

Bonneville Power Administration
United States Department of Energy
Rules of Procedure Governing Rate Hearings

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Section 1010.1 Applicability

(a) General Rule. This rule applies to all proceedings conducted under the procedural requirements for ratemaking contained in section 7(i) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839e(i). On determining that new or revised rates may be needed to satisfy fiscal or other statutory obligations of Bonneville Power Administration (BPA), the Administrator may initiate a hearing in accordance with this rule to develop a full and complete record on proposed rates.

(b) Transitional application. This rule applies only to rate hearings initiated on or after March 7, 1986. All hearings initiated prior to that date shall be conducted pursuant to the "Procedures Governing Bonneville Power Administration Rate Adjustments," 47 FR 6240 (February 10, 1982). Rate hearings are initiated as provided in § 1010.3 of this rule.

(c) Exceptions. This rule does not apply to:

(1) Proceedings regarding implementation of rates or formulae previously adopted by the Administrator and approved, on either an interim or final basis, by the Federal Energy Regulatory Commission,

(2) Proceedings required by statute or by contract, in which the Administrator does not propose any new rate, formula rate, discount, credit, surcharge or other rate change, or (3)

negotiation of, or the receipt of public comment on, any contract, except for provisions which satisfy the definition in s 1010.2(j).

(d) Waiver. To the extent permitted by law, the Administrator may waive any section of this rule of procedure or prescribe any alternative procedures he determines to be appropriate.

Section 1010.2 Definitions

(a) "Administrator" means the BPA administrator or the acting administrator or, for the purpose of § 1010.7. the hearing officer.

(b) "Agent" means counsel, consultants, witnesses, employees and other representatives of a person.

(c) "Draft Record of Decision" means the document, issued by BPA after the submission of initial briefs, which identifies each issue BPA will resolve in the pending rate hearing; summarizes the factual, legal and policy arguments presented by BPA and the parties on each issue; and sets forth the Administrator's tentative decision on each issue.

(d) "Ex Parte Communication" means an oral or written communication regarding the merits of any issue pending in a hearing conducted pursuant to Northwest Power Act section 7(i) which is not on the record and with respect to which reasonable prior notice to parties has not been given, but it shall not include request for status reports on any hearings.

(e) "Hearing Officer" means the official designated by the Administrator to conduct a hearing pursuant to Northwest Power Act section 7(i)(2).

(f) "Legal Issue" includes any issue grounded on any contractual right or obligation, any of BPA's organic statutes, the Administrative Procedure Act, 5 U.S.C. 551, et seq., or the Trade Secrets Act, 18 U.S.C. 1905, which has a bearing of the propriety of a rate proposed by BPA or any party.

(g) "Participant" means any person submitting for the record oral or written comments pursuant to § 1010.5 on a rate proposed by the Administrator.

(h) "Party" means any person whose intervention is effective under § 1010.4.

(i) "Person" means an individual, partnership, corporation, association, an organized group of persons, a municipality, including a city, county, or any other political subdivision of a state, a state, any agency, department, or instrumentality of a state, a province, or the United States, or any officer, or agent of any of the foregoing acting in the course of his or her employment or agency.

(j) "Rate" means the monetary charge, discount, credit, surcharge, pricing formula, or pricing algorithm for any electric power or transmission service provided by BPA, including charges for capacity and energy. However, the term does not include transmission line losses, leasing fees, facility-use charge other than for BPA transmission services, or charges for operation and maintenance of customer-owned facilities. A rate may be set forth in a contract; however, other portions of a contract do not thereby become part of the rate for purposes of these rules.

(k) "Record" means the testimony, exhibits, transcripts, notices, comments, briefs, pleadings, draft record of decision and record of decision certified by the hearing officer.

