

**UNITED STATES OF AMERICA  
U.S. DEPARTMENT OF ENERGY  
BEFORE THE  
BONNEVILLE POWER ADMINISTRATION**

Proposed Safety-Net Cost )  
Recovery Adjustment Clause ) BPA Docket SN-03  
(SN CRAC) Adjustment to )  
2002 Wholesale Power Rates )

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**INITIAL BRIEF OF THE CANBY UTILITY BOARD**

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## **REVISED LIST OF EXHIBITS**

Canby did not sponsor direct testimony by itself but rather joined the Customer Coalition. As a result, there are no exhibits bearing Canby's name alone that were introduced in this proceeding.

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**INITIAL BRIEF OF THE CANBY UTILITY BOARD**

**I. INTRODUCTION**

The Canby Utility Board (“Canby”) files this Initial Brief, pursuant to Section 1010.13(c) of the Rules of Procedure Governing BPA Rate Hearings, 51 Fed. Reg. 7611 (1986). The Brief addresses legal, factual and policy issues to be resolved by the Administrator in this proceeding.

Canby is also a member of the Customer Coalition. Canby therefore incorporates all of the statements, issues and exhibits in the Customer Coalition’s Direct Testimony, SN-03-E-CC-01, and its Rebuttal Testimony. SN-03-E-CC-02, as well as its Prehearing Brief, SN-03-P-CC-01.

Canby endorses the request by the Public Power Council in its Initial Brief, SN-03-B-PP-01, to withdraw the SN CRAC rate case, and it supports the statements of various parties, including Northwest Requirements Utilities, SN-03-B-NR-01, that BPA should not have triggered the SN CRAC in the first place. Finally, Canby supports and incorporates the statements and discussion of issues raised by the Industrial Customers of Northwest Utilities (“ICNU”) and Alcoa, Inc., in their brief, SN-03-B-IN/AL-01.

## **II. STATEMENT OF CANBY’S CASE**

1. BPA’s five-year power sales contract with Canby does not expressly allow BPA to impose a Safety-Net Cost Recovery Adjustment Clause (“SN CRAC”) on Canby, pursuant to successor General Rate Schedule Provisions (“GRSPs”). At Canby’s request, BPA removed the language “successor GRSPs” in 2000 from section 12(b) of Canby’s contract. BPA should therefore exempt Canby from the SN CRAC power rate surcharge.

2. BPA is obligated by the Northwest Power Act to conduct a section 7(b)(2) rate test prior to imposing the SN CRAC. BPA has not done so.

3. The SN CRAC is inconsistent with BPA’s 1995 Business Plan and Environmental Impact Statement (“EIS”). The Federal Register notice for this proceeding contains information that is inaccurate. BPA must prepare a new Business Plan and EIS, or reduce the SN CRAC to comply with the Business Plan and EIS.

### III. ISSUES

The following pages address the issues that Canby believes the Administrator must resolve in this proceeding.

**A. Section 12(b) of Canby's contract does not allow BPA to revise rates pursuant to successor GRSPs. BPA may therefore not impose the SN CRAC on Canby.**

The Federal Register Notice for this proceeding<sup>1</sup> and BPA's direct testimony in this case<sup>2</sup> call for BPA to impose an SN CRAC on Priority Firm ("PF") power sales, except for Slice purchases, Pre-Subscription, and Seasonal and Irrigation Mitigation contracts.

The Federal Register Notice and the GRSPs in this proceeding do not exempt Canby (or other utilities, if any) whose contracts do not allow BPA to revise rates pursuant to successor or amended GRSPs.<sup>3</sup>

Section 12(b) of Canby's contract is different than the standard Subscription agreement. It does not allow BPA to adjust rates pursuant to successor GRSPs. BPA must therefore exempt Canby from the SN CRAC surcharge.

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<sup>1</sup> 68 Fed. Reg. 12053-54 (March 13, 2003).

<sup>2</sup> SN-03-E-BPA-03.

<sup>3</sup> Canby's power sales contract 00PB-12049. It is not known if other entities have identical language in section 12(b).

Canby advanced this legal argument in the 2001 proceeding. At that time, Canby argued that the “rate lock” provision in its Subscription Contract precluded the imposition of the SN CRAC. Canby Brief, WP-02-B-CA-02 at 3, and Canby Brief on Exceptions, WP-02-R-CA-02 at 29.

