dams into compliance with the CWA. Revenue Requirement Study Documentation, Vol.1, WP-02-E-BPA-02A, at 371-72. Alternative 13u also assumes that Congress will appropriate in the current Federal budget process over \$200 million for these purposes. *Id.* at 373. There is a significant possibility that “unadjusted” schedules for Alternatives involving dam breaching (such as alternative 13u) could not be met. *Id.* at 349. No regional consensus has formed around Alternative 13u, and no such proposal is being made or considered by Congress at this time.

CRITFC/Yakama argue that “[w]hen Columbia Basin tribes suggested that Bonneville could cover all the fish and wildlife options and still have rates that were 25 percent below the market projections for electricity we were told that Bonneville could not raise rates. Bonneville’s policy against raising rates is counter to Bonneville’s trust and fiduciary responsibilities.” CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 26.

CRITFC/Yakama further argue in their brief on exceptions that they should be afforded some special status in this rates proceeding, and to do otherwise is a violation of BPA’s treaty, trust, and fiduciary obligations to the tribes.

. . . [A]ll of the responsible alternatives for meeting BPA’s Treaty and environmental responsibility will cost much more after 2006. BPA must position itself to meet these costs and remain competitive. BPA cannot ignore these facts simply because there is not a consensus among all of its customers. BPA, utilities, and large industries are not sovereign governments. They are not resource managers. They cannot veto the decisions of entities that are sovereigns and resource managers. Lack of a consensus does not eliminate BPA’s Treaty and trust obligations to the tribes or its responsibility to follow Federal law. In fact, such a lack of consensus heightens BPA’s obligations to see that the trust responsibility is fulfilled.

CRITFC/Yakama Ex. Brief, WP-02-R-CR/YA-01, at 6. CRITFC/Yakama continue:

It is not appropriate to treat the views of sovereigns and fishery managers the same as a utility trade association. This clearly violates BPA's Treaty, trust, and fiduciary obligations. It is also not appropriate for BPA to conclude that there is not clear science on what measures are needed to meet Treaty and fish and wildlife protection obligations. BPA may not substitute its judgement for fishery managers. It may not use the excuse that since some utilities which benefit from the dams but have no responsibility to restore fish and wildlife do not support some measures, that the restoration actions are unlikely to be implemented. Such a use inappropriately elevates a special interest over the public interest. It places a commercial interest over the views of sovereigns that are protected by a long-standing Treaty with the United States.

*Id.* at 14.

Notwithstanding CRITFC/Yakama's position that tribal interests should override other competing interests, the fact that there are competing positions with respect to fish and wildlife restoration reinforces the need to "keep the options open" for future fish and wildlife decisions. Thus, the 13 Fish and Wildlife Alternatives represent a set of assumptions, a forecasting convention, to establish capital investment and O&M levels, system operations assumptions, and risk analysis assumptions for purposes of setting rates. DeWolf *et al.*, WP-02-E-BPA-13, at 9. In addition, the fact that CRITFC/Yakama and other Indian tribes are parties in this rate proceeding does not mean that these tribes should be afforded any special status with respect to their participation in the rate case. In contrast to the due weight given to the tribes' views pursuant to section 4(h)(7) of the Northwest Power Act (16 U.S.C. §839b(h)(7)), the section 7(i) ratemaking procedures describe a more general process open to "any person." 16 U.S.C. §839e(i). All parties in the rate case are afforded the same rights and have the same obligations.

CRITFC/Yakama allege that BPA's actions in this rate proceeding in some way violate BPA's trust and fiduciary responsibilities. However, CRITFC/Yakama cite only case law for the general proposition that BPA, as a Federal agency, has a general trust responsibility to Indian tribes. CRITFC/Yakama can cite to no statute, law, or executive order that establishes a BPA-specific trust-related responsibility as defined in *U.S. v. Mitchell*. BPA complies with its own tribal policy and that of the DOE. In addition, BPA follows the Clinton Administration's view of the Federal trust responsibility to the Columbia River treaty tribes and the relationship between this Federal responsibility and the ESA. *Letter from Terry D. Garcia, NOAA Assistant Secretary for Oceans and Atmosphere, to Ted Strong, CRITFC Executive Director* (July 21, 1998) (stating the twin goals of Federal policy being recovery and delisting of ESA listed salmonids and restoration of salmonid populations over time to provide meaningful exercise of treaty fishing rights). None of these policies, however, creates legal obligations for BPA to take specific actions, such as funding drawdown of lower Snake River Dams or adopting Fish and Wildlife Alternative 13u.

## **Decision**

*BPA's initial rate proposal complies with BPA's tribal trust and fiduciary obligations. BPA fulfills its trust responsibility to the region's tribes by working with them in the manner prescribed by the tribal policies of DOE and BPA and fully complying with applicable laws and regulations.*

## **Issue 5**

*Whether BPA's use of the words "in consultation with" in the Federal Register Notice when describing the discussions that occurred during the development of the Principles with a number of parties in the Northwest, including the Columbia Basin Tribes, was inaccurate and misleading.*

## **Parties' Positions**

CRITFC/Yakama and Shoshone-Bannock Tribes argue that, notwithstanding the statement in the Federal Register Notice, the Principles were not developed "in consultation" with the Columbia Basin Tribes as the tribes define the term "in consultation." Lothrop, WP-02-E-CR/YA-02, at 7; Kutchins, WP-02-E-SH-01, at 5. Based on a definition of consultation developed by the Confederated Tribes of the Umatilla Reservation, the process described by BPA was clearly not consultation with the tribes. Lothrop, WP-02-E-CR/YA-02, at 7; CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 54.

CRITFC/Yakama also argue that "[l]etters from a number of Columbia Basin Tribes reinforce the conclusion that these Fish [and Wildlife] Funding Principles do not have the support of the tribes . . ." *Id.*

## **BPA's Position**

BPA's informal usage of "consultation" in this context refers to the public process of sharing and gathering of information among the voluntary participants listed above. DeWolf *et al.*, WP-02-E-BPA-39, at Attachment 3. Also as used in this context, consultation does not necessarily mean that consensus was reached among the participants, but rather that everyone had a chance to participate and voice their opinions, suggestions, and concerns during the development of the Principles. *Id.*

## **Evaluation of Positions**

The passage in the Federal Register Notice to which the parties refer states:

*The Principles were developed in consultation with constituents, customers, other Federal agencies, the Northwest Congressional delegation, and Columbia Basin Tribes in an extensive public involvement process. The parties focused on guidelines for structuring BPA's approach to Subscription and FY 2002-2006 power rates to ensure that BPA could meet its financial obligations, including*

those for fish and wildlife, given hydroconditions, market prices, fish recovery costs, and other uncertainties.

64 Fed. Reg. 44318, 44321 (1999). (Emphasis added.)

Shoshone-Bannock Tribes also argue that they do not consider consultation to be a public process, but instead a formal process of negotiation, cooperation, and policy-level decisionmaking between sovereigns. Kutchins, WP-02-E-SH-01, at 5. BPA explained that it did not intend to use the strict definition of “consultation” as that term is defined in BPA’s Tribal Policy, but rather a more general definition, since BPA was seeking input from many parties in addition to the tribes. DeWolf *et al.*, WP-02-E-BPA-39, at 34. BPA also expressed regret for any confusion that its use of the word “consultation” may have caused. *Id.*

Despite BPA’s explanation in its rebuttal testimony, CRITFC/Yakama raised this issue again in its brief. CRITFC/Yakama Brief, WP-02-B-CR/YA-01, at 54. BPA acknowledges that the use of the word “consultation” may have caused some confusion on the part of the tribes. However, BPA’s use of the word “consultation” was meant to encompass many interested participants and was not in any way structured as a formal consultation and decisionmaking process among sovereigns. BPA’s purpose for including the sentence at issue here was to provide readers with a sense of how expansive and inclusive the public process was that resulted in the Principles. This public process was not structured as a formal consultation and decisionmaking process among sovereigns, and BPA did not intend to convey that BPA engaged in a formal consultation and decisionmaking process with the Indian tribes.

### **Decision**

*BPA’s use of the words “in consultation with” in the Federal Register Notice passage describing the public process involved in the development of the Principles caused some confusion, and BPA regrets any offense it may have caused. Notwithstanding any such confusion, BPA participated in the development of the Principles with the involvement of a great many participants with diverse interests. BPA does not believe, nor did it represent, that this public process was a formal consultation and decisionmaking process among sovereigns.*

### **18.2.3 Adequacy of Briefing Schedule**

#### **Issue**

*Whether parties were afforded sufficient time to prepare their briefs on exceptions.*

#### **Parties’ Positions**

The IOUs maintain that they were given insufficient time to prepare their brief on exceptions, in violation of statutory and due process rights. IOU Ex. Brief, WP-02-R-AC/GE/PI/MP/PL/PS/EN-01, at 78.

