Final Firm Power Products and Services Rate Adjustment Proposal (FPS-96R)

Administrator's Record of Decision FPS-96R-A-02

FIRM POWER PRODUCTS AND SERVICES (FPS-96R) RATE ADJUSTMENT

ADMINISTRATOR'S FINAL RECORD OF DECISION

BONNEVILLE POWER ADMINISTRATION

U.S. DEPARTMENT OF ENERGY
March 2000

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COMMONLY USED ACRONYMS

AANR	Audited Accumulated Net Revenues
AC	Alternating Current
AER	Actual Energy Regulation
AFUDC	Allowance for Funds Used During Construction
AGC	Automatic Generation Control
aMW	Average Megawatt
ANRT	Accumulated Net Revenue Threshold
AOP	Assured Operating Plan
APS	Ancillary Products and Services (rate)
ASC	Average System Cost
BASC	BPA Average System Cost
BO	Biological Opinion
BPA	Bonneville Power Administration
Btu	British Thermal Unit
C&R	Cost and Revenue
C&R Discount	Conservation and Renewables Discount
California PX	California Power Exchange
CBP	Columbia Basin Project
CCCT	Combined-Cycle Combustion Turbine
CEC	California Energy Commission
Cfs	cubic feet per second
COB	California-Oregon Border
COE	U.S. Army Corps of Engineers
Con/Mod	Conservation Modernization Program
COSA	Cost of Service Analysis
CRAC	Cost Recovery Adjustment Clause
CRC	Critical Rule Curves
CSPE	Columbia Storage Power Exchange
CT	Combustion Turbine
CTPP	Conditional TPP
CY	Calendar Year (Jan-Dec)
DC	Direct Current
DDC	Dividend Distribution Clause
DMP	Data Management Procedures
DOE	Department of Energy
DSIs	Direct Service Industrial Customers
ECC	Energy Content Curve
EIA	Energy Information Administration
EIS	Environmental Impact Statement
Energy Northwest	Formerly Washington Public Power Supply System (Nuclear) Project
EPP	Environmentally Preferred Power
F&O	Financial and Operating Reports
FBS	Federal Base System
FCCF	Fish Cost Contingency Fund

FCRPS	Federal Columbia River Power System
FCRTS	Federal Columbia River Transmission System
FELCC	Firm Energy Load Carrying Capability
FERC	Federal Energy Regulatory Commission
Fourth Power Plan	NWPPC's Fourth Northwest Conservation and Electric Power Plan
FPS	Firm Power Products and Services (rate)
FSEA	Federal Secondary Energy Analysis
FY	Fiscal Year (Oct-Sep)
GEP	Green Energy Premium
GI	Generation Integration
GRI	Gas Research Institute
GRSPs	General Rate Schedule Provisions
GSP	Generation System Peak
GSU	Generator Step-Up Transformers
GTA	General Transfer Agreement
GWh	Gigawatthour
HELM	Hourly Electric Load Model
HLH	Heavy Load Hour
HNF	Hourly Non-Firm
HOSS	Hourly Operating and Scheduling Simulator
ICNU	Industrial Customers of Northwest Utilities
IJC	International Joint Commission
IOUs	Investor-Owned Utilities
IPTAC	Industrial Firm Power Targeted Adjustment Charge
IP	Industrial Firm Power (rate)
ISC	Investment Service Coverage
ISO	Independent System Operator
KAF	Thousand Acre Feet
kcfs	kilo (thousands) of cubic feet per second
ksfd	thousand second foot day
kV	Kilovolt (1000 volts)
kW	Kilowatt (1000 watts)
kWh	Kilowatthour
L/R Balance	Load/Resource Balance
LDD	Low Density Discount
LLH	Light Load Hour
LME	London Metal Exchange
LOLP	Loss of Load Probability
m/kWh	Mills per kilowatthour
MAF	Million Acre Feet
MC	Marginal Cost
MCA	Marginal Cost Analysis
MCS	Model Conservation Standards
MIP	Minimum Irrigation Pool
MMBTU	Million British Thermal Units
MOP	Minimum Operating Pool

MORC	Minimum Operating Reliability Criteria
MPC	Montana Power Company
MT	Market Transmission (rate)
MW	Megawatt (1 million watts)
MWh	Megawatthour
NCD	Non-Coincidental Demand
NEPA	National Environmental Policy Act
NERC	North American Electric Reliability Council
NF	Nonfirm Energy (rate)
NFRAP	Nonfirm Revenue Analysis Program (model)
NLSL	New Large Single Load
NMFS	National Marine Fisheries Service
NOB	Nevada-Oregon Border
NORM	Non-Operating Risk Model
Northwest Power Act	Pacific Northwest Electric Power Planning and Conservation Act
NR	New Resource Firm Power (rate)
NRU	Northwest Requirements Utilities
NT	Network Transmission
NTP	Network Integration Transmission (rate)
NTSA	Non-Treaty Storage Agreement
NUG	Non-Utility Generation
NWPP	Northwest Power Pool
NWPPC C&R	Northwest Power Planning Council Cost and Revenues Analysis
NWPPC	Northwest Power Planning Council
O&M	Operation and Maintenance
OMB	Office of Management and Budget
OY	Operating Year (Aug-Jul)
PA	Public Agency
PBL	Power Business Line
PDP	Proportional Draft Points
PDR	Power Discharge Requirement
PF	Priority Firm Power (rate)
PFBC	Pressurized Fluidized Bed Combustion
PMDAM	Power Marketing Decision Analysis Model
PNCA	Pacific Northwest Coordination Agreement
PNRR	Planned Net Revenues for Risk
PNUCC	Pacific Northwest Utilities Conference Committee
PNW	Pacific Northwest
POD	Point of Delivery
PPC	Public Power Council
PSE	Puget Sound Energy
PSW	Pacific Southwest
PTP	Point to Point
PUD	Public or People’s Utility District
PURPA	Public Utilities Regulatory Policies Act
RAM	Rate Analysis Model (computer model)

Reclamation	Bureau of Reclamation
REP	Residential Exchange Program
RFP	Request for Proposal
RiskMod	Risk Analysis Model (computer model)
RiskSim	Risk Simulation Model
RL	Residential Load (rate)
RMS	Remote Metering System
ROD	Record of Decision
RPSA	Residential Purchase Sale Agreement
RTF	Regional Technical Forum
SCCT	Single-Cycle Combustion Turbine
SS	Share-the-Savings Energy (rate)
STREAM	Short-Term Evaluation and Analysis Model
TAC	Targeted Adjustment Charge
TACUL	Targeted Adjustment Charge for Uncommitted Loads
TBL	Transmission Business Line
tcf	Trillion Cubic Feet
TCH	Transmission Contract Holder
TPP	Treasury Payment Probability
TRL	Total Retail Load
UDC	Utility Distribution Company
URC	Upper Rule Curve
USFWS	U.S. Fish and Wildlife Service
VB	Visual Basic
VBA	Visual Basic for Applications
VOR	Value of Reserves
WEFA	WEFA Group (Wharton Econometric Forecasting Associates)
WPRDS	Wholesale Power Rate Development Study
WSCC	Western Systems Coordinating Council
WSPP	Western System Power Pool
WY	Watt-Year

1.0 INTRODUCTION

1.1 Background

In this rate proceeding, the proposed adjustments to the Firm Power Products and Services (FPS-96) rate schedule clarify the FPS-96 rate schedule and establish posted rates that will apply to the capacity without energy product. Prior to the 1996 rate case, the Contract Rate demand charge in Bonneville Power Administration's (BPA) Surplus Firm Power rate schedules (i.e., SP-93, SP-91, SP-89, and SP-86) was set to accommodate all of the following products: (1) firm energy; (2) firm capacity without energy; and (3) firm power. The rates ranged from $5.79/kW-month in 1987 to $6.09/kW-month in 1993. The FPS-96 rate schedule replaced the SP-93 rate schedule. However, due to significant product unbundling which occurred in 1996, the FPS-96 rate schedule includes a Contract Rate demand charge of only $0.87/kW/month. Unlike the predecessor rate schedules, this rate was designed and priced to be used exclusively in conjunction with the purchase of the separate energy product included in the same section of the FPS-96 rate.

As part of the 1996 product unbundling, separate sections for the capacity without energy product were included in both the Priority Firm Power (PF-96) and New Resource Power (NR-96) rate schedules. Although clarifying language was mistakenly omitted from the FPS-96 rate schedule itself, BPA made it clear in other rate case documentation that it intended to sell the capacity without energy product under the FPS-96 rate schedule only at negotiated prices that would not be based on the Contract Rate demand charge. Section 4.7 of BPA's Final 1996 Wholesale Power Rate Development Study (WPRDS), WP-96-FS-BPA-01 states:

> "Firm capacity without energy is available under PF-96 and NR-96 rate schedules for Computed Requirements customers purchasing under the 1981 Contract. Firm capacity without energy is also available under the FPS-96 rate schedule, at negotiated prices and terms that may vary from those in the PF and NR rate schedules."

In nearly identical language, the 1996 Record of Decision also confirms that the capacity without energy product would be offered under the FPS-96 rate at negotiated, rather than posted, rates. 1996 Final Rate Proposal, Administrator's Record of Decision (WP-96-A-02) at 323.

Long before establishment of the FPS-96 rate schedule, BPA had entered into a small number of power sales contracts that provided for BPA to supply, under specified circumstances, capacity without energy to be priced under the Contract Rate demand charge section of the then applicable Surplus Firm Power rate schedule. As noted previously, the FPS-96 rate schedule is the nominal successor to prior Surplus Firm Power rate schedules, but it is not designed to accommodate pricing the product in that manner. Issues related to these individual contracts were not raised by parties to the 1996 rate proceeding. At the time BPA made a final decision to negotiate rates for capacity without energy under the FPS-96 rate, there was no obvious indication of any conflict with individual provisions in a few surplus power sales contracts which had used a previous Contract Demand rate as the basis for a posted rate for that product.