In support of its position, Canby pointed to Section 12(b) of its contract, which reads as follows:

BPA may adjust the rates for Contracted Power set forth in the applicable power rate schedule during the term of this Agreement pursuant to the Cost Recovery Adjustment Clause in the 2002 GRSPs.

Utilities that signed the standard contract have different language. WP-02-B-CA-02 at 4. The entire sentence in the standard contract reads:

“BPA may adjust the rates for Contracted Power set forth in the applicable power rate schedule during the term of this Agreement pursuant to the Cost Recovery Adjustment Clause in the 2002 GRSPs, *or successor GRSPs.*” Emphasis added.

Canby’s contract does not contain the last three words. The reason: during contract negotiation in 2000, Canby requested and BPA agreed to remove the “or successor GRSPs” language from section 12(b). WP-02-B-CA-02 at 5, note 1.

Canby signed its Subscription contract on September 15, 2000. At the time, BPA had proposed only the Financial-Based CRAC. The two other CRACs mechanisms -- LB and SN -- were not adopted until June 2001, when the Administrator adopted the Record of Decision (“ROD”) for the Supplemental Power Rate Proposal.

Because Canby did not have the words “or successor GRSPs” in section 12(b) of its contract, it argued in the 2001 proceeding that BPA could not impose an SN CRAC on Canby during the rate period (ending on September 30, 2006).

Canby acknowledged that BPA would revise rates in the 2001 proceeding, pursuant to the GRSPs. But BPA had “one bite of the apple,” Canby said. BPA should not leave decisions about revenue levels and rate designs for a subsequent section 7(i) proceeding, Canby said. WP-02-B-CA-02 at 6. At the time, it was not clear whether BPA would in fact trigger the SN CRAC in the rate period.

BPA’s responded as follows in the 2001 Supplemental ROD:

“Canby’s argument is premised on the faulty assumption that by adjusting the LB CRAC or triggering the SN CRAC during the rate period, BPA is resetting rates in violation of this contract provision. The presence or absence of the ‘successor GRSPs’ language is not relevant. *Once submitted and approved by FERC, BPA will have only one set of GRSPs for the upcoming rate period.*” Emphasis added. WP-02-A-09 at 9-27.

BPA concluded:

“Canby’s argument appears to be based upon a faulty understanding of how the proposed GRSPs will work. The resulting adjustments from the application of the various CRACs will all occur pursuant to the provisions contained in the 2002 GRSPs and *not, as Canby contends, result from changes to the 2002 GRSPs themselves.*” Emphasis added. WP-02-A-09 at 9-27.

But BPA, in triggering the SN CRAC in this proceeding, has proposed the adoption of revised or successor GRSPs -- precisely what it said in 2001 it would not do.

See, Federal Register Notice with the “Amended 2002 GRSPs.” 68 Fed. Reg. 12053-54 (March 13, 2003). See, also, SN-03-E-BPA-03.

The revised GRSPs contain specific formulas for calculating the SN CRAC; they are successors to those published in the 2001 proceeding. Canby therefore requests that BPA reevaluate its position. It must exempt Canby and other entities (if any) whose rates may not be adjusted pursuant to successor GRSPs.

**B. BPA has a legal obligation to conduct the 7(b)(2) rate test in this proceeding.**

Canby believes that the Northwest Power Act (“the Act”), 16 U.S.C. § 839e(b)(2), requires BPA to conduct the 7(b)(2) rate test whenever BPA sets power rates for *public bodies and cooperatives* pursuant to section 7(i) of the Act, 16 U.S.C. § 839e(i).

BPA, however, has argued that it is required to conduct a 7(b)(2) rate test only on base rates (adopted in May 2000), not rates changed by the Cost Recovery Adjustment Clauses (“CRACs”).<sup>4</sup>

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<sup>4</sup> BPA made this argument in a motion to strike portions of testimony filed by the Springfield Utility Board (“Springfield”) concerning the 7(b)(2) rate test. SN-03-M-03 at 3. The Hearing Officer denied BPA’s motion to strike. SN-03-O-12. Springfield, Canby and the Public Power Council (the “public agencies”) then filed a motion to compel BPA to conduct the 7(b)(2) rate test. SN-03-M-19. BPA objected in an answer to the motion to compel. SN-03-M-22. The Hearing Officer denied the public agencies’ motion to compel on procedural grounds and concluded that the motion was untimely and failed to provide good cause for its tardiness. SN-03-O-15. The Hearing Officer did not reach the merits. BPA had argued that the Hearing Officer could not compel BPA to do the test anyway. SN-03-M-22 at 7-9.