## **BPA's Position**

BPA has had no prior opportunity to express an opinion with regard to this issue.

## **Evaluation of Positions**

The IOUs' position is without merit. Fourteen (14) days was adequate time to prepare their brief on exceptions. There are always competing demands of various kinds in any schedule. That is true for BPA as well as the parties. As to the complexity and length of the Draft ROD, that has more to do with issues raised by parties on their own initiative than it does with BPA's desire to author a voluminous Draft ROD. Every issue addressed therein was raised in some party's initial brief. Moreover, when BPA moved for an extension of time to prepare the Draft ROD, BPA requested that the parties be permitted additional time to prepare their briefs on exceptions. That additional time was requested by BPA in the interest of fairness. The Hearing Officer's Order states: "In extending the date for the Draft ROD, BPA also extends additional time to the parties to prepare their briefs on exceptions." WP-02-O-22. Furthermore, "[n]o party filed an objection to the extension, and good cause is shown for granting BPA's request." *Id.* After issuance of the Draft ROD, there was absolutely no reason why the IOUs could not have requested relief from the Hearing Officer by motion. Because they did not do so, the argument is waived.

## **Decision**

*The IOUs and other parties had adequate time to file briefs on exceptions, and there was no denial of due process or statutory rights.*

### **18.3 Environmental Analysis**

#### **18.3.1 Introduction**

BPA's 2002 power rate design is influenced by four policy considerations. First, BPA is voluntarily complying with FERC Order Nos. 888 and 889 by unbundling its transmission and ancillary services from its wholesale power services. Second, west coast market conditions have changed since the 1996 power rates were designed. Third, BPA's rate design is guided by the Principles established on September 21, 1998. *See* ROD sections 2.3, 5.4, and 18.2.2. Fourth, BPA's power rates are designed to implement the decisions in the Power Subscription Strategy. Burns and Elizalde, WP-02-E-BPA-08, at 1-9. *See* ROD sections 2.1 and 18.2.1.

The 2002 power rates include many features that will help BPA achieve the goals of the Subscription Strategy. These include:

- Continuing stable PF rates as established in the 1996 rate proceeding.
- Establishing rates for IOU Subscription sales at a rate as close as possible to the PF rate for sales under sections 5(b) and 5(c) of the Northwest Power Act.
- Establishing three-year and a five-year fixed PF rates and a five-year stepped rate.

- Establishing a TAC for PF and NR loads placed on BPA after the close of the Subscription window.
- Establishing an IPTAC.
- Establishing a CRAC.
- Developing a DDC to provide for return of excess financial reserves.
- Establishing monthly energy and demand charges.
- Establishing cost-based indexed PF and IP rate options.
- Developing rate mitigation in the form of cap for the Demand and Load Variance charges, an LDD, and relief for customers with large amounts of irrigation loads.
- Resolving certain inter-business line costs.
- Resolving treatment of GTA costs.
- Deciding to augment the system to serve more load than was anticipated by the Subscription Strategy.
- Establishing a C&R Discount to requirements rates.
- Establishing a GEP to allow a customer to designate a percentage of its Subscription purchase as EPP.

Burns and Elizalde, WP-02-E-BPA-08, at 9-21.

BPA's final 2002 power rate proposal is consistent with the Power Subscription Strategy and Power Subscription Strategy ROD (December 21, 1998), BPA's Business Plan, the BP FEIS (DOE/EIS-0183, June 1995), and the Business Plan ROD (August 15, 1995). The BP FEIS 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 BP FEIS and, if appropriate, issue a tiered ROD. Tiering subsequent RODs to the Business Plan ROD is helping BPA delineate decisions clearly, and provides a logical framework for connecting broad programmatic decisions to more specific actions. BPA's 2002 power rate proposal falls within the scope of the BP FEIS.

Consistent with the Business Plan ROD, the Administrator reviewed the BP FEIS to determine whether the actions embodied in establishing the 2002 power rates were adequately covered within the scope of the BP FEIS. The analysis in the BP FEIS includes an evaluation of the environmental impacts of rate design issues for BPA's power products and services. Comments on the Business Plan EIS were received outside the formal rate hearing process, but are included in the rate case record and considered by the Administrator in making a final decision

establishing BPA's 2002 power rates. The following section summarizes and incorporates information from the Business Plan and the BP FEIS.

### **18.3.2 National Environmental Policy Act Analysis**

The BP FEIS evaluates six business policy direction alternatives: Status Quo (no action); BPA Influence; Market-Driven; Maximize Financial Returns; Minimal BPA; and Short-Term Marketing. In the Business Plan ROD, the BPA Administrator selected the Market-Driven alternative. Each of the six alternatives provided policy direction for deciding major policy issues in broad categories; variations of the alternatives (modules) were developed for four key issues, including rate design.

The alternatives examined in the BP EIS were evaluated against the need for and purposes of the action. The wholesale electricity market is increasingly competitive. To be able to compete in the changing utility market, BPA needs an adaptive policy, which will allow the agency to meet its public service and business missions. The 19 key policy issues analyzed include several rate-related decisions, such as unbundling or rebundling BPA's power products and services and pricing. The modules included a range of rate level and design alternatives. Alternatives for rates analyzed in the BP FEIS include tiered rates, streamflow-based rates, seasonal rates, surcharges, market-based pricing, and elimination of existing rate discounts.

The BP EIS found that environmental impacts are determined by the responses to BPA's marketing actions, rather than by the actions themselves. *See* BP FEIS, page 4.1. The BP FEIS identified four types of market responses: resource development; resource operations; transmission development and operation; and consumer behavior. These market responses determine the environmental impacts. The environmental impacts addressed in the BP FEIS include those related to the physical environment, including air quality, water quality, land use, human health, and safety. They also include those related to the socio-economic environment, such as the effects of changes in products, services, and rates on end-users (consumers) of electricity, including BPA's DSI customers.

General market responses to the 19 key policy issues are shown in Table 4.2-1 of the BP FEIS. The market responses for products and services are discussed for each of the alternative business directions in section 4.2.1 of the BP FEIS, and the market responses for rates are discussed in section 4.2.2 of the BP FEIS. The environmental consequences for the market responses are evaluated in section 4.3 of the BP FEIS. Section 4.4 presents the market responses and environmental impacts by alternative. The market responses and environmental consequences for the range of power rate design alternatives in the rates module are discussed in section 4.5.2 of the BP FEIS. In addition, Appendix B to the BP FEIS includes an exhaustive evaluation, including market response and environmental impacts, of a range of power rate types, attributes, and adjustments. Specifically, Tables B-3 and B-4 in appendix B (Rate Design) of the BP FEIS summarize loads and resource responses for the range of rate alternatives examined.

Additional information on the environmental consequences of the six alternative plans of action is presented in sections 4.3 and 4.4 of the BP FEIS. The potential environmental impacts of all alternatives 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. (Table 4.4-20, BP FEIS.) Business Plan ROD, at 6.

In the Business Plan ROD, the Administrator chose the Market-Driven alternative. The Market-Driven alternative strikes a balance between marketing and environmental concerns. It also helps BPA to ensure the financial strength necessary to maintain a high level of support for public service benefits such as energy conservation and fish and wildlife mitigation activities. The BP FEIS and Business Plan ROD also documented a decision strategy for tiering subsequent business decisions to the Market-Driven approach (BP FEIS, section 1.4.2; Business Plan ROD, at 15). BPA's power Subscription Strategy was one of those subsequent decisions.

In deciding to establish the 2002 power rates as a feature of implementing the Market-Driven approach, BPA understands that the conditions that permit the agency to function successfully may change over time. Therefore, the Market-Driven alternative contains preparatory mitigation measures (response strategies) to respond to change and allow the agency to balance costs and revenues. Such mitigation will enhance BPA's ability to adapt to changing market conditions. These response strategies--which include means to decrease spending, increase revenues, and transfer costs--could be implemented if BPA's costs and revenues do not balance. BPA decided in the Business Plan ROD to apply as many mitigation response strategies as necessary whenever BPA's costs and revenues do not balance. These mitigation strategies, or equivalents, will be implemented to enable BPA to best meet its financial, public service, and environmental obligations, while remaining competitive in the wholesale electric power market.

## **18.4 Participant Comments**

### **18.4.1 Introduction**

This section summarizes and evaluates the comments of participants in BPA's 2002 rate proceeding. Participants are persons and organizations who comment on BPA's rate proposal by means of attendance at field hearings, correspondence, or phone calls but do not take part in the formal rate case hearings. Comments of participants are part of the official record of the rate proceeding and are considered when the Administrator makes her decisions set forth in this ROD.