As designed, the Contract Demand rate was intended to be used only in conjunction with a firm power sale. Under the FPS-96 rate schedule, such transactions would always require payment of the additional energy charge, which was designed to reflect seasonal and diurnal effects on the value of energy. Because the capacity without energy product typically permits flexibility with respect to return energy, this value would not be recovered through the current Contract Demand rate standing alone. Consequently, the Contract Demand rate is not an appropriate vehicle for pricing the capacity without energy product.

The purpose of this proceeding is to correct this error. Because some contracts may require a posted, as opposed to a negotiated, rate for capacity without energy, BPA is proposing to amend the FPS-96 rate schedule to include a seasonally and diurnally adjusted rate for the capacity without energy product. This step is necessary to correct an inadvertent oversight that could distort the revenue requirement approved by FERC, change the cost allocations adopted by BPA, and provide an extraordinary windfall to one customer class at the expense of others.

1.2 Procedural History of this Rate Proceeding

Section 7(i) of the Northwest Power Act, 16 U.S.C. §839e(i), requires BPA to establish its wholesale power and transmission rates according to certain procedures. These procedures include, among other things, issuance of a Federal Register Notice announcing the proposed rates; one or more hearings; the opportunity to submit written views, supporting information, questions, and arguments; and a decision by the Administrator based on the record. Proceedings conducted pursuant to §7(i) are governed by BPA's *Procedures Governing Bonneville Power Administration Rate Hearings*, 51 Fed. Reg. 7611 (1986) (hereinafter Procedures).

On August 13, 1999, BPA filed notice in the Federal Register (FRN) that it was proposing to amend the FPS-96 rate schedule pursuant to §1010.10 of the Procedures. 64 Fed. Reg. 44362 (1999). BPA's initial proposal was published on August 24, 1999. Testimony, a study and documentation, along with the proposed changes to the FPS-96 rate schedule, were provided in support of the initial proposal.

A prehearing conference was held on August 24, 1999. At the conference parties agreed upon modifications to the schedule included in the FRN. The most important of the adjustments was an agreement among the parties to extend the date for publishing the Final Record of Decision (ROD) from December 6, 1999, to January 18, 2000. In order to make this adjustment, written approval of the Administrator was required. The Administrator approved the schedule changes on August 27, 1999.

The parties' direct cases were due on October 16, 1999, but the deadline was extended until October 27, 1999, after Southern California Edison (SCE) sought additional time to file its direct case. SCE was the only party to file a direct case in this proceeding. On November 17, 1999, SCE sought leave to file supplemental testimony. This request was granted by order of the Hearing Officer on November 19, 1999. On November 19, 1999, BPA filed its rebuttal testimony. Cross-examination was held on November 22 and 23, 1999. SCE filed its initial brief on December 2, 1999. The Administrator issued a Draft Record of Decision (DROD) on

December 17, 1999. SCE filed its Brief on Exceptions on January 10, 2000. The Final Record of Decision was originally scheduled for release on January 18, 2000. However, due to other demands on BPA staff caused by an ongoing general power rate proceeding, the Administrator authorized a delay until now.

1.3 Legal Guidelines Governing Establishment of Rates

Section 6 of the Bonneville Project Act (Project Act), 16 U.S.C. § 832e, requires that the Administrator prepare schedules of rates and charges for electric energy sold to purchasers. Under the Project Act, rate schedules become effective upon confirmation and approval by the Federal Power Commission (succeeded by the Federal Energy Regulatory Commission (FERC)). Section 6 of the Project Act directs the Administrator to establish rates with a view to encouraging the widest possible diversified use of electric energy. Section 7 of the Project Act, 16 U.S.C. § 832f, provides that rate schedules are to be established having regard to the recovery of the cost of producing and transmitting electric energy, including amortization of the capital investment over a reasonable period of years.

The Federal Columbia River Transmission System Act, 16 U.S.C. § 838 (Transmission System Act), contains requirements similar to those of the Project Act. Section 9 of the Transmission System Act, 16 U.S.C. § 838g, provides that rates shall be established: (1) with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates consistent with sound business principles; (2) with regard to the recovery of the cost of producing and transmitting electric power, including amortization of the capital investment allocated to power over a reasonable period of years; and (3) at levels that produce such additional revenues as may be required to pay when due the principal, premiums, discounts, expenses, and interest in connection with bonds issued under the Transmission System Act.

The Flood Control Act of 1944 (Flood Control Act) contains ratemaking requirements similar to the Project Act and the Transmission System Act. Section 5 of the Flood Control Act directs that rate schedules should encourage the most widespread use of power at the lowest possible rates to consumers consistent with sound business principles. 16 U.S.C. § 825s. Section 5 also provides that rate schedules should be drawn having regard to the recovery of the cost of producing and transmitting electric energy, including the amortization of the Federal investment over a reasonable number of years.

In addition to the Bonneville Project Act, the Transmission System Act, and the Flood Control Act, the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 (Northwest Power Act), provides numerous rate directives. Section 7 of the Northwest Power Act directs the Administrator to establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Rates are to be set to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (FCRPS) (including irrigation costs required to be repaid by power revenues) over a reasonable period of years. 16 U.S.C. § 839e(a)(1). Section 7 also contains rate directives describing how rates for individual customer groups may be derived.

1.4 Broad Ratemaking Discretion Vested in the Administrator

The Administrator has broad discretion to interpret and implement statutory standards applicable to ratemaking. These standards focus on cost recovery but they do not restrict the Administrator to any particular rate design methodology or theory. *See Pacific Power & Light v. Duncan*, 499 F. Supp. 672 (D.C. Or. 1980); *accord City of Santa Clara v. Andrus*, 572 F.2d 660, 668 (9th Cir. 1978) ("widest possible use" standard is so broad as to permit "the exercise of the widest administrative discretion"); *Electricities of North Carolina v. Southeastern Power Admin.*, 774 F. 2d 1262, 1266 (4th Cir. 1985). In addition, section 7(f) of the Northwest Power Act provides that "[n]othing in this Act prohibits the Administrator from establishing, in rate schedules of general application, a uniform rate or rates for sale of peaking capacity or from establishing time-of-day, seasonal rates, or other rate forms." 16 U.S.C. §839e(f).

The United States Court of Appeals for the Ninth Circuit has also recognized the Administrator's ratemaking discretion. *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1120-29 (9th Cir. 1984) ("[b]ecause BPA helped draft and must administer the Northwest Power Act, we give substantial deference to BPA's statutory interpretation"); *PacifiCorp v. F.E.R.C.*, 795 F.2d 816, 821 (9th Cir. 1986) ("BPA's interpretation is entitled to great deference and must be upheld unless it is unreasonable"); *Atlantic Richfield Co. v. Bonneville Power Admin.*, 818 F.2d 701, 705 (9th Cir. 1987) (BPA's rate determination upheld as a "reasonable decision in light of economic realities"); *Aluminum Company of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 389 (1984) ("The Administrator's interpretation of the Regional Act is to be given great weight"); *Dep't of Water and Power of the City of Los Angeles v. Bonneville Power Admin.*, 759 F.2d 684, 690 (9th Cir. 1985) ("Insofar as agency action is the result of its interpretation of its organic statutes, the agency's interpretation is to be given great weight").

1.5 Confirmation and Approval of Rates

BPA rates become effective upon confirmation and approval by FERC. 16 U.S.C. § 839e(a)(2). FERC's review is appellate in nature, and is based on the record developed by the Administrator. *United States Dep't of Energy--Bonneville Power Admin.*, 13 F.E.R.C. ¶ 61,157, 61,339 (1980). The Commission is not authorized to modify rates proposed by the Administrator, but may confirm, reject or remand them. *United States Dep't of Energy--Bonneville Power Admin.*, 23 F.E.R.C. ¶ 61,378, 61,801 (1983).

With respect to all rates other than those for sales of nonfirm energy outside the Pacific Northwest and rates for transmission access ordered by FERC, FERC determines whether: 1) rates are sufficient to assure repayment of the Federal investment in the FCRPS over a reasonable number of years after first meeting BPA's other costs; 2) rates are based on BPA's total system costs; and 3) transmission rates equitably allocate the cost of the Federal transmission system between Federal and non-Federal power using the system. 16 U.S.C. § 839e(a)(2). *See United States Dep't of Energy--Bonneville Power Admin.*, 23 F.E.R.C. ¶ 61,378 (1983).

In its order giving final approval to BPA's 1987 rates, FERC summarized the scope of its review as follows:

> In *Central Lincoln Peoples' Utility District v. Johnson*, the court interpreted the Northwest Power Act as setting a narrow scope for the Commission review of Bonneville's regional wholesale power and transmission rates. The Commission's review of these rates is limited to a determination of whether they meet the three specific, limited requirements of section 7(a)(2): (1) the rates must be sufficient to assure repayment of the federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting Bonneville's other costs; (2) the rates must be based on Bonneville's total system costs; and (3) the transmission rates must equitably allocate the cost of the federal transmission system between federal and nonfederal use of the system. Under this narrow review, *the Commission does not address either the rate design or cost allocation between customer classes except as they relate to the equitable allocation of transmission costs* between federal and nonfederal users of the federal transmission system.