BPA's argument should fail for the following reasons:

First, the statute makes no such distinction between base rates or rate adjustments, and BPA's own prior interpretations of the Act do not support its position.

Second, BPA agreed to conduct a section 7(i) rate hearing for the SN CRAC when it settled the Supplemental Power Rate Proposal in 2001. Having agreed to the section 7(i) rate case, BPA cannot now argue that it does not have to comply with the 7(b)(2) rate test when setting rates for public bodies and cooperatives.

### 1. The Rate Test

The rate test under section 7(b)(2) of the Northwest Power Act is one of the most important steps that BPA takes when it sets power rates for public bodies and cooperatives.<sup>5</sup> 16 U.S.C. § 839e(b)(2). The test is part of a complex list of requirements, called "rate directives," which BPA is obligated to follow when it sets rates.<sup>6</sup> 16 U.S.C. § 839(e).

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<sup>5</sup> Section 7(b)(2) specifically directs BPA to conduct after July 1, 1985, a comparison of projected rates to be charged its public body, cooperative and Federal agency customers with the costs to those customers under hypothetical assumptions. 16 U.S.C. § 839e(b)(2). If the rate test "triggers," certain costs are then re-allocated to other customers. Thus, the 7(b)(2) rate test imposes a "rate ceiling" on the rates charged to preference customers and Federal agency customers. Public Power Council v. Johnson, 589 F. Supp. 198, 200 (1984).

<sup>6</sup> "...[T]he Act sets forth directives...for the Administrator to follow in establishing rates...". Central Lincoln Peoples' Utility Dist. v. Johnson, 735 F.2d 1101, 1107 (9<sup>th</sup> Cir. 1984).

BPA first analyzed the 7(b)(2) rate directives in a 1984 analysis, the “Legal Interpretation of Section 7(b)(2) of the Pacific Northwest Electric Power Planning and Conservation Act,” 49 Fed. Reg. 23,998. (“The Legal Interpretation”).<sup>7</sup>

The Legal Interpretation said:

“Section 7 of the Northwest Power Act...[citation omitted] contains a number of directives that the BPA Administrator *must* consider in establishing rates for the sale of electric energy and capacity and for the transmission of non-Federal power. Section 7(b)(2), commonly referred to as the ‘rate test,’ is one of these directives.” Emphasis added. Page 3.

The Legal Interpretation also said:

“BPA will conscientiously follow the requirements of section 7(b)(2) to perform the ‘rate test’ for its public body, cooperative and Federal agency customers. If the results of the rate test indicate that BPA must recover costs in excess of those allowed under section 7(b)(2), BPA will implement the section 7(b)(3) supplemental rate charge provision for that purpose.” Page 9.

To this day, BPA itself routinely describes the section 7(b)(2) mandate as a “rate directive.” See, for example, the Administrator’s Record of Decision (“ROD”) for the Supplemental Wholesale Power Rate Proposal, WP-02-A-09 (June 2001) at 6-1.

And yet BPA’s arguments in this proceeding would undermine the very purpose of the 7(b)(2) rate directive. The directive would become a discretionary request to BPA

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<sup>7</sup> The Legal Interpretation is contained as an exhibit to SN-03-M-19A. It was originally included in Springfield’s Direct Testimony, SN-03-E-SP-01J.

that it could -- or could not obey -- depending on whether it classified the rate as a “base rate.”

## 2. BPA’s arguments and Canby’s rebuttal

In its Answer to the Motion to Compel filed by Canby and other public agencies, BPA offered a variety of explanations for why it was not legally obligated to conduct a 7(b)(2) test in this proceeding. SN-03-M-22. The following paragraph summarize BPA’s arguments and Canby’s rebuttals.