The participants' portion of the Official Record consists of transcripts of nine field hearings held in September, October, and November 1999, throughout the region. A total of 174 persons presented comments at the field hearings. The field hearings were transcribed, and the transcripts were made part of the Official Record. BPA also received over 7,000 pieces of correspondence and documented telephone calls related to the rate filing during the public comment period, which officially ended November 30, 1999. These comments also are part of the Official Record. Over 700 additional pieces of correspondence were received after the conclusion of the official public comment period.

BPA reviewed the participants' portion of the record and identified the concerns expressed by the participants to be addressed in this chapter of the ROD. Comments on technical areas addressed by the parties are evaluated in the foregoing ROD chapters that address those topics.

Following is a tally and summary of the testimony provided at the field hearings and the letters and telephone calls that BPA received both during and after the comment period, along with discussions of those concerns.

Copies of the comments of participants and letters received after the comment period will be available for inspection in BPA’s Public Information Center by the time this final ROD is issued.

**18.4.2 Evaluation of Participant Comments**

The summary indicates the total responses for each issue; many letters contained more than one comment. Over 6,400 comments from letters and over 700 comments from the field hearings were analyzed.

<b>Rate Case Process</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. BPA already has made up its mind; BPA ignores our concerns.	4	5
b. Afraid the “Good Old Boy” network will make decisions.	1	
c. Issues are not clearly stated; there is misinformation or missing information or lack of advertising; need more information.	8	29
d. More hearings in different locations ( <i>e.g.</i> , Goldendale)	2	3
e. Continue dialogue with local citizens and tribes about different subjects ( <i>e.g.</i> , fish, economic development, DSIs)	9	
f. It is too expensive to participate.	1	1
g. Thanks for a good process and past programs and cost cutting.	6	
h. Do not deny people a voice in the process.	4	2
i. Timing of the rate case is wrong ( <i>e.g.</i> , important decisions about dams on the Snake River yet to be made)	4	1
j. Theft, corruption, malfeasance, incompetence, intentionally misleading statements, or other ethical, legal, or practical concerns related to the rate increase and/or process.		49
k. BPA acting in or responding to a partisan (liberal or conservative, Democratic or Republican, socialist or capitalist, environmentalist or industrialist) manner.		8

**Discussion**

Several commentators stated that BPA made up its mind early in the process and ignored the concerns of parties and participants. Another expressed concern that the “good old boy” network will make the decisions. Several accused BPA of acting in a partisan manner or responding to a partisan position. Several stated that BPA should not deny people a voice in the process. Commentors stated concerns with ethical, legal, or practical matters related to the rate proposal and process.

BPA has been holding various public involvement processes for several years to develop information to feed into the 2002 power rate case. For example, BPA conducted a public process to develop the Power Subscription Strategy, and the decisions from that process appeared in the Power Subscription Strategy Administrator's ROD published in December 1998. BPA also has been conducting public processes to receive information in aid of developing the C&R Discount, to design the Slice product, and to evaluate the proposed Good Corporate Citizenship Clause. Once BPA knows it needs to adjust its rates, it develops its rate proposal in a multiphase process. Prerate case workshops began in April 1998. These workshops generally are highly technical. Notice is posted on BPA's Internet site and mailed to interested persons. BPA staff and others revise computer models, conduct analyses, and develop alternative solutions and share them in the workshops. For the rate case itself, BPA follows the procedures outlined in section 7(i) of the Northwest Power Act. BPA has added steps to those procedures to make the rate case even more informative. Rate cases include many chances for the parties to read and ask questions about BPA's case and to provide comments and criticisms to BPA. One of those chances occurred March 2, 2000, when the parties presented their oral arguments directly to the Administrator and other top BPA officials. Rate cases also include a public comment period, during which BPA holds field hearings around the region and accepts comments submitted by post, electronic mail, or telephone. Other than officially recognized parties, any person or organization may comment and thus become a participant. BPA received several thousand participant comments this year, and each was cataloged, read, and considered before the Administrator made her decisions summarized in this ROD.

Commentors stated that issues are not clearly stated and information is insufficient. Comments were concerned about misinformation, missing information, and lack of advertising. Two commentors stated that it is too expensive to participate. BPA understands the frustration that can occur when dealing with a large entity such as BPA. We have tried to make information complete, accurate, and available through various sources, such as the Internet ([www.bpa.gov](http://www.bpa.gov)), mailing lists of interested persons, advertisements in local newspapers, and a toll-free line to BPA's public information and document request center (1-800-622-4520). BPA also publishes a comprehensive monthly newsletter called the Journal to which anyone may subscribe free by calling BPA's toll-free line. BPA will mail information to those who request it, free of charge. It is expensive to become an official party to the rate case, and such a responsibility requires time and expertise. The Hearing Officer admits to party status any group that can fulfill its responsibilities and does not represent an interest already represented by another party. But as stated earlier, anyone not representing an official party can become a participant and have his or her comments included in the official record of the rate proceeding.

Several commentors stated that the timing of the 2002 power rate case is wrong, considering that the decision whether to breach the Snake River Dams is yet to be made. BPA recognizes that the decision whether to breach is an important one that could influence power rates for many years. Other issues regarding BPA's fish and wildlife obligations also are pending. The available options have different costs associated with them, so BPA's tools for assessing financial risk include methods to ensure that BPA's rates will recover sufficient funds to meet the costs. These methods are included in the rates and will provide mitigation should future revenues not be as high as expected. *See* ROD chapters 6 and 7. The Subscription Strategy published in December 1998 developed a framework for contract prototype development for power sales

contracts to be put in place in 2001. Current power sales contracts expire in 2001 and need to be replaced. BPA needed to conduct the 2002 power rate case early enough to have final rates available when individual contract negotiations get underway for Subscription sales.

Several commentors stated that BPA should hold field hearings in various different locations. In setting up the field hearings, BPA must find a large facility that will accommodate a large crowd, and such facilities are available in only some of the cities in the region. Another consideration is geography – BPA schedules field hearings in areas that are representative of the large variation in economy that the region supports so as to receive a broad range of opinions. Cost limits the number of hearings. In the 2002 power rate case BPA held nine field hearings around the region, during September, October, and November 1999. Advertisements were placed in local newspapers and notice was posted on the rate case Internet site and mailed to interested persons. The hearings were well attended and provided useful information to BPA in developing its final 2002 power rate proposal.

Several commentors thanked BPA for a good rate process and past programs and cost cutting. Several commentors stated that BPA should continue dialogue with local citizens and tribes. BPA appreciates the positive feedback and will continue working to become more business-like. BPA will continue dialogue with local citizens and tribes whenever possible. Anyone may keep up-to-date on issues, meetings, and chances to comment by looking at BPA’s Internet site or by subscribing to the Journal.

<b>General Rates Issues</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. Oppose rate increase.	4	20
b. Hard to pay rates on a fixed/low-income, includes senior citizens, disabled, and retired citizens.	4	410
c. Taxes too high/cost of living too high/all or other utilities too high; Energy Northwest made rates too high.	1	59
d. BPA should keep a balanced view of meeting the concerns about the future with the needs of today.	1	1
e. No choice in selecting utility provider; do not penalize because of location or residence.	1	29
f. Public power works.	3	0
g. A longer-term solution is needed to competitive public/private issues. Public preference keeps competitive market forces from benefiting all electric customers.		1
h. Favor rate increase (e.g., spend money on fish, to meet Treasury payment, etc.)	4	1
i. Power generation has been subsidized by the loss of fish and wildlife.	1	1
j. Mergers, monopolies, lack of concern for people, shortsighted, everything slanted in their favor, greed.		23
k. Electricity is a public necessity; profit should be secondary.	1	1