Section 1010.3 Initiation of Hearing

A hearing on the Administrator's proposal to establish or revise the rate for any power or transmission service shall be initiated on the day a notice of BPA's initial rate proposal is published in the Federal Register. The notice shall:

- (a) Specify the proposed rates and summarize any studies, analyses, or other available information that BPA intends to use in the hearing to justify the proposed rates,
- (b) Establish a deadline for filing petitions to intervene,
- (c) State whether the hearing will be conducted under the rule for general rate proceedings § 1010.9, or the rule for expedited rate proceedings § 1010.10, together with a statement of reasons for the Administrator's choice between the two rules,
- (d) Establish a date on which the hearing officer will conduct the prehearing conference,
- (e) Specify the date on which the Administrator will issue the record of decision, which date shall be used by the hearing officer in establishing the procedural schedule for the hearing, and
- (f) Provide other information which the Administrator determines to be pertinent to the hearing.

Section 1010.4 Intervention.

(a) Filing. A person seeking to become a party in a rate hearing must file a petition to intervene with the hearing officer. A copy of the petition shall be served on BPA's Office of General Counsel/APR.

(b) Contents. The petition shall state the name and address of the person and the person's interests in the outcome of the hearing. Petitioners may designate no more than two persons on whom service will be made. BPA customers and customer groups whose rates are subject to revision in the hearing will be granted intervention, based on a petition filed in conformity with this section. Other petitioners must explain their interests in sufficient detail to permit the hearing officer to determine whether they have a relevant interest in the hearing.

(c) Time.

(1) Petitions must be filed within the time specified in the § 1010.3(b) notice for the hearing in question.

(2) Late interventions are strongly disfavored. Granting an untimely petition to intervene must not be a basis for delaying or deferring any procedural schedule. A later intervenor

must accept the record developed prior to its intervention. In acting on an untimely petition, the hearing officer shall consider whether:

- (i) The petitioner has a good reason for filing out of time,
- (ii) Any disruption of the proceeding might result from allowing a later intervention,
- (iii) The petitioner's interest is adequately represented by existing parties, and
- (iv) Any prejudice to, or extra burdens on, existing parties might result from permitting the intervention.

(d) Opposition. Any opposition to an intervention petition shall be filed and served at least 24 hours before the prehearing conference. Opposition to a late intervention petition shall be filed and served within two days after service of the petition.

(e) Application of hearing procedures. Procedures specified in §§ 1010.6, 1010.8-1010.15 are available only to parties, and are not available to participants.

Section 1010.5 Participation

Any person, who is not a party, may become a participant by submitting written recommendations for the record or by testifying in legislative-style hearings when conducted by the Administrator for the purpose of receiving public comment. Written comments must be submitted to the BPA Public Involvement Office. The hearing officer may allow reasonable questioning of participants by BPA counsel.

Section 1010.6 Prehearing Conference

A prehearing conference shall be held on the date specified in the Administrator's Federal Register notice. During the conference, the hearing officer shall:

- (a) Act on all intervention petitions.
- (b) Establish any special rules of procedure the hearing officer considers appropriate, provided that such special rules conform to BPA's rules of procedure governing rate hearings,
- (c) Establish a service list,
- (d) Establish a procedural schedule for the entire hearing, and
- (e) Consolidate parties with similar interests into groups for purposes of filing jointly sponsored testimony and briefs and for expediting cross-examination.

Section 1010.7 Ex Parte Communications

(a) General Rule. Except as permitted in paragraph (b) of this section, no party or participant in any hearing shall submit ex parte communications to the Administrator or any BPA employee regarding any matter pending before BPA in the hearing. Neither shall the Administrator nor any BPA employee request or entertain such ex parte communications.

(b) Exceptions. The prohibitions contained in paragraph (a) of this section do not apply to a communication:

- (1) Relating to matters of procedure only;
- (2) From a person when otherwise authorized by law or other portions of these procedures;
- (3) From or to the Federal Energy Regulatory Commission after coordination with BPA counsel;
- (4) Which all parties agree may be made on an ex parte basis;
- (5) Relating to exchanges of data in the ordinary course of business, data required to be exchanged pursuant to contracts, or data which would be available pursuant to Freedom of Information Act requests;
- (6) Which relates solely to a request for supplemental information or data necessary for an understanding of factual materials contained in documents filed with BPA during a hearing and which is made in the presence of or after coordination with BPA counsel; or
- (7) Which relates to a topic that is only secondarily the object of a hearing, for which BPA is statutorily responsible under provisions other than Northwest Power Act section 7, or which is eventually decided other than through a section 7(i) hearing.