United States Dep't of Energy--Bonneville Power Admin., 54 FERC ¶ 61,235, 61,691 (1991) (*emphasis added*)(*citing* 735 F.2d 1101, at 1115 (9th Cir, 1984)). Moreover, FERC has indicated that its regulatory responsibility focuses on the overall cost/revenue relationship of BPA rate schedules in the aggregate, not the merits of each individual rate schedule. 18 CFR §300.21(c)(1); *United States Dep't of Energy--Bonneville Power Admin.*, 36 FERC ¶ 61,350, 61,849 (1986).

2.0 SUBSTANTIVE ISSUES

2.1 Introduction

In this section, BPA identifies key substantive issues, SCE's and BPA's positions on each issue, and the Administrator's final decision on each issue.

2.2 Use of Marginal Cost Analysis

Issue

Whether BPA can use marginal cost analysis to establish the rates for a capacity without energy product.

Parties' Position

In its Brief on Exceptions, SCE argues that BPA is improperly trying to recover market costs in the rates proposed in FPS-96R. FPS-96R-B-SO-01, at 16. SCE argues that BPA has not shown it does not have sufficient surplus capacity to meet its obligations under the SCE contract. *Id*. SCE contends that in both the 1996 and 2002 rate cases BPA has stated that it has sufficient surplus capacity to serve SCE's contract. *Id.* SCE also notes that there has been no notice of insufficiency. Thus, SCE argues, it is inappropriate to use the proxy plant approach because BPA is not presently required to purchase the resource. *Id.*

SCE also maintains that BPA's reliance on Northwest Power Act section 7(f) is misplaced because the statute does not allow for market based rates. *Id.* at 18. Rather, SCE contends that its contract with BPA establishes how the product should be priced. SCE alleges further that BPA's pricing methodology is designed to overcollect BPA's costs and thereby discourage SCE from exercising its contract rights. *Id.* at 17.

For these reasons, SCE concludes that surplus capacity prices must be based on BPA's costs and the NR-96 rate schedule is proposed as a surrogate. *Id.* According to SCE, BPA did not present information regarding the market costs of the resources on the West Coast to support not adopting the NR-96 rate schedule. *Id.* at 19. Moreover, SCE argues there is no evidence of market research or comparison of product characteristics to support the proposed pricing. *Id.* In fact, SCE argues that BPA is attempting to establish a price for capacity using a market forecast where no market exists. *Id*.

SCE raises several other arguments regarding the choice of pricing methodology. SCE asserts that such an approach is inconsistent with section 7(k) of the Northwest Power Act. 16 U.S.C. §839e(k). *Id*. at 17. SCE also argues that BPA is claiming that its actual costs and marginal costs are the same. *Id*. SCE states that BPA is not using the same rate development methodology in the WP-02 rate proceeding because that methodology would not withstand the scrutiny of the parties in that proceeding. SCE also believes that BPA's rate methodology inappropriately uses only the first year costs of a combined-cycle combustion turbine (CCCT) in

the development of the proposed rates. *Id.* SCE further maintains that since BPA admits it does not know the costs to produce the product, it is violating sound business practices. *Id.*

BPA's Position

BPA has established posted rates for capacity without energy based on the marginal costs of production. FPS-96R-E-BPA-01, at 3-4. BPA is not asserting that its actual costs of providing the product will be equal to the marginal costs. FPS-96R-E-BPA-05, at 15-16. BPA is using marginal costs to set these rates for the reasons stated in its rebuttal testimony. *Id*. at 13. In its analysis, BPA relied on the marginal cost of a CCCT because it represents the incremental resource on the West Coast. FPS-96R-E-BPA-03, at 5. As such, the cost of the CCCT sets the costs, on the margin, of capacity on the West Coast. *Id.* at 15. BPA believes the proxy plant approach to pricing at the margin for the capacity without energy product is appropriate pricing for this product. *Id.* at 15. Contrary to SCE's assertion, BPA did not use only the first year costs of a CCCT to price this product. *Id*. at 13.

BPA disagrees with SCE's assertion that it must demonstrate an insufficient supply of capacity or show some need to purchase capacity on the market to fulfill its obligations in order to price this product in the manner proposed. BPA interprets its ratemaking directives as not limiting its rates to strict cost of service standards. BPA maintains that the discretion provided by section 7(e) ensures that rates for each class of customer recovers appropriate costs, and that the sum of the rates for all customer classes recovers, in the aggregate, the Administrator's total system costs.

Evaluation

BPA has relied on marginal cost analysis based on the incremental cost resource for power products on the West Coast. *Id.* at 15. Within that market, the incremental resource is a CCCT. *Id.* The use of a CCCT, therefore, is a reasonable way to determine the incremental, or marginal, costs of capacity without energy. BPA's methodology uses the incremental cost of a CCCT based on the costs of an actual plant purchased in actual markets. Tr. 34-36. Thus, the rates for capacity without energy developed in this proceeding have been established using the costs of the type of facility that is applicable to providing this type of power product. Procter, *et al.,* FPS-96R-E-BPA-05, at 15. BPA is not asserting that its actual out-of-pocket costs to serve this particular contract will equal the capital costs of the CCCT used to estimate the rates in this analysis. *Id.* By developing rates for this product using the type of resource companies will likely rely on in the future to meet power requirements, BPA is simply following sound business principles, recognizing the risks inherent in such a product, and maintaining its statutory obligation to recover costs and repay Treasury. *Id.*

SCE contends this approach to pricing is inconsistent with the Northwest Power Act. FPS-96R-B-SO-01, at 17. SCE provides no factual or legal analysis to support its position and such an argument lacks merit. The Northwest Power Act grants the Administrator discretion in the design of rates. This broad discretion is found in section 7(e) of the Act, 16 U.S.C. § 839e(e), which provides:

> Nothing in this Act prohibits the Administrator from establishing, in rate schedules of general application, a uniform rate or rates for sale of peaking capacity or from establishing time-of-day, seasonal rates, or other rate forms.

The Ninth Circuit has recognized this authority, finding that "the statute does not require BPA to impose any particular type of rate on its customers. Rather it restricts BPA only to 'sound business principles' in setting rates to meet its revenue requirements." *City of Seattle v. Johnson*, 813 F.2d 1364, 1367 (9th Cir. 1987). Thus, the Administrator's primary rate setting obligation is to set rates to meet BPA's revenue requirements, consistent with sound business principles. *See* 16 U.S.C. § 839e(a)(1).

In fact, the Ninth Circuit has previously approved FERC confirmation of rates--much like the ones at issue here--that were designed "to price electricity on the basis of the cost of producing it in the future, rather than on the embedded costs of production." Central Lincoln Peoples' Utility District. v. Johnson, 735 F.2d 1101, 1121 (9th Cir.1984). The Court noted that the Northwest Power Act "specifically allows the Administrator latitude in choosing rate forms" and has, as a main purpose, encouraging "conservation and efficiency." *Id*. at 1122 (*citing* 16 U.S.C. § 839e(e) and 16 U.S.C. § 839(1). The point of such rate-making is to "encourage efficiency and conservation by enabling customers to make informed consumption decisions based on the costs of producing each type of electric power." *Id*. at 1121. This is exactly the same logic used to develop the rate for capacity without energy in this proceeding. Despite SCE's assertions to the contrary, it is a proper exercise of statutory rate-making authority that "permits rate forms' designed to give BPA customers price signals'." *Id*. at 1122 (*citing* H.R. Rep. No. 976, Part II, 96th Cong., 2d Sess. (1980) at 53).

Section 7(f) also specifically provides the Administrator broad discretion in the development of rates for surplus power sales. Section 7(f) does not require that rates for regional sales of surplus firm power be limited to the embedded cost of system resources and purchased power costs. Rather, the provision permits the Administrator to set rates for such sales "based upon the cost . . .of additional resources which, in the determination of the Administrator, are applicable to such sales."

Language in other BPA rate directives similar to that found in section 7(f) has been held not to limit the Administrator's broad discretion to set rates. In *Pacific Power & Light v. Duncan*, 499 F. Supp. 672 (D. Or. 1980), plaintiffs contended that section 7 of the Bonneville Project Act imposed a cost of service standard. 16 U.S.C. § 832f. That section requires, in part, that rates shall be set "having regard to the recovery of the cost of producing" the power sold, and be "based upon an allocation of costs." The court rejected the argument:

> Despite all the references to cost, the two quoted passages do not support an inference that cost is the <u>only</u> basis upon which rates may be computed. The qualifying phrases "having regard to," "may include," and "to the maximum extent practicable," indicate that the discretion granted in 16 U.S.C. §§ 825s, 832e, 838g . . . was not significantly altered by the requirement to <u>consider</u> costs in calculating rates.

Id. at 683 (emphasis in original). SCE's interpretation to the contrary would frustrate the Administrator's section 7(a) cost recovery obligations and create conflict with BPA's obligation to establish rates consistent with sound business principles. 16 U.S.C. § 839e (a)(1). The "based upon" language in section 7(f) cannot reasonably be interpreted to require that the price be capped at BPA's embedded costs, in part because BPA's embedded cost for any given sale of surplus power is not susceptible to rote calculation, and in part because the ultimate amount of recovery is generally dictated by market conditions. In some cases, market conditions will permit BPA to recover only a portion of its embedded costs. Thus, capping rates in the manner proposed by SCE would deny BPA potential opportunities to offset market-dictated below cost sales with above market sales.

Finally, SCE asserts that BPA is setting the rate for capacity without energy inconsistent with section 7(k) of the Northwest Power Act. FPS-96R-B-SO-01, at 17. However, the rate setting procedures contained in section 7(k) apply only to the establishment of rates for the sale of extra-regional nonfirm energy. 16 U.S.C. § 839e(k). Section 7(k) does not apply to rates for the sale of surplus firm energy and capacity**.** *See United States Dep't of Energy--Bonneville Power Admin.*, 23 F.E.R.C. ¶ 61,161, 61,354 (1983).