General Rates Issues	Field Hearings Comments	Letters Comments
l. Provide the residential, business and small customers of IOUs a fair and equitable share of the Northwest's Federal power.	5	9
m. Prioritize power for Northwest benefit (including comments about specific states, WA for example), as long as it is needed here.	9	46
n. Power should be offered to customers in the Northwest before it is sold out of the region for profit at market rates, offer it at cost to NW customers.	3	
o. Power should not be sold outside the region when there are regional customers that are willing to purchase at cost. The DSIs should be considered as one of those alternatives.	5	
p. Continue the benefits of hydropower to everyone in the region.	3	64
q. Do not have disproportionate rate increases for different customer classes.	8	5
r. Against tax breaks and subsidies for utilities (includes PUDs, DSIs).	6	4
s. We are losing jobs in this nation. We are crippling our own country by continuing to take away from our own industries by putting pressure on them. We will force them to go elsewhere. We want to retain our businesses and attract new ones.	23	2
t. If lost revenues are to be counted as a cost, do not just count spill; count water through the locks for navigation, water siphoned off for crops in Idaho, pumping, etc. BPA is shifting around the costs.	1	
u. Electric supply and costs are a major factor of many of our customers.	6	1
v. The economy is only good for corporations, BPA and PUDs; profit-oriented corporate leaders have plundered the Northwest.	7	
w. Our farmers, especially dairy farmers, need and deserve the credit for the service they do for the country. Family farms going under. Farms need cost-based power.	5	4
x. BPA should consider the economic impacts of its rates; those impacts affect jobs, families, and security.	15	7
y. The aluminum companies provide excellent paying jobs, contribute to the tax base, and provide secondary benefits to their communities.	17	7
z. Agricultural provides jobs and income and provides secondary benefits to their communities.	2	

<b>General Rates Issues</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
aa. The taxpayers did not pay for BPA; they paid for the money to start BPA. But the ratepayers have paid for BPA.	1	
bb. BPA as a government agency represents the people, not the companies.	1	11
cc. BPA should not compete with private enterprise.		89
dd. BPA's mission is to provide rural electrification, including obligations to the agricultural sector.	12	2
ee. The issue is the cost and availability of power to BPA's historical and industrial customers.	1	1
ff. Citizens expect BPA to be managed efficiently.		6
gg. The public is concerned about the decisions that BPA makes, and the effect they will have on the future.	1	1
hh. Transportation costs.	1	

### **Discussion**

Many participants commented on the level of BPA rates, stating they want no rate increase and that any increase would be hard to absorb on a fixed income or with the slim profit margins of farmers. BPA understands these concerns. In the initial proposal, BPA successfully met its rate pledge of no increase in the PF Preference rate from 1996 rate levels. The RL-02 rate for IOUs that participate in a settlement of the residential exchange is equal to the PF Preference rate, and those benefits will be passed through to residential and small farm consumers of IOUs that choose to participate in a settlement. The PF Exchange Program rate, for IOU customers that continue to participate in the traditional residential and small farm power exchange, is higher than the PF Preference rate. This is because of the “triggering” of the 7(b)(2) rate test, which protects the rates of Preference customers as described in section 7(b)(2) of the Northwest Power Act. Assuming that a utility participating in the exchange program has an ASC higher than BPA's PF Exchange rate, then that utility will receive benefits that will be passed on to residential and small farm consumers. BPA's ratesetting methods and the Subscription Strategy assure that the residential and small farm consumers of IOUs receive the benefits they are entitled to under law.

Some commentors stated concerns with the difference between publicly owned and privately owned utilities regarding rate levels to consumers and the difference in rates BPA charges these types of utilities. BPA understands this concern. In setting the 2002 power rates, BPA has complied with several Federal laws, implemented the Subscription Strategy, and forecasted future needs for financial reserves, risk management strategies, and other expenses. This required a fine balancing of past, present, and future customer needs and responding to other concerns such as fish and wildlife restoration and promotion of conservation and renewable resources. BPA believes its final 2002 power rate proposal has successfully balanced the requirements and concerns within the many and varied constraints to which BPA is subject. Some comments addressed the greed of privately owned businesses, and tax breaks and subsidies for businesses; these issues are outside the scope of the rate case. BPA sells wholesale power

and pays its expenses as directed by its statutory authorities and is not able to comment upon issues of fairness in other businesses. *See also* the Residential Exchange discussion in this ROD chapter.

Commentors stated concerns with the health of various economic sectors, including agriculture and industry. One comment stated that BPA's mission is to provide rural electrification, including obligations to the agricultural sector. Two comments were concerned about the cost and availability of power to BPA's historical and industrial customers. BPA realizes the importance of keeping jobs in the region and using the relatively inexpensive output of the FCRPS to benefit the regional economy. BPA also is aware that the cost of electricity can be a large component of manufacturing and farming expenses. The 2002 power rates include several features to encourage regional businesses. One of the DSI rates, the cost-based indexed IP rate, is tied to the price of aluminum, allowing the aluminum smelters' price of power to decrease as the price of their product decreases, and vice versa. That rate is designed to recover on average the costs allocated to the DSIs. *See* ROD chapter 15 for a further discussion of DSI rate issues, and section 10.16.2 for a discussion of the cost-based indexed IP rate. BPA is continuing the LDD, is capping the Demand Charge and the Load Variance Charge, and is setting aside \$4 million for relief for customers with a high proportion of irrigation loads. The foregoing list of rate impact mitigation measures is implemented in BPA's wholesale rates; how the local utility passes to consumers those benefits is not within BPA's control.

Many commentors stated that BPA should assure that FCRPS power is used to benefit the PNW region before selling the power outside the region. This BPA does as a matter of course, to comply with the Regional Preference Act, P.L. 88-552, and the Subscription Strategy. The Subscription Strategy ROD states: "Sales to extraregional entities are a possibility only if BPA does not subscribe all of its Federal power to Pacific Northwest customers. Such sales are not the focus of the Subscription process, but BPA intends that any power remaining after all requests from regional loads are met will be offered to extraregional public customers consistent with public preference and other customers under the applicable provisions of Northwest preference statutes." Subscription Strategy ROD, at 71.

Several commentors favor a rate increase, in particular to increase spending for fish and wildlife restoration and conservation and renewable resources, and to build up financial reserves for the same programs. As mentioned above, setting BPA's rates is a fine balancing act. BPA believes its final 2002 power rate proposal has successfully balanced the requirements and concerns within the many and varied constraints to which BPA is subject. *See* ROD chapters 5 and 7 for a discussion of financial issues.

One commentor stated that if BPA is going to count lost revenues from spill as a cost, BPA should include in its revenue requirement the cost of water passed through the locks due to navigation, water siphoned off for crops, and so on. BPA's governing statutes instruct BPA to set rates for the power it markets, based on the costs of that power, not based on the cost of water used for purposes other than power generation. BPA includes the cost of fish and wildlife programs, including spill, in its revenue requirement because those costs are directly attributable to operation of the Federal hydrosystem. Costs for water used for navigation and farming are not

directly attributable to marketing power, nor could they easily be quantified even if they were relevant costs.

One commentor stated that the taxpayers do not pay for BPA; ratepayers have paid for BPA. This is true. BPA does not receive Congressional appropriations but depends on funding from rates charged for sales of power and transmission products and services. Several comments stated that BPA as a governmental agency represents the people, not the companies. Several comments stated that citizens expect BPA to be managed efficiently. One comment stated that the public is concerned about the decisions that BPA makes and the effect they will have on the future. Many comments stated that BPA should not compete with private enterprise. How BPA does business is determined largely by its governing statutes, including the Regional Preference Act, P.L. 88-552, and the Northwest Power Act. For example, how BPA markets power to customer groups (utilities, DSIs, and others) is defined in section 5 of the Northwest Power Act. How BPA sets its rates is defined in section 7 of the Northwest Power Act. BPA also does business consistent with policies it sets itself, such as the Power Subscription Strategy. Such policies are developed with the help of extensive public involvement processes that allow BPA’s customers, constituents, and others to state their opinions and present alternative analyses if they choose. The BPA Administrator makes decisions to establish policies and set rates only after considering all the comments in the official record of the proceeding. BPA has been reducing staff for several years and streamlining its processes as much as possible so as to become more business-like, efficient, and competitive.

<b>Other General Issues</b>	Field Hearings Comments	Letters Comments
a. New customers will not benefit from proposed transmission budget.	1	1
b. Want BPA in the Northwest to protect Northwest resources.	3	
c. It will cost more to shutdown WNP-2 than it would get in revenues for the next 10 years.	1	
d. WNP-2 operates above market rates. It will not cost too much to shutdown WNP-2.	1	
e. We have only one land, one water system and one air system. We all have to share it. So we all must work together and do our part to protect the environment and improve it when we have the chance.	2	
f. Coal-fired generators may move to the area. No one wants to breathe dirty air.	1	
g. Many of our residential customers think their electric bills are going to increase with energy deregulation.	1	1
h. The Northwest Power Act mandates conservation, prioritizing clean energy over nuclear, coal, and other fossil fuels.	11	7
i. Privatize BPA.		1
j. All utilities should be controlled by the Government and non-profit organizations.		1

<b>Other General Issues</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
k. Likes their utility.	3	
l. Does not like own utility.	2	5
m. Global warming issues ( <i>e.g.</i> , Kyoto Accord).	2	1
n. Subscription issues ( <i>e.g.</i> , plan not fair or equitable, need flexible products, expand involvement of other utilities, abandon plan).	6	3
o. Other	3	9

### **Discussion**

Other participant comments focused on issues outside of BPA's purview and outside the scope of the power rate case. These issues include competitive market forces, deregulation of the electric utility industry, public preference, and regional preference. BPA has no control over these issues but has set the 2002 power rates to respond to them, as discussed elsewhere in this section and elsewhere in the ROD. One comment stated support for Oregon Governor Kitzhaber's regional proposal. Another addressed water rights. Another voiced opposition to being part of the national power grid. Another stated that residential customers think their electric bills are going to increase with energy deregulation. These issues all are outside the scope of the rate case and BPA will not address them here.