**Issue 1:** BPA maintains that it has conducted section 7(i) proceedings in the past without conducting a 7(b)(2) rate test. BPA cited several examples. SN-03-M-22 at 9-10.

Canby response: None of the cases cited by BPA involved Priority Firm (“PF”) rates for public power utilities. The examples all referred to section 7(i) rate hearings that changed the rates for non-publics, or that adjusted specialized rates.<sup>8</sup> The rate hearings did not adjust the applicable PF rate under which utilities purchase firm power from BPA, and are therefore irrelevant to the issue at hand.

Canby never argued that BPA had to conduct the 7(b)(2) rate test for *all* rate cases, no matter what. What Canby said then -- and what it repeats here -- is that BPA is obligated to conduct the 7(b)(2) rate test whenever it sets or adjusts the PF rate for public bodies and

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<sup>8</sup> BPA cited, for example 36 FERC ¶ 61,350 (1986), but that order approved a surplus firm power rate for Southern California Edison. See, also, 36 FERC ¶ 61,142 (1986), approving a variable industrial rate on an interim basis for the Direct Service Industries (“DSIs”).

cooperatives in a section 7(i) hearing. In those circumstances, the two processes -- the section 7(i) rate case and the section 7(b)(2) rate test -- are inextricably linked. When it comes to establishing PF rates for public bodies and cooperatives, BPA cannot do one without the other.

**Issue 2:** BPA argues that it has established “numerous adjustment clauses and has *never* required itself to conduct a section 7(i) hearing *or* a section 7(b)(2) rate test when implementing them.” (Emphasis in text.) SN-03-M-22 at 10.

Canby response: BPA’s statement oversimplifies the historical record. In 1987, for example, BPA adopted a limited cost recovery adjustment mechanism that was capped at 10 percent. See, Administrator’s ROD for the 1987 Final Rate Proposal, WP-87-A-07 at 62-63. In that rate case, BPA argued against holding a separate section 7(i) hearing prior to implementing the cost recovery mechanism.

In this proceeding, however, BPA itself has agreed to hold a section 7(i) hearing. Once BPA agreed to hold such a hearing for the purpose of adjusting the PF rate, BPA was committed to conduct a section 7(b)(2) rate test.

In 1989, BPA extended its rates and approved a modified version of the cost recovery adjustment clause. That rate case, however, settled with all parties. The Administrator’s ROD noted: “This proposal has received full and complete support from all parties to the 1989 rate proceeding.” WP-89-A-02 at 1. What happened in 1989 creates no precedent and

stands for little except that the parties can agree, if they wish, to a cost recovery adjustment mechanism without the 7(b)(2) rate test.

In 1993, BPA adopted an Interim Rate Adjustment (“IRA”). But BPA determined that because base rates did not “trigger” the 7(b)(2) rate test, “the issue [of including the IRA in the rate test study] is moot and will not be addressed in its merits.” WP-93-A-02 at 225. The IRA in that rate case contained definite parameters and trigger points.

In this proceeding, the facts are different. The SN CRAC, as proposed in 2001, was so open-ended that BPA agreed to hold a section 7(i) hearing before imposing it on customers. Unlike the cost recovery adjustment mechanisms adopted in 1987, 1989 and 1993, the SN CRAC as adopted in 2001 was not a rate as much as it was a term and condition in the GRSPs that allowed BPA (under certain circumstances) to hold a rate case in the future to revise rates.

That is why BPA has had to design a specific rate structure in this proceeding.<sup>9</sup>

In response to management direction, the staff at BPA developed a variable SN CRAC that would last for three years. SN-03-E-BPA-10 at 3.

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<sup>9</sup> Much of BPA’s argument rests on its simple classification of “base rates” compared with “adjustment clauses” where rates rise or fall based on a specific formula. SN-03-M-22 at 20. The problem with this facile distinction is that until BPA published its Federal Register Notice for the SN CRAC proceeding in March 2003, the SN CRAC was so vague it could scarcely be called a rate. The SN CRAC, as adopted in 2001, had no formulas, parameters, algorithms or calculations. In effect, it allowed BPA to design a new rate under the guise of an “adjustment clause.”