Decision

BPA is properly relying on marginal cost analysis to set posted rates for capacity without energy. Section 7(k) of the Northwest Power Act does not apply to these rates.

2.3 Setting the Rate for Capacity Without Energy Equal to NR-96

Issue

Whether the rate for capacity without energy in FPS-96R should be set equal to the rates for capacity without energy contained in the NR-96 rate schedule.

Parties' Position

SCE's Brief on Exceptions argues that there is no distinction between the capacity without energy product under SCE's contract and capacity without energy under the NR-96 rate schedule. FPS-96R-R-SO-01, at 29. Therefore, SCE concludes that the FPS-96 rates for a capacity without energy product should be the same as the rates established for the capacity without energy product in the NR-96 rate schedule for the term of the NR-96 rates, i.e., through September 30, 2001. FPS-96R-B-SO-01, at 17. For the remaining five years of the FPS-96 rate schedule (i.e., through September 30, 2006), SCE recommends that BPA either negotiate a new rate for the remainder of the term of SCE's contract or initiate a rate proceeding similar to this proceeding.

Moreover, SCE argues that BPA has failed to articulate a sound rationale for changing methods from those underlying the pricing of this product in BPA's 1996 rate proceeding. *Id.* at 18. SCE alleges that BPA is attempting to extract a significantly higher price from SCE than BPA charges other customers for the same product and that nothing in its contract with BPA permits such a

differential. *Id.* SCE also contends that BPA has admitted that the rate for capacity without energy in NR-96 is the appropriate successor rate for SCE's Option Capacity based upon statements made in a separate contract arbitration. *Id.* at 20.

BPA's Position

BPA's rebuttal testimony declined to adopt SCE's proposal to use the NR-96 rate in the manner suggested by SCE. FPS-96R-E-BPA-05, at 5-6. BPA is proposing a rate of general applicability to be effective through September 30, 2006. 64 Fed. Reg. 44362 (1999). It is BPA's position that using the approach proposed by SCE would require BPA to ignore new information about the market cost of resources on the West Coast. Procter, *et al.*, FPS-96R-E-BPA-05, at 13. BPA believes that SCE's proposal would result in less efficient use of existing resources than will be the case when capacity without energy prices are set equal to the cost of the incremental resources on the West Coast system. *Id.*

BPA asserts that the proposed rates are not an attempt to extract a higher price than BPA charges for the same product from other customers. BPA stated in its rebuttal testimony that the rates being proposed are rates generally applicable to future sales of capacity without energy under the FPS-96 rate schedule. *Id.* at 3.

BPA also notes that a "baseball" style arbitration is far removed from a rate making proceeding and the issues there are limited to a prior delivery period that is not even subject to the rates being developed here. Thus, BPA argues that any statements made in that context are not germane. FPS-96R-E-BPA-06; FPS-96R-E-BPA-07; and FPS-96R-E-BPA-09.

Evaluation

SCE's case has not provided any analytical support substantiating the contention that the rate for capacity without energy in the NR-96 rate schedule is more appropriate than the proposed rates. SCE merely argues that since those rates already exist, the only equitable thing to do is for BPA to apply them until the NR-96 rates expire in 2001. FPS-96R-B-SO-01, at 17. This argument lacks analytical justification and would require BPA to ignore any new information that impacts the development of rates in the market today. Procter, *et al.*, FPS-96R-E-BPA-05, at 5. By contrast, BPA has presented arguments supported by evidence in the record demonstrating that it is more reasonable to develop a rate for this product using the incremental cost of the marginal resource. Procter, *et al.*, FPS-96R-E-BPA-05, at 15-19; and Procter, *et al.*, FPS-96R-E-BPA-03, at 1-5.

Further, adopting SCE's proposal would not utilize existing resources efficiently since it would under-price the product relative to a more valid approach to determining the incremental, or marginal cost, of this product. Procter, *et al.*, FPS-96R-E-BPA-05, at 13. Nor would setting the rates equal to NR-96 until September 30, 2001, achieve BPA's objective of establishing posted rates for a capacity without energy product in FPS-96 for the remaining period of time for which the FPS-96 rate schedule is in effect (i.e., through September 30, 2006). 64 Fed. Reg. 44362 (1999).

As to the argument that BPA cannot substantiate the rates being proposed in BPA's direct case, BPA has clearly identified the steps taken in the development of its rates. FPS-96R-E-BPA-01, at 4. BPA addressed why it is reasonable to use a CCCT to estimate the costs used to develop these rates. Procter, *et al.,* FPS-96R-E-BPA-03, at 5. The focus of BPA's rationale has been the fact that the incremental resource on the West Coast system is a CCCT. Procter, *et al.,* FPS-96R-E-BPA-05, at 15. In turn, the fixed costs of a CCCT form a reasonable basis for determining the incremental cost of a capacity product--the fixed costs being the cost of the capacity of the incremental resource. Procter, *et al.,* FPS-96R-E-BPA-03, at 5.

BPA also outlined the difference between instantaneous and sustained peaking concepts in its rebuttal testimony. Procter, *et al.,* FPS-96R-E-BPA-05, at 3-5. In that testimony, BPA explained the historical context of rate development in BPA's 1996 proceeding and how it impacts the development of rates in this proceeding. As BPA explained:

> In 1987, BPA did not distinguish between "capacity" and "demand" in its marginal cost analysis (MCA) or its power products. In 1987, the demand charge was based on BPA's generation costs allocated to demand, or capacity, spread across the peak period. Therefore, the demand charge in the contract rate section of the SP-87 rate schedule contains a rate for a sustained peaking capability power product.
>
> In contrast, in 1996, the MCA for the first time distinguished between Demand and Capacity. BPA's 1996 Final MCA defined capacity as the maximum number of kilowatthours (kWh) a utility must be prepared to produce within the heavy load hours during each week of a given month. In contrast, demand was defined as a number of kilowatthours that a utility must be prepared to produce during the hour of its monthly peak energy load. The difference between capacity and demand, as defined in the MCA, is the difference between being prepared to meet sustained and instantaneous peaks. This distinction did not exist back in 1987 when the SP-87 rate schedule was developed and SCE's contract with BPA was negotiated. This is one reason why BPA has asserted that the $0.87/kW-mo demand charge in the contract rate section of FPS-96 is not the correct rate for the Option Capacity product in SCE's contract.
>
> To reiterate, the demand charge in WP-96 reflects a new power product--instantaneous peaking. In turn, the $0.87/kW-mo. for this instantaneous peaking product was posted as the demand charge component of the contract rate of a firm power sale. This is why the $0.87/kW-mo. demand charge is not the correct rate for a capacity without energy product. *Id.*

SCE's final argument in support of applying the NR-96 rate is the contention that BPA's response to an interrogatory, in a separate contract arbitration case, supports the application of the NR-96 rate. FPS-96R-B-SO-01, at 20. While a cursory reading of the interrogatory response could allow such an impression, SCE fails to provide any context by way of explaining the nature of that arbitration proceeding. Doing so demonstrates that SCE's contention is without merit. FPS-96R-E-BPA-06; FPS-96R-E-BPA-07 and FPS-96R-E-BPA-09.

The arbitration between BPA and SCE is for the past delivery year (May-September 1999), a period that does not involve future deliveries that would be covered by the proposed rate. *Id.* In addition, the arbitration is "baseball" arbitration where each side is required to assert a position; the arbitrator must select one of the two proposals and cannot fashion an alternative. *Id.* BPA and SCE were required to identify for the arbitrator specific rates that they believe should apply to capacity without energy sales under the contract. *Id.* SCE identified the $0.87 demand charge as the appropriate rate. BPA has proposed only that the average rate for capacity without energy in NR-96 be adopted as the remedy for the short-term issue of the 1999 delivery period. *Id.*

Decision

BPA is not required to set the rates for capacity without energy in the FPS-96R rate schedule equal to the existing rates for capacity without energy in NR-96, nor would it be appropriate to do so, given BPA's objectives and responsibilities.

2.4 Use of New York Mercantile Exchange (NYMEX)

Issue

Whether BPA's use of NYMEX prices to seasonally shape the rates is appropriate.

Parties' Position

SCE argues that the CCCT costs are not accurately portrayed because BPA relied upon only a single day of NYMEX numbers as the basis for shaping the prices. FPS-96R-B-SO-01, at 21; and FPS-96R-R-SO-01, at 25. Further, SCE argues that BPA itself concedes that the NYMEX index is inappropriate because BPA does not use the NYMEX index in its 2002 rate proposal. FPS-96R-B-SO-01 at 22. SCE also argues that BPA offered no proof that the NYMEX numbers for the year 2000 would be applicable during 2001-2006. *Id.* SCE also claims that BPA erred in extrapolating out six years using a single NYMEX 2000 forecast. *Id.*

BPA's Position

BPA believes it was appropriate to use NYMEX futures prices to seasonally shape the fixed costs of a CCCT. Procter, *et al.,* FPS-96R-E-BPA-03, at 5. BPA believes that the use of a single day to shape the prices is reasonable.

Evaluation

SCE's argument reflects a fundamental misunderstanding about how the NYMEX prices were used in the rate development process. BPA explained the rationale for using the NYMEX numbers in its direct case. FPS-96R-E-BPA-01, at 4. In addition, the description found in the study is elaborated on in testimony. Procter, *et al.*, FPS-96R-E-BPA-03, at 4-5. The NYMEX prices had nothing to do with the pattern of CCCT costs across time, as SCE's argument seems to suggest. *Id.* The patterns of CCCT costs across time are embedded in the levelization of those costs. The levelization of CCCT costs transforms a pattern of CCCT costs across time into a flat,

level CCCT cost. FPS-96R-E-BPA-01, at 4. The sole function of the NYMEX prices is to develop a set of seasonal rates for capacity without energy using the seasonal pattern contained in the FPS-96 rate schedule. *Id.* How BPA went about converting the levelized CCCT cost using the NYMEX numbers was explained in both the study (Procter, *et al.*, FPS-96R-E-BPA-01, at 4) and the testimony in BPA's direct case (Procter, *et al.*, FPS-96R-E-BPA-03, at 5).