Two comments stated that new customers will not benefit from the proposed transmission budget. Transmission financial requirements are outside the scope of the 2002 power rate case. The few transmission-related issues addressed in the 2002 power rate case may be found in ROD chapters 8 and 9.

One comment stated that WNP-2 should be shut down because it operates at above market rates. This issue is outside the scope of the power rate case.

Several comments addressed the benefits of preserving and improving the natural environment, including one comment addressing the Kyoto Accord. One comment stated that the Northwest Power Act mandates conservation, prioritizing clean energy over nuclear, coal, and other fossil fuels. BPA is proud to support conservation and renewable resources programs. How these programs are included in BPA's rates is addressed in ROD sections 10.13 and 10.14; the issue of spending levels for these programs is outside the scope of the rate case.

A few commentors stated that they like or dislike the electric utility that serves them. One stated that they are entitled to cheap power because power lines cross their property. One stated that they should be compensated for having to have lights on all night long because they do not have street lights. One commentor stated that all utilities should be controlled by the Government and non-profit organizations. The 2002 power rate case sets rates for BPA's wholesale power and does not address retail utility pass-through of the rates or other retail issues. These are outside the scope of the rate case.

<b>Residential Exchange</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. Form letter from We Care. All residential customers, whether they live in cities or rural areas, deserve the same opportunity to receive a fair share of Federal electricity cost savings. Develop a plan that treats all residential customers fairly.		4,859
b. Small co-ops could be hurt by giving out additional exchange benefits.	16	3
c. Rural residents as well as other residents are also customers of IOUs.	7	1
d. Do not change formula so that residents in rural areas receive less.	10	12
e. Do not give energy to IOUs with below BPA average system costs.	2	4
f. Support or expand the residential exchange.	5	4
g. Do not help the IOUs because they are responsible to investors not the customers.	6	2
h. Sell IOUs extra power but do not give them money.	2	
i. Do not support the Puget power grab.	7	2
j. BPA has shirked its obligations under the Northwest Power Planning Act.	1	3
k. Follow the laws pertinent to the allocation of power.	1	2

### **Discussion**

Comments received on the REP were critical of BPA's implementation of the Power Subscription Strategy of December 1998. A major goal of that BPA policy and other BPA policies is to promote the spread of the benefits of the FCRPS as broadly as possible, especially to residential and small farm customers in the region. Comments received on the initial power rate proposal stated that BPA's proposal did not meet that goal.

A major concern of commentors was equity. Retail customers of IOUs, including many rural customers, stated that their exchange benefits should not be less than those of publicly owned utilities. On the other hand, other commentors stated that BPA should not provide any exchange benefits to IOUs, who seem to evidence more responsibility to their investors than to their customers. Other commentors stated that BPA should not be selling power to the DSIs, because doing so reduces exchange benefits to residential and small farm consumers. Others stated that BPA should follow the laws pertinent to the allocation of power.

The Subscription Strategy provided a marketing policy framework for the power rate case. After discussing the issues in an extensive public process, BPA stated in its Subscription Strategy and ROD that an IOU has the choice whether to continue to participate in the REP or enter into a settlement of the program. Under a settlement, BPA would offer a certain number of aMW worth of benefits for residential and small farm consumers at a rate expected to be approximately equal to the PF Preference rate. Because these decisions were made in a previous public

involvement process and stated in a previous ROD (Power Subscription Strategy Administrator’s ROD, December 1998), these decisions are not at issue in the 2002 power rate case, except for ratemaking implications of providing the IOUs an additional 100 aMW for the proposed settlement.

The 2002 power rate case implemented the Subscription Strategy by setting a rate for power purchased under the REP described in section 5(c) of the Northwest Power Act (PF Exchange rate). It also set rates for power purchased to meet IOUs’ net requirements under section 5(b) of the Northwest Power Act, including: the NR-02 rate; and the RL-02 rate and the PF Exchange Subscription rate, which would be used to serve an IOU’s residential and small farm load under a settlement. The 5(b) and 5(c) rates proposed in the 2002 rate case were designed to comply with the rate directives in the Northwest Power Act and the Subscription Strategy. The statutory directives include section 7(b)(2), which protects the rates of BPA’s preference customers from certain costs of the Act and can result in the PF Exchange rates being higher than the PF Preference rate. The PF-02 Preference rate and the RL-02 rate are identical in level, although they serve different shapes of loads. The PF Exchange Program rate is higher than the PF Preference rate due to the 7(b)(2) rate test. An IOU has a choice as to how to provide the benefits of the FCRPS to its residential and small farm consumers, and thus the rate it will pay for BPA power. Utilities are required by law to pass the benefits of the exchange program through to their residential and small farm consumers; the exchange is not designed to benefit the utility itself. As discussed elsewhere in this ROD, BPA believes that in setting its 2002 power rates it has complied with the Subscription Strategy and all applicable laws, including section 5(c) of the Northwest Power Act, which defines the residential and small farm power exchange.

Similarly, BPA believes that its intent to serve a portion of DSI loads complies with the Subscription Strategy and all applicable laws and will not significantly reduce the exchange benefits of any residential and small farm customers.

Comments received stated that “huge” financial reserves reduce consumers’ fair share of exchange benefits. As discussed elsewhere in this ROD, BPA’s risk management tools, including financial reserves, balance the many needs BPA faces. BPA must consider its obligation to repay the U.S. Treasury for the Federal investment in the FCRPS; its competitive position in the market; its ratesetting and other requirements as set forth in its governing statutes; and future possibilities for contingencies and uses of funds. For detailed discussions of revenue requirements and risk, *see* ROD chapters 5, 6, and 7.

Tribal Issues	Field Hearings Comments	Letters Comments
a. BPA has Trust responsibility to the tribes, and to all of the people.	7	4
b. By building the dams, the Government ensured that the Northwest tribes would no longer be able to subsist on fishing.	1	
c. Tribes are seeking economic development and jobs and cultural resources, including fish and wildlife, protection.	4	2

<b>Tribal Issues</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
d. The Federal Government has not followed through on its promises to the tribes.	3	1
e. The current proposal creates a risk that BPA will fail to meet tribal obligations.	2	1
f. Tribes do not want to take jobs away from steelworkers.	1	
g. Labor leaders have an interest in the region's tribal obligations and environmental health.	2	

**Discussion**

Several comments addressed the U.S. Federal Government's trust and treaty responsibilities to the tribes. BPA takes these responsibilities seriously and in all its programs strives to fulfill its responsibilities. *See* ROD section 18.2.2, Issue 4. One comment referred to the Federal Government building the dams as a way to deprive the tribes of their livelihood and in turn their society; a couple of comments discussed the mutual respect between the tribes and steelworkers. These issues are outside the scope of the rate case.

Several comments summarized the goals of the tribes as being economic development, jobs, and protection of cultural resources and fish and wildlife. A couple of the comments imply that they favor wind power. BPA has several rate features that indirectly will protect jobs, including the cost-based indexed IP rate and the LDD. BPA also has successfully met its rate pledge to keep average PF rates at 1996 levels. Along with COE and Reclamation, BPA funds programs to preserve cultural resources that could be damaged by river operations, or by construction or O&M activities. The three agencies that operate the FCRPS work together with the tribes to identify, record, and protect cultural sites. *See* ROD section 18.2.2, Issue 3. BPA also funds fish and wildlife programs consistent with the Principles, as discussed in ROD section 5.3.2. BPA recovers the costs of fish and wildlife programs, cultural resources programs, and conservation and renewable resource programs through its rates, but spending levels are determined outside the rate case. The 2002 power rates also include a C&R Discount that is designed to encourage these alternative forms of energy production. *See* ROD section 10.13.

<b>Low Density Discount</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. This discount is outdated and has served its purpose and should be eliminated. The savings should be applied to lowering the PF-02 rates.		1
b. Isolated areas deserve a price break.		3

**Discussion**

Participants favor maintaining the LDD. The LDD is an active issue in the rate case. For a full discussion, *see* ROD section 10.12.