BPA itself has rejected the notion of simply modifying the existing FB CRAC. SN-03-E-BPA-10 at 3. Instead, the staff developed parameters that are unique to the SN CRAC proposal. SN-03-E-BPA-10 at 4. BPA considered alternative designs. SN-03-E-BPA-10 at 7-11.

Unlike the 1989 rate case, the parties in this proceeding have not settled. Canby has waived no rights. Furthermore, Canby and others have requested that BPA perform a section 7(b)(2) rate study, pursuant to BPA's obligations under the Northwest Power Act.

**Issue 3:** BPA points out that many parties signed a Partial Stipulation and Settlement Agreement in the 2001 Supplemental Power Rate Proceeding. The parties then filed a joint brief (April 24, 2001) stating that BPA need not conduct the section 7(b)(2) rate test for subsequent rate adjustments, including the SN CRAC. WP-02-B-JCG-01. BPA quotes liberally from the brief. SN-03-M-22 at 14-18.

Canby response: BPA seems to labor under the misconception that a critical mass of customers (determined by BPA) can waive certain statutory rights of others. Canby never signed the Stipulation and Settlement Agreement, nor did it endorse the brief.<sup>10</sup> Canby is therefore not bound by its terms. Federal courts have long held that waivers of rights must

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<sup>10</sup> Springfield, which supported the motion to compel in this proceeding, did not sign the 2001 Partial Stipulation and Settlement either, nor did it endorse the brief in question. The Public Power Council, in contrast, signed the 2001 settlement and also co-sponsored the motion to compel in this proceeding. SN-03-M-19. The PPC has explained its position on 7(b)(2) in more detail in its Initial Brief, SN-03-B-PP-01.

be done affirmatively and are not to be presumed lightly. See, for instance, Krentz v. Robertson, 228 F.3d 897 (8<sup>th</sup> Cir. 2000). Canby, however, has taken no affirmative actions to waive its rights in this proceeding.

**Issue 4:** Finally, BPA argues that preparing a 7(b)(2) rate test in this proceeding “would produce absurd results.” SN-03-M-22 at 12. BPA said it would have to rebuild computer models and engage in lengthy, complicated studies. SN-03-M-22 at 13.

Canby response: It would take time for BPA to conduct a thorough 7(b)(2) rate test. But BPA has had months to prepare for the day when it would trigger the SN CRAC and prepare a 7(b)(2) rate test. What makes the situation absurd is that BPA itself has neglected its duties and now attempts to complain that there is not enough time to discharge its responsibilities under law.

### 3. The 1984 Implementation ROD

In addition to the statutory arguments discussed above, Canby believes that BPA’s 1984 Record of Decision for the Section 7(b)(2) Implementation Methodology, b-2-84-F-02 (“Implementation ROD”) addresses when BPA is required to perform the 7(b)(2) rate test.<sup>11</sup>

BPA adopted the Implementation ROD after holding a section 7(i) proceeding under the Northwest Power Act. For a chronology of events leading up the publication of the ROD, see Public Power Council v. Johnson, 589 F. Supp. 198, 201-202 (1984).

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<sup>11</sup> The Implementation ROD is an exhibit to SN-03-M-19B. It was originally included in Springfield’s Direct Testimony, SN-03-E-SP-01K.

The Implementation ROD lends no support for BPA's assertion that it need only do a 7(b)(2) rate test on base rates, not adjustment clauses. The Implementation ROD analyzed, among other things, when BPA was obligated to conduct a new 7(b)(2) rate test and perform a new 7(b)(2) study. Among the factors: changes in BPA loads to reflect elasticity of demand. Implementation ROD at 22-23. The Implementation ROD also called for BPA to adjust DSI loads in the rate test if the DSIs no longer exist or suspend BPA service. "If a DSI leaves the region or is no longer served by BPA, its loads will not be assumed to transfer from BPA service to utility service." Implementation ROD at 41.

Those conditions are precisely the ones that Springfield raised in its Direct Testimony in this proceeding.<sup>12</sup> Springfield, in other words, properly relied upon BPA's Implementation ROD in framing its arguments. BPA attempted to strike the testimony but the Hearing Officer denied the request. SN-03-O-12.