Using NYMEX to seasonalize the CCCT levelized costs that are flat across time is reasonable. SCE presents no testimony proposing the use of some other technique to seasonally adjust rates. SCE merely asserts that the method BPA selected is wrong on its face and implies that BPA should use more current data. Grosz, *et al.*, FPS-96R-E-SO-01, at 22. If BPA were to use more current NYMEX prices the result would only be a different scaling of the levelized CCCT costs across seasons. Different NYMEX numbers have no effect on the levelized CCCT costs. Procter, *et al.*, FPS-96R-E-BPA-03, at 4-5. BPA simply scaled the CCCT costs into seasonal values using NYMEX. Further, BPA did not extrapolate the NYMEX numbers from June 1999 to the period 2001-2006. *Id.*

Decision

Use of NYMEX for the sole purpose of developing a seasonal pattern to apply to the levelized CCCT costs is a reasonable method of portraying the CCCT costs for the seasonally adjusted rate for capacity without energy.

2.5 Developing a Seasonal Pattern to the CCCT Costs

Issue

Whether it is appropriate to develop a seasonal pattern using the CCCT costs.

Parties' Position

In SCE's Brief on Exceptions, SCE argues that it is not appropriate to seasonally adjust the CCCT costs. FPS-96R-R-SO-01, at 25. SCE contends that the cost of producing power does not vary seasonally. Therefore, seasonally adjusting the price is not reasonable. *Id.*

BPA's Position

BPA believes that it is reasonable to develop a set of rates for capacity without energy for FPS-96 using the same seasonality adjustments that were used in both the FPS-96 rate schedule as well as the seasonality used for capacity without energy in the NR-96 rate schedule.

Evaluation

SCE's contention that it is improper to seasonally adjust the proposed rates is not supported by any legal analysis. Section 7(e) of the Northwest Power Act grants the Administrator considerable rate design discretion. Section 7(e) provides that "[n]othing in this chapter prohibits the Administrator from establishing, in rate schedules of general application, a uniform

rate or rates for sale of peaking capacity or from establishing time of day, seasonal rates or other rate forms." 16 U.S.C. § 839e(e) (emphasis added). The seasonality adjustments for the proposed rate for capacity without energy are consistent with the adjustments made in other rate schedules for the same product. Thus, the proposed adjustments are appropriate.

Decision

BPA's statutory rate directives specifically allow seasonally adjusted rates and the seasonally adjusted rate at issue here is a proper exercise of that authority.

2.6 Link Between Pricing Capacity Without Energy and SCE's Contract

Issue

Whether the capacity without energy product in this proceeding reflects the product purchased under SCE's contract.

Parties' Position

SCE argues that the approach taken by BPA to develop a rate for capacity without energy mistakenly assumes that SCE only purchases capacity and not energy. FPS-96R-B-SO-01, at 22. SCE contends that BPA analysts did not take into consideration an aspect of the SCE contract in which BPA has the discretion to require SCE to return the energy. *Id.* SCE argues that BPA cannot require SCE to return the energy and then also price SCE's option capacity punitively. *Id.*

BPA's Position

BPA maintains it did not mistakenly assume that SCE only purchases capacity and not energy under its contract. Procter, *et al.,* FPS-96R-E-BPA-05, at 15. BPA stated that it was developing rates of general applicability and as such BPA was not merely pricing a product for SCE's contract. *Id.* It is BPA's position that the proposed rate for capacity without energy has been developed in a manner that is also consistent with the capacity without energy option under SCE's contract. *Id.*

Evaluation

SCE's contention that the rate proposed for FPS-96R does not sufficiently reflect the terms of SCE's contract for Option Capacity is not relevant to this proceeding. FPS-96R-B-SO-01, at 22. BPA is developing rates of general applicability that may apply to more than just the SCE contract. Procter, *et al.,* FPS-96R-E-BPA-05, at 3. The underlying premise of each of SCE's arguments is a contention that SCE's contract with BPA requires the Option Capacity to be priced in a particular fashion. Questions of this nature are matters of contract interpretation and lie outside the scope of this proceeding. What is at issue is whether the proposed rates are appropriate and have a sound analytical foundation. While BPA believes the rate will be applicable to the Option Capacity under the SCE contract, that issue is not relevant to this

proceeding. Any forthcoming legal dispute regarding applicablility of the rate to SCE's contract will take place elsewhere.

BPA is proposing rates for a capacity without energy product where the energy is returned to BPA. Procter, *et al.*, FPS-96R-E-BPA-05, at 18. The proposed rates were developed to apply to potential power sales under contracts other than SCE's. *Id.* at 3. By using a CCCT to develop rates for a capacity without energy product, BPA was able to mirror certain characteristics of the option capacity under SCE's contract. *Id.* at 15. In BPA's rebuttal testimony BPA stated:

> Q. *SCE appears to imply (Grosz, et al., FPS-96R-E-SO-03, at 16, lines 13-18) that BPA did not consider the product contained in SCE's contract when BPA set the rates contained in FPS-96R. Do you agree?*
>
> A. No. BPA did in fact consider the product SCE may purchase as Option Capacity in that contract. BPA used the fixed costs of a CCCT to price this product because a CCCT produces power in a fashion that is consistent with the Option Capacity under SCE contract (in addition to being consistent with incremental, or marginal cost, principles). Another reason BPA selected the fixed costs of a CCCT is as SCE states in its testimony the Option Capacity product in SCE's contract has no load shaping or load following associated with it. Grosz, *et al.*, FPS-96R-E-SO-03, at 16. BPA also wants to note that the product contained in SCE's contract is a fairly standard capacity without energy product and that, as BPA noted in section 5, the rates being developed in this proceeding would be applicable to any new contracts requiring a posted rate for a capacity without energy product, especially since after September 30, 2001, the FPS-96 rate schedule will be the only rate schedule which contains posted rates for capacity without energy.
>
> Procter, *et al.*, FPS-96R-E-BPA-05, at 15.

If the energy is not returned, then the energy must also be paid for and the price of the energy is not included in the rates proposed in this proceeding. *Id.* at 18. To develop the energy charges, BPA would include fuel costs and other variable costs associated with operating the CCCT. *Id.* This is a fairly simple calculation and BPA could certainly add this to the rates proposed in this proceeding; but the resulting capacity and energy prices would be for a different product and a different type of power service than the product for which BPA is developing rates in this proceeding.

Decision

Questions regarding the applicability of the proposed rates to SCE's contract are beyond the scope of this proceeding. The methodology BPA used, however, is a reasonable means to set a rate for a capacity without energy product.

2.7 Equitable Pricing of Capacity Without Energy

Issue

Whether BPA is establishing rates in this proceeding to apply to SCE that exceed rates charged for capacity without energy available to other customers.

Parties' Position

SCE argues that the methodology used by BPA to develop the rates in this proceeding has not been used to develop rates for any other product. FPS-96R-B-SO-01, at 23. In support of its position, SCE states that BPA's witness, Mr. Bolden, testified that the methodology used to develop the proposed rates had not been used for any other rate except to price backup resources. *Id.* at 25. Moreover, SCE states that the methodology used to develop the proposed rate is different from the methodology employed in 1996 and that BPA has provided no justification for the change. *Id.*

SCE also asserts that the rates in this proceeding are excessive when compared to similar products for the remainder of the current rate period through September 30, 2001. *Id.* SCE also argues that BPA's other contracts for capacity without energy do not have prices as high as those being developed in this proceeding. *Id.* at 23-24. SCE believes these contracts demonstrate that the proposed rates are inequitable. *Id.*

SCE also asserts that BPA was incorrect when it stated in data response SO-BPA:90 that there is no basis for comparison between FPS-96R and FPS-96. *Id.* at 26. SCE then compares the $0.87/kW-month demand charge with what SCE refers to as a capacity charge of $6.29/kW-mo that appears to be about 36 percent lower than the rate proposed in BPA-05, Attachment C. *Id.* at 26-27. SCE also argues that SCE Exhibit 1 demonstrates that the capacity charge reflects the demand charge and the 50-hour per week charge (sustained peak). *Id.* at 26. SCE also argues that the WP-96 demand charge is $0.87/kW-month, and that there is a 50-hour per week charge (sustained peak) of $5.42 and a capacity charge of $6.29/kW-month. *Id.* at 26.

In SCE's Brief on Exceptions, SCE reargues the point that BPA cannot price a product dramatically different from the way it prices similar products sold to other customers. FPS-96R-R-SO-01, at 24. SCE believe that because BPA charges significantly less for similar products under the NR and PF rates schedules, the rates are therefore unsupportable. *Id*. SCE also contends in its Brief on Exceptions that the Administrator did not analyze the rates charged to others for similar products. *Id*. at 28. Finally, SCE also contends Gery Bolden, a BPA witness, admitted that this methodology used to set the rates was not used in any other rate case and since this fact was never acknowledged before cross examination the testimony should be stricken. *Id.* at 20.