Risk Mitigation	Field Hearings Comments	Letters Comments
a. If BPA misses too many Treasury payments, then it will lose its special status ( <i>e.g.</i> , cost-based rates).	1	
b. If BPA misses a Treasury payment, then it may not be able to fund fish and wildlife programs.	6	2
c. Raise rates to prevent missed Treasury payments and to pay for fish and wildlife costs.	1	
d. Do not calculate multiple deferrals as one deferral during the rate period.	2	2
e. BPA's risk is too high.	1	2
f. Does BPA need to sell power outside the region at higher rates to provide a cushion against current or future obligations?	1	1
g. Do not generate profit at expense of power customers.		2
h. Reserves will be spent on additional questionable programs.	4	
i. Reserve fund too high ( <i>e.g.</i> , not standard business practice, places a tax on region, removes too much money from the economy for unknown or inappropriate reasons).	10	82
j. Reserve fund too low ( <i>e.g.</i> , will not cover fish obligations and TPP, could increase rates substantially after this rate case).	9	7
k. Reserve fund adequate and appropriate.	1	2
l. Use part of the reserve to provide additional power or financial resources to constituents.		1
m. Unspent fish and wildlife funds are being used as part of the reserve.	1	
n. BPA treats all 13 alternatives as equally likely to happen in any given year. This is not the way we will proceed with salmon recovery in the Columbia Basin. The region will operate under a biological opinion until one path is chosen, and we will stay on that path for the remainder of the rate period. When viewed like this, TPP drops dramatically.	3	
o. Raise rates enough to cover all costs without the arbitrary cap proposed.	7	5
p. The DDC could have the effect of reducing future reserves and threaten future fish and wildlife restoration.	4	1
q. Do not give out the dividends and/or pay off the bonds.	2	1
r. The PNRR needs to be at least \$180 million a year to be used as a contingency, if higher fish and wildlife costs are needed. In this rate proposal, that number has been reduced to \$127 million a year.	2	1
s. New laws prevent good analysis of financial risks.	1	

## Discussion

Two comments stated that BPA's risk is too high. Another stated that the rider Slade Gorton implemented to save the fish prevents good analysis of financial risks. Many of BPA's risks are out of its control, such as precipitation to "fuel" the hydrosystem and passage of new laws. BPA has conducted extensive risk analyses and included several risk mitigation measures in its 2002 power rates to address its risks. *See* ROD chapters 6 and 7 for a detailed discussion of risk.

Several commentors expressed concern about the negative effects of BPA missing Treasury payments. One comment suggested raising rates to assure Treasury payments and to pay for fish and wildlife costs. Several commentors instructed BPA not to count multiple deferrals as one deferral during the rate period. Issues regarding TPP are addressed in ROD section 7.2.

Several commentors stated that BPA's consideration of all 13 fish cost alternatives having equal chances of happening in any given year is not the way salmon recovery will occur in the Columbia Basin. Rather, the region will operate under a biological opinion until one path is chosen for the rest of the rate period. Comments claimed that TPP should be lower. Issues regarding the risk analysis are addressed in ROD chapter 6, and TPP is addressed in detail in ROD section 7.2.

Two comments asked whether BPA needs to sell power outside the region at higher rates to provide a cushion against current or future obligations. Two commentors stated that BPA should not generate profit at the expense of power customers. Several commentors stated that reserves will be spent on additional questionable programs. Many comments stated that BPA's reserve fund is too high. Others stated that BPA's reserve fund is too low and will not cover fish obligations or Treasury repayment, leading to higher rates in the future. A few commentors even stated that BPA's reserve fund is adequate and appropriate. One comment stated that part of the reserve should be used to provide additional power or financial resources to constituents. Issues regarding reserves are addressed in detail in ROD chapter 7.

Two comments stated that the planned net revenue for risk needs to be at least \$180 million a year to be used as a contingency for higher fish and wildlife costs. In the 2002 initial proposal, that number was reduced to \$127 million a year. Issues regarding PNRR are addressed in detail in ROD section 7.4.

Several commentors stated that BPA should raise rates enough to cover all costs without the arbitrary cap proposed. Commentors stated that the DDC could have the effect of reducing future reserves and threaten future fish and wildlife restoration. A few comments stated that BPA should not give out the dividends or pay off the bonds. Issues regarding the CRAC are addressed in ROD section 7.3, and issues on the DDC are addressed in ROD section 7.5.

<b>Fish and Wildlife</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. There are a lot of people that agree with the Native American position on costs, and fish costs, and dam breaching. There are going to be huge costs if the fish do not come back.	4	1
b. People are concerned about accounting for fish costs and making sure the monies spent assure the recovery of salmon and steelhead and resident fish.	8	6
c. The fish program and the science that has come from it needs to be analyzed to see if there are other alternatives.	7	
d. Support spending more money to meet fish and wildlife costs.	9	3
e. Against spending more money.	2	5
f. Consider impacts to other industries from preserving fish.		1
g. BPA should collect enough money now to pay for all biologically sound recovery measures.	10	1
h. Support BPA meeting its obligations for salmon recovery, but not at the expense of today's needs.	1	1
i. Ignoring salmon recovery will not make the issue go away.	1	2
j. Corporations must do their part to preserve fish.	1	
k. Suggestions for measures: fish friendly turbines, fish ladders, barging, flow augmentation, avoid nitrogen supersaturation, stop trolling, keep hatcheries, do not use nets, reduce or stop harvest, reduce sea lions, fish farming, restrict logging practices, do not club non-native fish, cattle, water temperatures, do not clip fins, spill, use nuclear power to protect fish and environment.	17	22
l. People are more important than fish.		3
m. The fish and wildlife MOA of 1995 says that unspent capital at the end of a year be dedicated to fish and wildlife costs. The rate proposal moves those unspent capital funds to the general reserves of the agency instead of dedicating them to fish and wildlife.	3	1
n. The fish and wildlife MOA of 1995 says that emergency credits under 4(h)(10)(c) can be expended to recover emergency situations such as a prolonged drought. Instead BPA's rate proposal sends \$180 million of those emergency credits to sustain its rate proposal.	1	
o. Salmon recovery costs should be equally allocated to all users of area water.		4
p. I believe we can have both a vibrant agricultural economy and healthy salmon runs.	1	
q. Salmon and steelhead recovery will provide jobs and income and secondary benefits to communities.	1	

<b>Fish and Wildlife</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
r. Abolish or revise the Bolt Decision.		1
s. For dam breaching.	13	3
t. Against dam breaching.	11	6
u. Biological Opinion delay is illegal.	1	
v. Restore natural river conditions.	2	

### **Discussion**

Many commentors stated opinions regarding whether dams should be breached to aid anadromous fish migration. Two comments recommended restoring natural river conditions. The 2002 power rates are designed to recover the costs of the fish and wildlife measures decided upon in the several separate public involvement processes currently underway to develop, analyze, and review various fish and wildlife initiatives.

Several comments stated that salmon recovery costs should be equally allocated to all users of area water. BPA's power rate development includes no mechanism to allocate costs to water users. BPA is required by law to allocate power costs to its customers as rates for purchases of power products and services.

One commentor stated that salmon and steelhead recovery will provide jobs, income, and secondary benefits to communities. Another stated that the region can have a healthy agricultural economy and healthy salmon runs. Another stated that corporations must do their part to preserve fish. BPA is proud to support fish and wildlife recovery programs. How these programs are included in BPA's rates is addressed in ROD chapters 2 and 5; the issue of spending levels for these programs is outside the scope of the rate case. Although BPA provides information to businesses and individuals regarding means to aid recovery of fish and wildlife, BPA is not authorized to require corporations to participate in or develop such programs.

Several commentors stated that many people agree with the tribes' positions on fish recovery and dam breaching, and that it is better to incur costs along the way than face a huge amount of costs in the future. Others said that they support BPA's "forward thinking" and current spending on fish and wildlife programs, but such should not come at the expense of today's needs. Others stated that BPA should collect enough money now to pay for all biologically sound recovery measures. Comments weighed in on both sides of the issue regarding whether to spend more money on fish and wildlife programs. BPA's 2002 power rate proceeding addressed implementation of the Principles developed in consultation with constituents, customers, other Federal agencies, the Northwest Congressional delegation, and the Columbia Basin Tribes. Actual spending levels will not be set until after the rate case is over, so the 2002 power rate levels must address a broad range of spending possibilities. *See* ROD section 5.4 for a detailed discussion of implementation of the Principles.