(c) Application. The prohibitions contained in this section shall apply from the day on which BPA publishes the Federal Register notice specified § 1010.3, or the person responsible for such communication has knowledge that a notice will be published.

(d) Notice of meetings. BPA will give reasonable public notice of any meeting which BPA intends to hold with any customer group or member of the public when it reasonably appears that matters of substance relative to the merits of a section 7(i) hearing will be discussed. For any such meeting held individually with customers, customer groups, and others, BPA will prepare a memorandum reciting the date of the meeting, persons in attendance, and a summary of issues discussed and positions taken. This memorandum will be placed in an ex parte file separate from the material upon which the Administrator relies in reaching a decision. This file will be available for review through BPA's Public Involvement Office.

(e) Written materials. Any written material received by the Administrator or BPA staff which would otherwise be subject to the prohibition of paragraph (a) of this section automatically will be placed in the ex parte file identified in paragraph (d) of this section.

(f) Oral communications. The Administrator or any BPA employee who receives an oral offer of any communication prohibited by paragraph (a) of this section shall decline to listen to such communication and shall explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof shall advise the communicator that he or she will not consider the communication. The recipient shall prepare a statement setting forth the substance of the communication and the circumstances thereof within 48 hours and deliver the statement to BPA's Office of General Counsel. BPA's Office of General Counsel must deliver these statements to the hearing officer who will serve copies on parties to the

proceedings. The hearing officer will also serve a copy of the statements to the communicator and allow him or her a reasonable opportunity to file a response.

(g) Rebuttal. Requests for an opportunity to rebut, on the record, any facts or contentions contained in either ex parte communication or in a memorandum prepared pursuant to paragraph

(h) of this section should be filed with the hearing officer. The hearing officer will grant such requests only where the dictates of fairness so require.

Section 1010.8 Discovery

BPA and the parties to any rate hearing may engage in discovery, and be subject to discovery requests, according to the following rules:

(a) Informal requests. Prior to initiation of a rate hearing, information concerning BPA rates may be requested by making a written request through BPA's Office of General Counsel/APR.

(b) Data requests. Data requests shall be made in writing at the times designated in the procedural schedule. Any relevant information may be requested that is not privileged or unduly burdensome to produce. BPA or any party may request data in hard copy or computer tape, studies, or admissions; however, no party shall be required to perform any new study or to run any analysis or computer program. Requests shall be addressed to counsel for the party to whom the requests are sent (or directly to a party not represented by counsel), and shall be served on all parties to the service list compiled by the hearing officer. Responses to data requests are required to be served only on counsel for the requesting party.

(c) Clarification sessions. The hearing officer may schedule one or more transcribed sessions for the purpose of allowing parties to question witnesses about the contents of their prepared testimony and the derivation of their recommendations and conclusions. The procedural schedule shall require that BPA and the parties wishing to participate in clarification of a witnesses' testimony serve all data requests pertaining to that testimony at least one business day prior to the session. Witnesses shall have the option of providing answers to data requests during the clarification session. If a witness is unable to answer a given question during the clarifying session, the answer to that question shall be provided in accordance with paragraph (b) of this section.

(d) Objections to discovery. Objections to data requests or to questions asked during clarification sessions shall be submitted within the time specified in the procedural schedule. Objections must explain the grounds on which response is being withheld.

(e) Motions to compel. Anyone whose data request or clarifying question is not answered may file a motion with the hearing officer to compel an answer. The movant must certify that it first attempted to resolve the objection informally with the objecting party. Motions to compel must be made within the time specified in the procedural schedule.