BPA's Position

BPA believes the marginal cost analysis used to develop the proposed rates is appropriate for the product. Procter, *et al.*, FPS-96R-E-BPA-05, at 15-16. Contrary to SCE's assertions, BPA has

relied upon the same general methodology to develop rates and price power products. Tr. 197-200. BPA believes SCE misrepresents BPA's statements in cross-examination about how BPA has used this methodology in other matters by failing to fully explain the questions asked and the nature of the responses. Tr. 197-200. The argument that Mr. Bolden's testimony should be stricken is also without merit. To the extent SCE had a right to strike the testimony, all objections not made by the close of the hearing are waived.

BPA also believes its response to SO-BPA-90 was accurate and that it fully responded to all data requests. Grosz, *et al.*, FPS-96R-E-SO-03, Attachment 8. BPA maintains, as well, that any differences between the rate for capacity without energy under the proposed modification to the FPS-96 rate schedule and other rate schedule or contracts are well-founded and do not render the proposed rate unreasonable.

Evaluation

The methods relied upon by BPA in developing the rates contained in this proceeding are sound. The methodologies have been applied to develop other prices for products contained in other power contracts. Tr. 197-198. There is nothing unique about using a proxy plant approach to develop marginal costs. Procter, *et al.*, FPS-96R-E-BPA-05, at 15. There is nothing extraordinary about using the West Coast's incremental, or marginal, resource to estimate the costs of that service. These are straightforward methods. *Id.* Further, the fact that BPA changes its method over time is not exceptional either. BPA has provided a number of explanations for the use of a CCCT in this case. *Id.* at 19. BPA has also explained why it is inappropriate to simply apply rates from a different rate schedule to the FPS-96 rate schedule in this circumstance. *Id.* at 3-7.

SCE's assertion that BPA is inappropriately attempting to extract a significantly higher price from SCE, when compared to other customers, is simply false. SCE presents no information to substantiate this assertion. Furthermore, these rates are rates of general applicability available for any contracts for capacity without energy which require posted rates and are entered into after the proposed rates go into effect. *Id.* at 3. Second, SCE refers to several other contracts, which allegedly include capacity without energy products. Grosz, *et al.*, FPS-96R-E-SO-04, Attachment 2. SCE argues that the rate in this proceeding far exceeds the rates contained in those contracts. Grosz, *et al.*, FPS-96R-B-SO-01, at 23-25. However, what SCE fails to note is that these contracts have a fundamentally different approach to pricing. FPS-96R-E-SO-04, Attachment 2. The SCE contract uses a rate schedule for pricing the Option Capacity and, as a result, the rate for that product is inextricably tied to the fluctuations in rates in the rate schedule to which the contract is tied. All the other contracts referenced by SCE contain specifically identified fixed rates or formula rates. The fact that these other customers negotiated different terms cannot now be pointed to as evidence that BPA's methodology underlying the rates being developed in this proceeding lack merit.

SCE's reliance on the cross-examination testimony is also misplaced. A full review of the transcript demonstrates that Mr. Bolden's explanation goes well beyond the interpretation SCE wishes to give it.

Q. I made the distinction, it did not have to do with application, it had to do with the product, itself. Have you used this new methodology for any other customer that you have used in the FPS-96R case?
MR. BURGER: Mr. Bolden, do you understand the question?
A. (Mr. Bolden) We are not using this method to develop any other rate--is that the question? We did not develop any other rate using this particular method.
BY MS. FISHER:
Q. Did you use it to develop any other price for a product called capacity without energy?
A. (Mr. Bolden) Yeah. We used this--not currently using these exact numbers, but used the same method to develop a capacity market value that we used to evaluate other prospective contracts.
Q. I did not ask you that. I said have you used it, that is as of this date?
A. (Mr. Bolden) I have used the method, yes.
Tr. 197-198.

During redirect, the following exchange occurred;
BY MR. BURGER:
Q. Mr. Bolden, Ms. Fisher's last couple of questions related to the use of the CCCT analysis to price other products, and I believe you answered that you had never used it to price that product. That product meaning what?
A. (Mr. Bolden) The particular capacity without energy that is exercised and utilized in the manner that I am imagining the SCE contract be used.
Q. Have you ever used that general methodology of the CCCT to price other products for Bonneville?
A. (Mr. Bolden) Yes, in particular, resource backup products.
Tr. 199-200.

While SCE attempts to characterize Mr. Bolden's testimony as supporting its argument that the method relied upon in FPS-96R is unique and has never before appeared in a BPA rate proceeding, the facts are to the contrary. Tr. 197-200. Mr. Bolden only testified that to his knowledge BPA had never used this same method and the same inputs. *Id*. at 198. Mr. Bolden also testified that BPA has used this method to price resource backup products. *Id*. at 200.

SCE's request to have a portion of Mr. Bolden's above referenced testimony stricken lacks factual or legal support. SCE should have made any such motion to strike the testimony before

the close of the hearing. Failing to do so waives the objections. Even if the objection had not been waived, it would not be sustainable. The cross-examination question is framed very narrowly and seeks to determine whether Mr. Bolden ever used the same inputs and methodology in setting rates for another product. SCE appears to argue that Mr. Bolden's negative response to the question is inconsistent with his later testimony that he used the same methodology to price backup resources. The record does not indicate, however, that the same inputs and methodology were used by Mr. Bolden to price that product or any other product. Nor does the record indicate whether Mr. Bolden used the methodology as part of a rate-setting process. SCE cannot use its own failure to clarify these salient issues as a platform to argue that the testimony is somehow defective or less than candid. Thus, on the merits, SCE is not entitled to the remedy requested.

SCE's other arguments that it is being unfairly charged a higher rate are similarly without merit. It is true, of course, that BPA is proposing rates that are based on a change in methodology from 1996. Procter, *et al.*, FPS-96R-E-BPA-05, at 19. As noted previously, these rates are not limited in application to SCE's contract, but will be generally applicable to contracts requiring a posted rate for capacity without energy. SCE's identification of a number of contracts using other pricing methods offers no assistance to SCE's position. Grosz, *et al.*, FPS-96R-E-SO-04, Attachment 2. The existence of such contracts merely acknowledges that the parties to different contracts may have different needs at different times and places. Negotiating a contract with a fixed price or price formula and negotiating a contract with a price tied to a rate schedule are simply different pricing strategies. The fact that contracts contain price terms that are dissimilar from the rate proposed in this proceeding is not relevant to the issue of whether there are analytical shortcomings with respect to the proposed rate.

As to SCE's assertion that BPA's response to SO-BPA:90 was not truthful, the record provides no support for such an allegation. FPS-96R-B-SO-01, at 26. SCE's data request specifically asked, in part, for the following: "Please provide all work papers, materials, and documentation to support any market analyses used or considered in developing the 96-FPS rates and the FPS-96R rate." SO-BPA:90. SCE contends that when BPA failed to reference and produce a document generated by Mr. Bolden and Ms. Holland in response to this request, it failed to fulfill its discovery obligations. FPS-96R-E-SO-01, at 26. The document in question was not part of the rate development process in this proceeding or in the development of other rates under FPS-96. Tr. 105. Rather, the document in question was generated to assist Mr. Miller in negotiating a resolution of a contractual dispute between BPA and SCE. *Id*.

SCE suggests that the $0.87/kW-month demand charge from BPA's 1996 rates schedules applies to this product. FPS-96R-B-SO-01, at 25. BPA's rebuttal testimony addresses the methods underlying the pricing of the demand charge in FPS-96 and why it is not appropriate to apply that charge to the Option Capacity in SCE's contract. FPS-96R-E-BPA-05, at 3-5.

Decision

BPA is proposing a rate of general applicability that does not unfairly charge any customer or customer group a higher rate for the same product.

2.8 Applicability of the Rates Proposed in This Proceeding

Issue

Whether BPA's purpose in initiating this proceeding is to punitively retaliate against SCE for exercising its rights to the Option Capacity.

Parties' Position

SCE argues that BPA's purpose in developing the rates in this proceeding is solely to punish SCE for exercising its contract rights. FPS-96R-B-SO-01, at 28. SCE argues that the "adjustment," as SCE calls it, was not to correct an inadvertent omission but rather is intended to change pricing in order to extract a much higher price from SCE than its contract contemplates. *Id.*

BPA's Position

BPA's purpose in initiating this rate proceeding was to correct an oversight in the FPS-96 rate schedule because it (a) did not clearly reflect BPA's intent to negotiate rates for the capacity without energy product; and (b) did not include posted prices for capacity without energy. FPS-96R-E-BPA-01, at 1-3. Further, since the capacity without energy rates contained in NR-96 and PF-96 expire on September 30, 2001, the rates contained in this proceeding may be the only posted rates for capacity without energy available after that date. Procter, *et al.*, FPS-96R-E-BPA-05, at 5. As BPA has indicated in other parts of this ROD, these rates may also be applied to contracts for capacity without energy entered into after the rates become effective. *Id.* at 3.

Evaluation

There is nothing in the record to support the allegation that the proposed rates are intended to be punitive in nature. The rates being develop here are rates of general applicability and, pending the outcome of the general power rate case, could be the only posted rates for capacity without energy once the PF-96 and NR-96 rate schedules expire. To the extent that these rates may apply to SCE's contract, which is beyond the scope of this rate proceeding, the proposed change in rates conforms to the notice requirements contained in that contract.

Decision

The purpose of this proceeding is to establish rates for capacity without energy sales under the FPS-96 rate schedule. BPA is not being guided by any improper motive and there no evidence to suggest otherwise.

2.9 Value of Capacity Without Energy Vs. Value of Capacity

Issue

Whether it is relevant, for purposes of this proceeding, to compare the value of a capacity without energy product to the value of a general capacity product.