Two comments stated that ignoring salmon recovery will not make the issue go away. Several others stated that people are more important than fish. The public involvement process to

develop the Principles considered these points of view and others before specifying guidelines for BPA’s approach to Subscription and the 2002 power rates.

Commentors said that the fish program and the science behind it need to be analyzed to determine if there are alternatives. Several commentors stated that the money spent on programs should assure the recovery of salmon, steelhead, and resident fish, and BPA should be accountable for their success. BPA’s fish and wildlife programs do incorporate analysis of alternatives, monitoring, and efficacy, but these analyses and BPA’s accountability are not at issue in this rate case. Many commentors suggested measures to protect fish: fish friendly turbines, fish ladders, barging, flow augmentation, avoid nitrogen supersaturation, stop trolling, keep hatcheries, do not use nets, reduce or stop harvest, reduce sea lions, fish farming, restrict logging practices, do not club non-native fish, cattle, water temperatures, do not clip fins, spill, use nuclear power to protect fish and environment. BPA is pleased to see that so many people in the region have creative solutions to fish and wildlife recovery. BPA is implementing cost-effective measures that can be shown to be successful.

Several comments were received on the directives of the 1995 MOA signed by five Federal agencies to stabilize BPA’s funding for fish and wildlife through 2001. (The 1998 Principles were developed to guide BPA’s approach to Subscription and FY 2002-2006 power rates.) One comment stated that the 2002 rates improperly moved unspent capital funds to BPA’s general reserves instead of dedicating them to fish and wildlife programs as directed by the MOA. Another stated that the 2002 rates improperly include \$180 million of emergency credits under Northwest Power Act section 4(h)(10)(C). Another comment stated that \$180 million of unspent, budgeted fish and wildlife funds are being used as part of BPA’s reserves. *See* ROD section 5.4 for a detailed discussion of these issues.

One comment stated that the delay of the biological opinion is illegal. Another stated that the Bolt Decision should be revised or abolished. These issues are outside the scope of the 2002 power rate case and will not be addressed here.

<b>Direct Service Industries</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. DSIs are an integral part of the hydrosystem and BPA’s Northwest power system ( <i>e.g.</i> , using power at night).	5	
b. Give the DSIs a good rate and/or adequate supply of cost-based power.	28	14
c. Do not subsidize the DSIs.	23	67
d. Buying power for the DSIs will make my rates go up.	1	
e. DSIs should not be allowed to walk away from their share of the Energy Northwest debt.	5	5
f. Sell the aluminum industry secondary energy and let plants shift part of their load to the local utility.		1
g. Encourage the DSIs to conserve and/or buy clean electricity elsewhere; or clean up emissions.	5	1
h. DSIs should remain loyal to BPA and make that commitment.	1	

<b>Direct Service Industries</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
i. The DSIs have spent money to conserve power.	6	
j. System augmentation for the DSIs should come from energy conservation, wind, solar, geothermal power, or fish friendly turbines.	5	2
k. Support the augmentation plan.	1	
l. Encourage economical new generation to bring purchase power to zero.	1	
m. Supports flexible/variable rate.	6	
n. Supports take-or-pay option.	1	
o. Provide the DSIs with decent transmission rates if they install their own generation facilities to help with the shortage of power allocation by BPA.	1	
p. Aluminum is a reusable resource; keep plants here where we have environmental controls.	2	
q. Supports Insertion of the Good Corporate Citizenship Clause (Good employee relations; Environmental Stewardship; Community Relations and Workplace Safety).	73	26
r. Reject the adoption of a Good Corporate Citizen Clause.		6
s. Corporations will only comply with environmental regulations if the Clause is in their contracts.	2	
t. Petitions supporting Clause.		14,252
u. BPA has no legal obligation to serve the aluminum industry and other DSIs.		3
v. BPA is trying to make the aluminum companies go away and does not know the consequences of this.	4	
w. Part of the contracts process (e.g., allocation of power to a company, not an aluminum plant).	6	2
x. Labor strike.	2	1

### **Discussion**

Two commentors stated that aluminum is a reusable resource, and the plants should be kept in the Northwest where there are environmental controls. Several stated that the DSIs are an integral part of the Northwest power system. Many commentors stated that BPA should give the DSIs a good rate and adequate supply of cost-based power. Several commentors stated that BPA is trying to make the aluminum companies go away without understanding the consequences. BPA is concerned about the survivability of the aluminum smelters. These businesses support the local and regional (as well as national) economy and provide jobs whose wages can support families. They also are good customers for BPA, traditionally providing stable, 24-hour a day base loads. In the 2002 power rate case, BPA set the rates for the DSIs (the IP rate plus the IPTAC amounts) at levels substantially below market rates to help the DSIs survive. The IP rate

levels were set in the initial power rate proposal to implement the Compromise Approach, which was developed in talks between BPA and the DSIs. The amount of power BPA will provide to meet DSI loads also is a product of the Compromise Approach. To aid aluminum smelter DSIs, BPA has developed a cost-based indexed IP rate that will vary with the price of aluminum. The cost-based indexed IP rate will help the smelters that choose to buy at that rate stay in business when the price of their product is low. Several commentors voiced support for the cost-based indexed IP rate. One commentor stated support for the contracts being take or pay.

One commentor pointed out that BPA has no legal obligation to serve the DSIs. Many commentors stated that BPA should not subsidize the DSIs. One commentor was concerned that buying power for the DSIs would increase his/her electric rates. Several commentors were concerned that the DSIs might not be paying their fair share of the debt for the Energy Northwest nuclear plants. Although BPA has no legal obligation to offer new requirements contract to serve the DSIs, BPA is authorized by the Northwest Power Act to sell to DSIs existing at the time the Northwest Power Act was passed. The 2002 IP rates are set to recover the costs of serving the DSIs, and thus BPA is not subsidizing the DSIs. Within statutory constraints and consistent with the Subscription Strategy and the Compromise Approach, BPA was able to develop cost-based rates that are low enough to encourage DSIs to stay in the region and maintain jobs, and high enough to recover the costs allocated to them in the ratesetting process. During the rate case BPA stated that it will purchase additional power to serve the DSIs. The costs of that acquired power are included in the rates the DSIs will pay. No other customer group will bear the costs of power acquired to serve the DSIs. Costs of the Energy Northwest nuclear plants are included with the costs of the FBS, which are allocated to all customer groups buying FBS power, including the DSIs.

Regarding power supply for the DSIs, one comment stated that BPA should sell secondary energy to the DSIs and let the DSIs shift part of their load to the local utility. Several stated that BPA should encourage the DSIs to conserve and/or buy clean electricity elsewhere, or clean up their emissions. Several commentors pointed out that the DSIs have spent money to conserve power, with good results. One commentor stated that the DSIs should remain faithful to BPA and commit to buying BPA power. One comment supported the augmentation plan. Several comments stated that system augmentation should come not from fossil fuels but from conservation, renewable resources, or fish friendly turbines. BPA sets its policies and rates consistent with mandates in Federal law and by means of processes that involve interested parties to the extent possible. The amounts and rate schedules for service to the DSIs that were proposed in the 2002 power rate case are designed to be consistent with statute, BPA's Power Subscription Strategy, and the Compromise Approach. BPA plans to make direct investments in new renewable resources, to continue its support of the Northwest Energy Efficiency Alliance (NEEA), and to invest in conservation resources as part of BPA's augmentation program to expand its resource availability to meet customer demands. BPA also is encouraging the DSIs to invest in conservation and renewables by offering to reduce their power rates in the amount of the C&R Discount. Both the DSIs and BPA require firm, reliable power to meet their business needs. Investments in conservation and renewables will provide significant benefits in the long term. In the meantime, both BPA and the DSIs realize the necessity of using primarily traditional power sources for reliability until the technology progresses.

Commentors stated that allocation of power should be to a plant, not to a company. This issue is addressed in ROD section 15.5.5.

One commentor stated that BPA should provide the DSIs with decent transmission rates if any DSIs install their own generation facilities to supplement purchases from BPA. BPA’s provision of transmission services to any potential DSI-owned generation, and the rates for that service, are outside the scope of the 2002 power rate case.

Many commentors supported including a Good Corporate Citizenship Clause in the DSIs’ new Subscription power sales contracts. Two petitions with over 14,000 names were submitted to the rate case record supporting the Clause. Six commentors recommended that BPA reject such a clause. Two other comments referred to the labor dispute at Kaiser Aluminum in general terms. These issues are outside the scope of the 2002 power rate case. The Kaiser labor dispute will be settled outside the rate case, and the Good Corporate Citizenship Clause is a contract matter. BPA conducted a separate public comment period for the Good Corporate Citizenship Clause and will use information received in that process to decide whether to include such a clause in contracts.