Canby believes the Implementation ROD should remain in force until amended or abandoned. If BPA believes it has the right to restrict the use of the 7(b)(2) rate test -- in ways not expressly analyzed in the Implementation ROD -- then BPA should go through the legal steps, pursuant to the Northwest Power Act, 16 U.S.C. § 839 et seq., and the

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<sup>12</sup> See Springfield's Direct Testimony, SN-03-E-SP-01. Springfield specifically cited conditions that changed since 2000, when BPA last conducted the 7(b)(2) rate test. DSI loads, for example, have shrunk from approximately 1,440 aMW to only 230 aMW in the SN CRAC projections. SN-03-E-SP-01 at 4 (Table 3). Springfield also cited financial benefits to investor-owned utilities that increased by \$371 million over the rate period. SN-03-E-SP-01 at 6 (Table 4).

Administrative Procedure Act, 5 U.S.C. § 551 et seq., to develop and publish a new or revised implementation methodology.

#### 4. The GRSPs

BPA has also argued that its General Rate Schedule Provisions (“GRSPs”) do not contemplate that BPA will conduct the 7(b)(2) rate test when implementing adjustment clauses (e.g., CRACs). SN-03-M-22 at 19. BPA therefore concluded that it was not obligated to conduct the rate test.

But the GRSPs, adopted in 2001 for the rate period, do not control. BPA cannot adopt a provision in the GRSPs or interpret them in a way that contradicts the mandate of a statute. In case of conflict between a GRSP and the Northwest Power Act, the statute prevails.

Courts will overturn an agency action or regulation that is inconsistent with the statutory language or that represents an unreasonable implementation of a statute. Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). BPA, however, has argued that it is entitled to deference in interpreting the GRSPs. But deference is not the starting point for judicial analysis. A reviewing court first asks whether Congress has directly spoken to the question at issue. If so, the inquiry ends. U.S. v. Haggard Apparel Co., 526 U.S. 380, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999). Accord: M-S-R Public Power v. Bonneville Power Administration, 297 F.3d 833 (9<sup>th</sup> Cir. 2002).

Only if Congress finds that the statute is intentionally ambiguous will courts normally defer to an agency's own interpretation of its organic statute. In re County of Orange, 262 F.3d 1014, 1019 (n.1) (9<sup>th</sup> Cir. 2001).

In this case, however, there is nothing in the GRSPs that prohibits BPA from conducting the rate test. The GRSPs are silent on the matter. In those circumstances, BPA must look to the statute and to its own historical practices, as contained in its Implementation ROD and other documents.

#### 5. BPA's responsibility

In its rebuttal testimony, BPA argued that Springfield had the opportunity to conduct a section 7(b)(2) rate test study and present the results as part of its direct case, "but chose not to do so." SN-03-E-BPA-11 at 78, lines 21-23.

Under the Northwest Power Act, it is BPA, not the customers, which bears the responsibility for implementing section 7(b)(2) of the Act. The statute refers to the Administrator, not the customers, making the assumptions needed to compare proposed power rates with the rates that would have occurred under the hypothetical conditions mandated by the Act.<sup>13</sup> 16 U.S.C. § 839e(b)(2).

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<sup>13</sup> BPA's own 1984 Legal Interpretation cited three tasks it had recently completed to implement the section 7(b) of the Act. The first was the development of a legal interpretation. The second was "the development of a computer model to perform the rate test." Legal Interpretation at 4. The third task was the preparation and release of a rate test methodology (later called the Implementation ROD). The Implementation ROD itself repeatedly refers to BPA's computer model and analytical skills.

The customers can offer criticisms, cross examine or suggest improvements. But they are not required to assume the mantle of BPA's statutory authority or responsibilities.

#### 6. The 2001 ROD

In its rebuttal testimony, BPA also argued that the Supplemental Power Rate Proposal, adopted in June 2001, established adjustment clauses ("CRACs") and did not include a 7(b)(2) rate test for the CRACs. SN-03-E-BPA-11 at 76, lines 23-26, and at 77, lines 1-3. BPA apparently believes that decision creates meaningful precedent to guide this proceeding.