Parties' Position

SCE raises in its Brief on Exceptions the argument that the capacity without energy it purchases under its contract is "less valuable than a general ability to buy capacity." FPS-96R-R-SO-01, at 27. Because BPA can determine whether SCE returns or pays for the energy, SCE argues, the proposed rate is unfair and discriminatory. *Id.*

BPA's Position

This issue was not addressed in SCE's Initial Brief and thus is deemed waived. To the extent that it is not waived, the fact remains that in this proceeding BPA is establishing rates of general applicability for a capacity without energy product. This is different than a capacity product in which the energy is not returned, which in fact is a power sale. Because they are two entirely different products, it is not possible to argue objectively whether one is more or less valuable than the other. Each customer is in the best position to make a subjective determination regarding which product is more suitable given present needs and conditions. With respect to BPA's contract right to decide whether or not SCE is to return the energy, once again, it is BPA's position that the product being priced in this proceeding is a capacity product where the energy is returned. The issue of what conditions would apply if BPA were to decide under the terms of the SCE agreement that SCE may keep the energy goes beyond the scope of this proceeding.

Evaluation

SCE's Initial Brief did not raise questions regarding the value of SCE's contract right to Option Capacity, and they are being raised for the first time in SCE's Brief on Exceptions. Under the BPA Rules of Procedure, a party's failure to raise the issue in the initial brief is deemed to be a waiver of the issue. *See* Procedures, § 1010.13(b).

In any case, the issue of whether SCE's rights to buy Option Capacity are less valuable than a traditional capacity product is beyond the scope of this proceeding. The scope of this proceeding is defined by the FRN and SCE's contract rights are not at issue. The FRN stated: "Pursuant to Rule 1010.3(f) of BPA's Procedures the Administrator limits the scope of this hearing to issues respecting the correction of the FPS-96 rate schedule as described in section II hereof. Other provisions of the existing FPS-96 rate schedule are not matters for the purpose of this hearing." 64 Fed. Reg. 44361 (1999). Section II of the FRN provides: "The purpose of the proposed changes to the Firm Power Products and Services (FPS-96) rate schedule is to clarify and establish the rates that apply to the capacity without energy product." *Id.* at 44363. To the

extent there are issues related to the relative value of the Option Capacity under SCE's contract, they are clearly beyond the scope of this proceeding.

Decision

For the purposes of this proceeding, the question of whether the value of a capacity without energy product is greater or less than the value of a general capacity product is not relevant. The value of SCE's contract rights is a matter of contract interpretation beyond the scope of this proceeding.

3.0 SCE CONTRACT ISSUES

3.1 Ability to Change Rates Applicable to SCE's Contract

Issue

Whether the proposed modification to the FPS-96 rate schedule is precluded by the contract between SCE and BPA.

Parties' Position

In its Brief on Exceptions, SCE contends that its contract with BPA requires that any rate for the purchase of Option Capacity under the contract must be a rate of general applicability. SCE further maintains that the proposed rate cannot be a rate of general applicability because only SCE's contract currently meets the criteria set forth in the FRN. FPS-96R-R-SO-01, at 10. SCE maintains that its position is supported by the fact BPA did not indicate that the rate would be applied to any circumstance other than SCE's contract until BPA filed its rebuttal testimony. *Id*. at 9. SCE argues that comments of BPA counsel at the pre-hearing conference that the rate would be more generally available are not sufficient to rebut the contention or change the nature of the proceedings. *Id*. at 10.

BPA's Position

The contractual provisions related to SCE's Option Capacity product (a product for capacity without energy) state explicitly that the rate for the product may be changed on nine months' notice. Grosz, *et al.*, FPS-96R-E-SO-03, Attachment 1. No other showing is required.

Furthermore, notwithstanding SCE's arguments to the contrary, the rate is one of general applicability. *See* section 3.4 *infra.* BPA believes that SCE's arguments rely upon the faulty underlying assumption that, because a rate may apply to only one current contract, it cannot be a rate of general application.

Evaluation

SCE maintains that its contract with BPA requires the applicable rate to be established in a certain fashion. FPS-96R-B-SO-01, at 13-14. Specifically, SCE alleges that, in spite of the provision stating that BPA can change the rate on nine months' notice, BPA is obligated to set the rate applicable to its contract without regard to recovery of its costs. *Id.* SCE does not explain why the Administrator would set a rate for a contract based on an approved rate schedule that can be changed on nine months' notice but at the same time agree that the rate would be set in the future without regard to cost recovery, a directive which is at the core of BPA's statutory responsibility.

Thus, SCE's suggestion that BPA is somehow motivated by a desire to evade a contractual responsibility is without merit. BPA has a contractual right to change the rate, and a responsibility to set the rate in accordance with statutory directives.

To the extent that SCE's argument goes beyond trying to show improper motive or bias in the rate-making process, that is a matter outside the scope of this administrative proceeding as it is defined by the FRN and as articulated by the Hearing Officer. Therefore, with regard to a substantive claim that BPA has breached its contract with SCE because the contract precludes the correction of a particular rate, that is a separate legal issue. The scope of this proceeding is defined by the FRN. The FRN stated: "Pursuant to Rule 1010.3(f) of BPA's Procedures the Administrator limits the scope of this hearing to issues respecting the correction of the FPS-96 rate schedule as described in section II hereof. Other provisions of the existing FPS-96 rate schedule are not matters for the purpose of this hearing." 64 Fed. Reg. 44361 (1999). Section II of the FRN provides: "The purpose of the proposed changes to the Firm Power Products and Services (FPS-96) rate schedule is to clarify and establish the rates that apply to the capacity without energy product." *Id.* at 44363.

While BPA has not breached its contractual obligations to SCE, if SCE disagrees, it may raise those matters in a separate contract action. The Hearing Officer noted that questions regarding the applicability of the rate to SCE's contract should be raised in the proper forum. Tr. 163-164.

SCE's Brief on Exceptions also argues that the proposed rate is flawed because it is not a rate of general applicability. SCE bases this argument on an underlying assumption that because it is a rate currently applicable to only one contract it cannot be a rate of general applicability. SCE provides no legal or factual support for this position. Rather than providing legal support for its position, SCE creates a new category: rates it refers to as rates of limited applicability. The designation of the proposed rates as ones of "limited applicability" is a designation without any legal significance. The fact that BPA is aware of only one *currently existing* contract to which the rates may apply does change the general applicability of the proposed rates. The proposed rates are rates of general applicability (*see* section 3.4 *infra*) and to the extent questions exist about whether the rates proposed in this proceeding apply to SCE's contract, that matter will be resolved in another forum.

Decision

BPA's contract with SCE gives BPA the right to revise rates for the Option Capacity product in the SCE contract, and the present proceeding is a proper exercise of the Administrator's rate-making authority.

3.2 Risk Management and Rate Development

Issue

Whether BPA can revise the rates to reflect business risks.

Parties' Position

SCE claims that BPA stated in the prehearing conference that it was adjusting this rate in an effort to fully recover its costs. FPS-96R-B-SO-01, at 13. SCE contends that in 1989, when

BPA submitted the Sales and Exchange agreement to FERC, BPA acknowledged that it was assuming a risk that it may not fully recover its costs through contract revenues. *Id.* Based on the risks assumed by BPA under the contract, SCE argues that "BPA has no right now to claim that a failure to recover rates is an appropriate basis for initiating this proceeding solely to develop a rate applicable to SCE's contract." *Id.* at 14.

BPA's Position

BPA believes that SCE has mischaracterized the issue before FERC when approval of the contract was sought. The risk of a revenue shortfall referred to in the filing with FERC and in the subsequent order applies to the surplus firm power sale portion of the contract and not the pricing of the capacity without energy product at issue in this proceeding.

Evaluation

BPA must consider a wide variety of risks in the rate development process. Once rates are put into place, BPA continues to bear revenue recovery risk during the rate period. On a planning basis, the setting of the amount of planned net revenues for risk and treasury payment probability are ways in which risk protection can be incorporated into rates. Risk emanating from particular contract provisions, as in this situation, can be mitigated in part by making the rate subject to change on notice to the other party. The fact that BPA may bear other significant risks throughout a rate period in no way absolves BPA of the responsibility to use sound business practices once rates are established, and to revise rates in a manner that comports with statutory and contractual requirements when it is reasonable to do so. This is exactly what BPA has done in this proceeding.

BPA did not assume the risk that it might not recover its costs on the Option Capacity product. The contract explicitly states that BPA may change the rate on nine months' notice. FPS-96R-E-SO-03, Attachment 1. This provision completely mitigates the risk that BPA would be in the position of not recovering its costs, except for the notice period, which itself is practically co-extensive with the time frame in which BPA would be able to put a new rate into effect. *Id.* Where BPA has identified an error in the establishment of a rate that results in a customer receiving a windfall by paying a rate that was not intended to apply to a product, BPA has not just the authority, but the statutory responsibility, to correct the error and price the product properly. *Id.*

SCE's contention that BPA assumed the risk that the revenues under the contract would not cover BPA's costs misinterprets the FERC ruling. SCE's contract involved the sale of separate and distinct products. One product available under the contract was a 250 MW surplus firm power sale, another was the Option Capacity, to which the capacity without energy rate in this proceeding would apply. The surplus firm power sale started at 28.5 mils per kWh and escalated upward based on a formula in the contract that was tied to weighted average of oil and gas prices. There was no guarantee that this formula would match BPA's costs. The Option Capacity, by contrast, was tied to a BPA rate. The rate for the capacity without energy would be tied to the recovery of BPA's aggregate costs and as a consequence there would be no risk of under recovery for this product under the contract. *See* ROD section 1.5, *supra*. Therefore, the

question before FERC was whether BPA could assume the risk of a revenue shortfall under the surplus firm power portion of the contract, not the Option Capacity portion. FERC stated in its order, "Bonneville assumes some risk that the revenues earned from *the sale of surplus firm power*. Bonneville states that it expects to fully recover its costs." *United States Dep't of Energy--Bonneville Power Admin.*, 46 FERC ¶ 61,094, 61,397 (1989) (emphasis added). It is relevant to note in this connection that the surplus firm power component of the contract is based on a completely separate rate schedule—i.e., SC-86. *Id.*

Decision

BPA has properly established posted rates for capacity without energy to reflect business risks in accordance with statutory directives.