<b>Conservation/Renewables</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. The BPA is in kind of a funny place (in) that they are not necessarily trying to conserve energy. . .they are tending to be concerned about raising revenue to pay back things.	1	
b. BPA should verify that the monies spent on conservation are being properly used.	6	4
c. Meet conservation obligations, but not at the expense of today’s needs or at excessive or subsidized costs.	2	1
d. BPA should invest in cost-effective energy conservation/wind/photovoltaics, etc. programs, including research.	8	9
e. Low-income conservation programs need to remain under state supervision.	5	5
f. Continue low-income conservation programs.	4	3
g. Increase rates to diminish demand.	2	
h. Increase the amount of money available for the conservation and renewables discount.	13	8
i. Establish a baseline for discount (regional standard), new acquisitions are truly new resources.	2	4
j. Conservation is a cheaper resource and has lower environmental effects.	3	1
k. Conservation work will create local jobs.	2	2
l. Hydropower is a clean, green power source; keep green power generating; it is a good source of peaking energy; cheaper than thermal.	4	

## Discussion

Some commentors recommended that BPA increase the amount of money available for the C&R Discount. The amount of the C&R Discount was determined based on information received during a public involvement process that preceded the 2002 power rate case. The amount of the discount was based on the Comprehensive Review's recommendation for a public benefits spending goal, modified to recognize the competitive position of BPA's power price when compared with expectations of the Northwest energy market during the rate period. The cost of the C&R Discount raises BPA's applicable rates by the same half mill per kWh that would be credited to customers' Subscription power purchases. BPA is willing to accept the market risk at the current level, but a discount any higher might not be acceptable to customers and would be inconsistent with BPA's goal of rate stability.

Commentors stated that BPA should invest in cost-effective energy conservation and renewable resources programs, including research. Several comments stated that conservation is a cheaper resource and has lower environmental effects. Another comment stated that BPA is not necessarily trying to conserve energy but is more concerned about raising revenue. BPA plans to make direct investments in new renewable resources, to continue its support of the NEEA, and to invest in conservation resources as part of BPA's augmentation program to expand its resource availability to meet customer demands. BPA also is encouraging its customers to invest in conservation and renewables by offering to reduce their power rates in the amount of the C&R Discount. One commentor stated that conservation work will create local jobs. BPA agrees that this may be the case. Two commentors stated that BPA should increase rates to diminish demand. As stated elsewhere in this ROD, BPA sets its rates subject to many constraints, including Federal law and market forces. BPA's rates must be based on the costs to provide the power. Raising rates to diminish demand is not within BPA's authority and could harm BPA's customers and the retail consumers of regional utilities.

Several comments stated that hydropower is a clean, green power source and should be kept generating, especially for peaking, as it is cheaper than thermal generation. Other commentors stated that low-income weatherization programs should be continued and that low-income weatherization programs need to remain under state supervision. These issues are outside the scope of the rate case. *See* Issue 2 at ROD section 10.13 regarding funding for low-income weatherization programs; BPA has stated it would make good the funding, but BPA will consider an alternative outside the C&R Discount to continue funding low-income weatherization programs.

Several commentors stated that BPA should verify that money spent on conservation is being properly used. Others stated that BPA should establish a baseline for the C&R Discount to confirm that new acquisitions are truly new resources. BPA has monitoring programs in place for the conservation and renewables programs funded through rates. The C&R Discount also will be implemented with certain reporting requirements. The C&R Discount will include self-certification, required at investment levels up to 3 percent of retail sales. To qualify for the discount, customers will be able to use specific activities or measures developed by the Regional Technical Forum as approved by BPA. It is BPA's hope that future conservation and renewable development activities can be implemented and administered under local control. A few

comments stated that BPA should meet its conservation obligations, but not at the expense of today’s needs or at excessive or subsidized costs. BPA believes it is funding programs and encouraging conservation and renewables at proper levels, levels set using information from other relevant agencies, BPA’s customers, and the public. Spending levels are not at issue in the rate case. *See* ROD section 5.3.

<b>Irrigation</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. The irrigated agricultural industry is highly sensitive to operational costs such as electric power.	6	4
b. Rate case imposes an unreasonable and unfair economic hardship on irrigators, especially during summer months.	5	4
c. The Northwest Power Act, in 3(18) states that only the first 400 horsepower during any monthly billing period of farm irrigation and pumping for any farm is eligible for the “residential use” or “residential load” classification. This is a hardship on farmers who pump out of deep wells (instead of canals or rivers).	2	
d. Rates have gone up 28 percent in the last three years; some pay twice through district assessment and increased pumping costs.	2	1
e. Rates have doubled in 10 years; where is the money going and how is it being used?	1	

**Discussion**

Commentors stated that the agricultural industry is highly sensitive to operational costs such as electric power. Others stated that the rate case imposes an unreasonable and unfair economic hardship on irrigators, especially during summer months. Several commentors stated that rates have gone up 28 percent in the last three years; some consumers pay twice through district assessment and increased pumping costs. One comment stated that rates have doubled in 10 years and asked where the money is going and how it is being used. BPA realizes the importance of keeping jobs in the region and using the relatively inexpensive output of the FCRPS to benefit the regional economy. BPA also is aware that the cost of electricity can be a large component of farming expenses. To address these concerns, BPA is continuing the LDD, is capping the Demand Charge and the Load Variance Charge, and is setting aside \$4 million for relief for customers with a high proportion of irrigation loads. The foregoing list of rate impact mitigation measures is implemented in BPA’s wholesale rates; how the local utility passes to consumers those benefits is not within BPA’s control. Also not within BPA’s control is fees assessed by local water districts and the like. As to where the money is going and how it is being used, the money BPA collects from rates goes to pay its expenses, including costs of the power generating resources, costs of programs to implement conservation and renewable resources, and costs for fish and wildlife recovery programs. *See* ROD section 5.3 for a discussion of BPA’s spending levels.

Two comments stated that section 3(18) of the Northwest Power Act defines “residential use” or “residential load” as including only the first 400 horsepower during any monthly billing period of irrigation and pumping. This is a hardship on farmers who pump out of deep wells. BPA is implementing the measures described above in its rates to mitigate rate impacts, but there is no way to effect changes in the Federal statute through the 2002 power rate case. This topic is outside the scope of the rate case.

<b>Marginal Cost Analysis</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. Marginal cost should be tempered to: (1) recover the system’s actual power production costs; or (2) make available power products to regional customers that will mitigate the effects of power markets outside the region.	1	1
b. Marginal costs should not ignore equity principles.	1	1

**Discussion**

Two comments stated that marginal cost should be tempered to recover the power system’s actual power production costs or to make available power products to regional customers that will mitigate the effects of power markets outside the region. Two comments from the same commentors stated that marginal costs should not ignore equity principles. The Marginal Cost Analysis Study, WP-02-E-BPA-04, that BPA produces for the rate case is used for two purposes. One is to inform (but not directly set) the price level at which BPA buys and sells in the bulk power market. Second, the MCA provides a basis for sending price signals through BPA’s rate design, such as the relative levels of the monthly energy rates. In competitive market pricing, the marginal cost of production is equivalent to the market clearing price. Rates patterned after market clearing prices send a signal to consumers about the marginal cost BPA sees in the energy market and will encourage economic efficiency.

<b>Slice of the System</b>	<b>Field Hearings Comments</b>	<b>Letters Comments</b>
a. Assure that Slice Product does not result in cost shifts.		3
b. The 20-year contract will give Slicers more rights to the power pie than full-requirements customers.		1

**Discussion**

Several comments stated that BPA should assure that the Slice product does not result in cost shifts. One commentor stated that a 20-year contract would give customers who purchase Slice more rights to the power pie than full requirements customers. Regarding cost shifts, the Slice product has been designed to assure that Slice participants pay their proportionate share of costs of the system. The Slice product design includes provisions that ensure appropriate cost recovery. BPA tested the Slice product design for cost shifts by conducting a Cost Shift Study, described in BPA’s initial rate case testimony Mesa *et al.*, WP-02-E-BPA-32. The Slice product also bears an appropriate share of BPA’s financial risk, and in fact the Slice participant will

assume some of BPA's risks directly. BPA also will calculate or "true-up" the difference between the forecasted Slice Revenue Requirement and actual expenses and credits of the Slice Revenue Requirement. The Slice true-up adjustment charge will apply to the Slice product annually. The Subscription Strategy ROD states that the minimum Slice contract term will be 10 years, and BPA is asking for FERC approval of the methodology for 10 years. After continuing discussions with potential Slice participants, BPA has decided that the contract term will be 10 years. The Slice product is addressed in detail in ROD chapter 16 and Attachment 1.