BPA's reliance on its decision in 2001 is misplaced. At issue in that rate case was BPA's obligation to analyze two rate adjustments -- the LB and FB CRAC -- both of which involved precise adjustments to base rates. The LB CRAC and FB CRAC formulas were contained in the GRSPs. The parameters for those CRACs were discussed in detail in the ROD for the 2001 rate proposal.<sup>14</sup>

At the time, the SN CRAC in 2001 was nothing more than a proposal in the GRSPs that allowed BPA to hold an open-ended rate proceeding at an unspecified, future date. No rate design alternatives were offered. BPA did no modeling of the impact of potential

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<sup>14</sup> Some parties objected to BPA's failure to perform a section 7(b)(2) analysis. See, WP-02-A-09 (June 2001) at 6-1 through 6-15. The rates from that proceeding are still before the Federal Energy Regulatory Commission ("FERC"). FERC does not have the authority to review rate design issues. Therefore, the sufficiency of BPA's compliance with section 7(b)(2) must wait future determination by the U.S. Court of Appeals for the Ninth Circuit. Nothing in this Initial Brief should be construed as waiving any arguments that Canby might make regarding the 2001 ROD for the Supplemental Power Rate Proposal or BPA's treatment of 7(b)(2) issues in that proceeding.

SN CRAC adjustments on different power rates. See, ROD for the Supplemental Power Rate Proposal, WP-02-A-09 (June 2001) at 4-49. BPA simply deferred decisions about the design and scope of the rates until the day that it began a section 7(i) rate hearing.

Thus, when BPA initiated the SN CRAC proceeding in March 2003, the situation changed. BPA formally triggered the section 7(i) process and set in motion the statutory requirements to conduct the 7(b)(2) rate test.

#### 7. A “Full and Complete” Record

The Northwest Power Act requires BPA to develop a “full and complete record” in a rate proceeding. 16 U.S.C. § 839e(i)(2). Based on the record, the Administrator then makes his or her decision, which includes a full and complete justification of the final rates. 16 U.S.C. § 839e(i)(5).

Courts have long held that the record must be complete if the decision in question can withstand judicial scrutiny. “If the record is not complete, then the requirement that the agency decision be supported by ‘the record’ becomes almost meaningless.” Portland Audubon Society v. Endangered Species Committee, 984 F.2d 1534,1548 (9<sup>th</sup> Cir. 1993).

To create a full and complete record, BPA must conduct the 7(b)(2) rate test and place the results in the administrator’s record. Omitting a key component of BPA’s traditional ratesetting methodology will leave open to challenge the entire SN CRAC proceeding.

Although courts have traditionally deferred to BPA in specific rate design issues and interpretations of its statutes, they will not do so if they believe Congress has directly

addressed the subject. “While we generally accord substantial deference to BPA’s decisions interpreting its organic statutes, extending such deference is unwarranted where, as here, Congress has squarely addressed the issue.” M-S-R Public Power v. Bonneville Power Administration, 297 F.3d 833, 844 (9<sup>th</sup> Cir. 2002).

Canby believes Congress has squarely addressed the applicability of the 7(b)(2) rate test. As a preference customer and purchaser of BPA power, Canby has a statutory right to participate in this proceeding and to have BPA set rates in conformance with the Northwest Power Act. Canby has a right to request that BPA develop a full and complete record in this proceeding. BPA cannot abandon its statutory and legal obligations simply for amorphous reasons of administrative convenience. Eighteen years of precedent demand that BPA run the 7(b)(2) rate test before imposing the SN CRAC surcharge.

#### 8. The Deadlines

BPA believes the tight, 40-day deadline shows that BPA’s intent all along was not to conduct the 7(b)(2) rate test. “This intent is confirmed by specific language that precludes BPA, as a practical matter, from performing such a test.” SN-03-E-BPA-11 at 75, lines 4-6.

BPA’s position contains two faulty assumptions:

First, the 40-day process did not prohibit BPA from starting to collect and analyze 7(b)(2) issues before the start of the rate case. BPA, for instance, could have modeled DSI loads under various conditions prior to publishing its Federal Register Notice.

Second, the GRSPs for the SN CRAC expressly allow BPA and other parties to extend the schedule for this proceeding. “The hearing shall be completed within 40 days, *unless a different duration is agreed to by the parties.*” Emphasis added. See, 2002 GRSPs, section F3b, in WP-02-A-09, Appendix, at 26.

In other words, BPA had -- and still has -- a practical way of performing the 7(b)(2) rate test. It can seek a new deadline with its customers.