(f) Privileged Information. The hearing officer may issue protective orders or make in camera inspection of documents as necessary to protect copyrighted, proprietary, or otherwise privileged information. The hearing officer may not order release of documents in BPA's possession withheld on the basis of exemptions to the Freedom of Information Act, 5 U.S.C. 552, or the Trade Secrets Act, 18 U.S.C. 1905.

(g) Sanctions. The hearing officer may remedy any refusal to comply with an order compelling answer to a data request or clarification question by:

- (1) Striking the testimony or exhibits to which the question or request relates, or
- (2) Limiting discovery or cross-examination by the party refusing to answer or respond, or
- (3) Recommending to the Administrator that an appropriate adverse inference be drawn against the party refusing to answer or respond.

(h) Copies. Any party wishing copies of data responses should request them from the party submitting the response.

Section 1010.9 General Rate Proceedings

(a) General rule. a general rate proceeding is a hearing on the Administrator's proposal to revise all, or substantially all, of BPA's power and transmission rates in instances where the Administrator does not utilize the procedures in § 1010.10 for an expedited rate proceeding. The hearing officer may establish the procedures and conduct hearings, consistent with this rule, as necessary to develop a full and complete record and to receive public comment and argument related to the proposed rates.

Section 1010.10 Expedited Rate Proceedings

(a) General Rule. The record of decision in rate hearings conducted under this section shall be issued within 90 days after notice is issued under § 1010.3, except as provided in paragraph (b) of this section. Consistent with fairness to the parties, the hearing officer shall establish the procedures or special rules necessary to satisfy the Administrator's expedited schedule.

(b) Extensions. Only the hearing officer may request the Administrator to extend the 90-day hearing limit, on a showing of good cause by a party. Upon a determination of the hearing officer that a party's showing has merit and is not dilatory, the hearing officer may request in writing an extension of time from the Administrator. Submission of a request shall not have the effect of staying the proceedings. The Administrator shall notify the hearing officer and the parties of his determination within four days thereafter.

(c) Special procedure. Oral argument will not be heard in expedited rate proceedings, unless all parties agree to substitute oral argument for a brief on exceptions.

Section 1010.11 Testimony And Exhibits

(a) General Rule.

- (1) Parties shall be provided an adequate opportunity to offer refutation or rebuttal on any material submitted by any other party or by BPA. Except as provided in § 1010.5, witnesses shall submit all testimony and exhibits at the times specified in the procedural schedule. Oral testimony will be permitted only by leave of the hearing officer.

(2) Any rebuttal to BPA's direct case must be contained in a party's direct testimony, which shall also contain any affirmative case that party wishes to present. Any subsequent rebuttal testimony permitted by the hearing officer shall be limited to rebuttal of the parties' direct cases. In lieu of cross-examination, the hearing officer is encouraged to allow the filing of surrebuttal testimony on an issue.

(3) Written testimony must have line numbers inserted in the left-hand margin of each page. It is the responsibility of each party to obtain from the hearing officer's clerk exhibit numbers for display on prefiled testimony and exhibits.

(4) The hearing officer shall reject exhibits and other documentation of excessive length. Parties may only introduce into evidence excerpts or summaries of such documentation, which exclude irrelevant or redundant material.

(b) Items by reference. Testimony, exhibits, or studies from other BPA rate hearings may be designated as items by references in any proceeding. Items by reference should not be physically included in the record, unless the hearing officer so orders.

(c) Official notice. The administrator or the hearing officer may take official notice of any matter that may be judicially noticed by federal courts, or any matter about which BPA is expert.

(d) Motions to strike. Motions to strike prefiled testimony and exhibits shall be filed within 7 days after service. Answers to the motion may be made; however, the movant may not reply to the answer.

(e) Record of participants. Testimony and comments received pursuant to § 1010.5 shall be compiled in a separate section of the record.