Finally, Canby wishes to note the potential ramifications of allowing an administrative agency to argue that it need not comply with its own statutory mandate or its own long-held practices simply because of time pressures. Following this line of reasoning, BPA could pick and choose whatever it wanted to follow in the Northwest Power Act on grounds that it was under time constraints. The provisions in the Act were placed there by Congress for a reason, and they have worked since 1980. BPA should not attempt to exempt itself from its obligations under law.

**C. BPA’s proposed SN CRAC is inconsistent with the 1995 Business Plan and its Environmental Impact Statement.**

In the Federal Register Notice for this proceeding, BPA stated that an initial review of this proposal rate adjustment indicated that it was consistent with the “Market-Driven Alternative,” adopted as the preferred alternative in the 1995 Business Plan and accompanying Environmental Impact Statement (“EIS”). 68 Fed. Reg. 12052 (March 13, 2003).

BPA said:

“This rate proposal [SN CRAC] would result in rate levels similar to those resulting from the rate designs evaluated in the Business Plan EIS, and thus would not be expected to result in significantly different environmental impacts from those examined for the Market-Driven Alternative in the Business Plan EIS....Therefore, BPA expects that this rate proposal will fall within the scope of the Market-Driven Alternative that was evaluated in the Final Business Plan EIS and adopted in the Business Plan ROD, and that BPA thus may tier its decision under NEPA for the proposed rate adjustment to the Business Plan ROD.”  
68 Fed. Reg. 12052.

The Public Generating Pool attempted to file direct testimony on the subject and to challenge BPA’s assertions in the Federal Register Notice, but the Hearing Officer granted BPA’s motion to strike its testimony. SN-03-M-09.

The Hearing Officer held that the Federal Register Notice was not sworn testimony. Had BPA submitted testimony, then rebuttal testimony would have been appropriate. The Hearing Officer also noted that BPA had asserted that it was conducting an ongoing environmental review of the SN CRAC in a separate forum, pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. See, SN-03-O-9 at 2.

BPA must reconcile the findings of the 1995 Business Plan and EIS with the specific rate design and results of this proceeding. BPA, however, has apparently completed no review of the rates beyond the Federal Register Notice language itself. Furthermore, the study period for the Business Plan EIS ended in 2002. See, Business Plan EIS at 1-5. The SN CRAC period, in contrast, is 2004-2006.

The Business Plan EIS *assumed* that BPA would implement tiered rates under which it would charge one rate for existing resources and another rate for purchases. Business Plan EIS at C-2 and C-3. In fact, BPA has not implemented tiered rates and sells power under melded rates.

Furthermore, the SN CRAC would increase average power rates by 20-30 percent above the levels anticipated in the Business Plan EIS. The Business Plan EIS, for example, projected rates that would not exceed 3.1 cents per kilowatt hour (kWh) for Tier 1 (existing federal resources). When combined with Tier 2 (reflecting market purchases), BPA projected rates that would not exceed 3.3 cents per kWh.

Even the “Status Quo” alternative (described by BPA as “business as usual”) produced average PF rates between 3.2 and 3.6 cents per kWh. See, Business Plan EIS at C-3.

But the SN CRAC, if levied to its maximum, would bring the PF rate to almost 4 cents per kWh, nearly double what it was in 2000. These rates are hardly similar to and consistent with what BPA envisioned in the Business Plan EIS.

BPA therefore cannot rely on the Business Plan and its EIS as the support under the National Environmental Policy Act for the proposed SN CRAC rate case. BPA must prepare a new environmental analysis or reduce the maximum SN CRAC to fit within the existing parameters of the Business Plan.

#### **IV. SUMMARY**

Canby requests that the Administrator:

- 1) Recognize the limiting language in Canby's five-year power sales contract and exempt Canby from the SN-CRAC;
- 2) Perform a section 7(b)(2) rate test in this proceeding, pursuant to the Northwest Power Act;
- 3) Evaluate the proposed SN CRAC rates for consistency with BPA's 1995 Business Plan and its EIS, and prepare a new EIS or lower the SN CRAC to conform with those documents.

DATED this 23<sup>rd</sup> day of May, 2003.

Respectfully Submitted:

Dan Seligman  
/s/ Dan Seligman  
Attorney for Canby Utility Board