(f) Sanctions. The hearing officer may reject or exclude all or part of any evidentiary material or pleading not submitted in accordance with this section.

Section 1010.12. Hearing

(a) Panels. The hearing officer may permit a party's witnesses to testify in a panel, provided that each panel member (1) has submitted a statement of qualifications, and (2) is under oath. Any panel member may respond to a cross-examination question.

(b) Cross-examination.

(1) Cross-examination shall be limited to issues relevant to the proposed rates or to issues identified in a statement of issues adopted by the hearing officer. The hearing officer may impose reasonable time limitations on the cross-examination of any witness.

(2) Only counsel for a witness may object to questions asked during cross-examination, except in instances of friendly cross-examination or where the objector can demonstrate that answers would unduly prejudice its interests.

(3) Where parties have substantially similar positions, the hearing officer may appoint lead counsel to conduct cross-examination.

(4) The hearing officer shall not permit cross-examination on issues where it is clear that the questioner's position is not adverse to that of the witness, viz, friendly cross-examination.

(c) Cross-examination exhibits.

(1) Documents used during cross-examination of any witness must be submitted to the hearing officer and to the witnesses' counsel.

(2) If a document used as a cross-examination exhibit contains material not offered as evidence, the party utilizing the exhibit must:

(i) Plainly designate the matter offered as evidence; and

(ii) Segregate and exclude the material not offered in evidence, to the extent practicable.

(d) Stipulations. The hearing officer may receive into evidence stipulations on any issue of fact.

(e) All other matters relating to conduct of hearings are left to the discretion of the hearing officer.

Section 1010.13. Briefs

(a) General rule. Briefs shall be filed at times specified by the hearing officer in the procedural schedule. All evidentiary arguments in briefs must be based on cited material contained in the record. Materials not admitted into evidence shall not be attached to any brief. Incorporation by reference shall not be permitted. The hearing officer may impose page limitations on any brief.

(b) Waiver of issues or arguments. Parties whose briefs do not raise and fully develop their positions on any issue shall be deemed to take no position on such issue. Arguments not raised are deemed to be waived.

(c) Initial brief. At the conclusion of the evidentiary portion of a hearing, the hearing officer shall allow each party to submit any initial brief. The purpose of an initial brief is to identify separately each legal, factual, and policy issue to be resolved by the Administrator and present all arguments in support of a party's position on each of these issues. The initial brief should also rebut contentions made by adverse witnesses in their prepared testimony.

(d) Brief on exceptions. After issuance of BPA's draft record of decision, each party may file a brief on exceptions. The purposes of the brief on exceptions are to: (i) Raise any alleged legal, policy, or evidentiary errors in the draft record of decision, or (ii) provide additional support for tentative decisions contained in the draft record of decision. Alleged errors not raised in briefs on exceptions shall be deemed waived.

(e) Sanctions. The hearing officer shall not admit into the record any brief that does not conform to this section.

Section 1010.14. Oral Argument

An opportunity for parties to present oral argument may be provided at the discretion of the Administrator, except as limited by § 1010.10(c).

Section 1010.15. Service of Documents

BPA and each party shall provide a copy of all motions, briefs, pleadings and prefiled materials to all persons listed in the service list compiled by the hearing officer. Until a service list is adopted by the hearing officer under § 1010.6, service on parties may be made by service on BPA General Counsel/APR. Parties may designate no more than two persons on whom service shall be made. The Administrator may designate additional persons upon whom service will be made. Participants shall not be included on the service list. Service of requests for data and responses to such requests is governed by § 1010.8 (b) and (h).

Section 1010.16. Record of Decision

Based on the entire hearing record, the Administrator shall make a decision adopting final proposed rates for submission to the Federal Energy Regulatory Commission for confirmation and approval. The record of decision shall include a full and complete justification for the final proposed rate or rates. The Administrator shall promptly serve copies of the record of decision on all parties to the proceeding. Copies of the record of decision will be made available to participants through BPA's Public Involvement manager.