3.3 Necessary Rates Development

Issue

Whether the FPS-96 rate schedule contained all the necessary rates when it was developed.

Parties' Position

SCE maintains that BPA did not omit a necessary rate under the FPS-96 rate schedule. FPS-96R-B-SO-01, at 16. In support of its position, SCE points to the ROD from the 1996 rate case where the new FPS rate schedule was designed to give BPA flexibility in its ability to price products to meet market competition. *Id.* Despite the focus of the FPS-96 rate schedule, SCE believes that BPA's surplus power obligations were not ignored under this rate schedule. *Id.* In support of this, SCE cites a discussion of SCE's contract in PacifiCorp's 1996 brief, the transcript from the 1996 hearings, and BPA's ROD on Excess Federal Power. *Id.*

In SCE's Brief on Exceptions, SCE reasserts the contention that no rate was omitted from the FPS-96 rate schedule. In support of this position, SCE contends that SCE's contract requires Option Capacity to be priced at the contract demand charge in the FPS-96 rate schedule. FPS-96R-B-SO-02, at 12. SCE also contends that it did not become involved in the 1996 Rate Case because it believed the demand charge to be the appropriate rate. *Id.* at 12. SCE claims it was satisfied with the proposed demand charge and therefore did not actively participate in the 1996 Rate Case. *Id.* at 13.

BPA's Position

The record shows that BPA intended to establish a posted rate for capacity without energy sales in its NR-96 and PF-96 rate schedules. FPS-96R-E-BPA-01, at 2. Unlike the NR-96 and PF-96 rate schedules, the FPS-96 rate schedule contains no posted rates for a capacity without energy product because BPA intended to negotiate rates for capacity without energy under the flexible pricing provisions of that rate schedule. *Id.*

BPA believes the contract demand charge in the FPS-96 rate schedule does not apply to the Option Capacity (capacity without energy) product under SCE's contract because it is a charge under BPA's rate schedules associated with an entirely different product. *Id.* at 3-4. See ROD section 2.3, *supra*. It is not proper to rely on SCE's lack of participation in the 1996 rate case as an indication of anything more than a waiver of its right to state a position in that rate filing. *Id.* at 13.

Evaluation

SCE's argument is not supported by the facts. The 1996 WPRDS and Final Record of Decision state unequivocally that BPA intended to establish a posted rate for capacity without energy in the PF-96 and NR-96 rate schedules. The same documents just as clearly indicate that the capacity without energy product could be offered under FPS-96, but only at negotiated rates. SCE attempts to muster factual support for its contention by referencing PacifiCorp's 1996 brief, the transcript from the 1996 hearings and BPA's Record of Decision on Excess Federal Power. However, these documents were not made a part of the record in this proceeding. Since the Administrator's decision must be based on evidence in the record, the materials referred to cannot be relied upon. 16 U.S.C. § 839e(i)(5). Furthermore, even assuming these materials were in the record, SCE provides no specific explanation how these documents allow one to conclude "BPA did not omit a necessary rate under the FPS-96 rate schedule." FPS-96R-B-SO-01, at 16.

In its Brief on Exceptions, SCE contends that the contract demand charge in the FPS-96 rate schedule demonstrates that no rate was omitted from that rate schedule. As section 2.3 of this ROD explains in detail, the contract demand charge is for a product different from the capacity without energy product. SCE's contention that the demand charge is the appropriate rate for its contract is also addressed in section 2.3 and, as noted there, it is a matter of contract interpretation that is beyond the scope of the issues in this proceeding. In short, an inadvertent oversight in 1996 provides no justification for SCE to receive a windfall now.

Decision

The FPS-96 rate schedule did not contain all of the necessary rates it should have contained to apply to the power products marketed by BPA under the rate schedule. Instead, it omitted a posted rate for capacity without energy.

3.4 Contract Demand Charge

Issue

Whether the contract demand charge under BPA's FPS-96 rate schedule is the appropriate charge for Option Capacity under SCE's contract.

Parties' Position

SCE argues that the rate charged for Option Capacity is controlled by the contract. SCE argues that the contract states that the price for Option Capacity is set by the contract demand charge.

FPS-96R-B-SO-01, at 14. SCE states "FPS-96 contains a general contract demand charge, which applies by the terms of the SCE contract to the price BPA can charge for capacity." *Id.* "Even if the contract demand charge does not apply, notwithstanding the express contract provisions saying it does, BPA cannot price this product dramatically differently than it prices the same product for sale to its other customers." *Id.*

In SCE's Brief on Exceptions, SCE contends that the DROD confuses the distinctions between the contract demand rate in the contract and the contract demand charge in the FPS-96 rate schedule. FPS-96R-R-SO-01, at 13. The contract authorizes the capacity to be priced at the contract demand rate charged other customers, and SCE believes that BPA cannot develop a rate to apply only to SCE's contract. *Id.* SCE maintains the proposed rate forces it to purchase the product at an artificially higher rate than is charged other customers under other rate schedules. *Id.*

BPA's Position

As stated above, BPA did not post a rate for capacity without energy in the FPS-96 rate schedule, nor was the demand charge developed in a manner that takes into account the costs of such a product. Procter, *et al.*, FPS-96R-E-BPA-05, at 3. Thus, it would not be appropriate to use the contract demand charge as the basis for a rate for capacity without energy under the FPS-96 rate schedule. *Id.* at 3-4. To the extent that SCE is arguing it is entitled, by contract, to a rate based on a contract demand charge, that is a contract issue beyond the scope of this proceeding.

BPA's rate directives allow it to price different products differently. Moreover, SCE will be purchasing this product at the same posted rate available to any other customer purchasing the same product at a posted rate under the FPS-96 rate schedule.

BPA believes that questions regarding whether SCE's contract requires that capacity without energy be priced at the contract demand rate under the FPS-96 rate schedule are ultimately matters of contract interpretation. BPA believes, however, that the contract demand rate under the FPS-96 rate schedule was designed and created to price a product different from the capacity without energy product SCE purchases under its contract. *Id*. at 4-5.

Evaluation

As noted above, the demand charge in the FPS-96 rate schedule was designed to be used only in conjunction with a contemporaneous sale of energy. Procter, *et al.*, FPS-96R-E-BPA-05, at 3-4. The energy charge in BPA's power rate schedules was designed to account for seasonal and diurnal differences in the market value of the firm power product. 1996 Wholesale Power and Transmission Rate Schedules at 62. As explained in detail in BPA's rebuttal testimony, the contract demand charge is for an instantaneous peaking product as opposed to a sustained peaking product, such as capacity without energy. Procter, *et al*., FPS-96R-E-BPA-05, at 3-4.

BPA did not intend for the demand charge to set the charge for capacity without energy. The problem arises only because the implications of the precise language in SCE's contract were not considered when BPA generically set its wholesale power rates in the 1996 rate case.

Questions regarding whether SCE's contract terms and conditions control the rate charged for Option Capacity are matters of contractual interpretation beyond the scope of this proceeding. Whether SCE's contract should be interpreted in a manner so that the contract demand charge under the FPS-96 rate schedule is the contract demand rate under SCE's contract is a question of contract interpretation and is beyond the scope of this proceeding. Finally, SCE provides no legal support for its contention that BPA cannot price this product "dramatically differently" from the way it prices the product for other customers. FPS-96R-B-SO-01, at 14. Nor is there a factual predicate for such an allegation. BPA charges all customers the same posted rate when they purchase under a specific rate schedule.

Decision

The contract demand charge under BPA's FPS-96 rate schedule is not the appropriate charge for capacity without energy as described in SCE's contract.

3.5 Generally Applicable Rates

Issue

Whether the rates developed in this proceeding are rates of general applicability or whether they are rates solely to be applied to one contract.

Parties' Position

SCE contends that the rate proposed is not one of general applicability. FPS-96R-B-SO-01, at 13. SCE argues that BPA's own documents indicate that BPA intends to apply these rates only to contracts executed on or before September 30, 1996, for a capacity without energy product that require a posted rate under the FPS rate schedule. *Id.* Further, SCE argues that BPA's own materials indicate that the only contract they know of which meets these conditions is the contract with SCE. *Id.* Therefore, SCE concludes the rate is not one of general applicability, but is designed to improperly alter SCE's contract. *Id.*

In SCE's Brief on Exceptions, SCE contends that BPA cannot adjust the rate for Option Capacity under its contract, unless it is a rate of general applicability. FPS-96R-B-SO-02 at 14. If the rate is generally applicable, SCE maintains that the rate cannot be amended in this proceeding. *Id.* at 14. SCE argues that the FRN defines the proposed rate as being not generally applicable. In addition, SCE believes this is evidenced by BPA's failure to give notice to potential new customers and, the fact that no revenues or sales were projected under the proposed rate. *Id.* at 14. SCE maintains that BPA cannot modify the FPS-96 rate schedule at all. *Id.* at 14-15. They contend that the FPS-96 rate schedule was designed only for negotiated rates as part of BPA's Excess Federal Power policy and as such, BPA is prohibited from posting a rate under that schedule. *Id.* at 15. SCE states that the rates set in this proceeding are not applicable to other BPA contracts. *Id.* at 26.

BPA's Position

BPA believes the proposed rate is one of general applicability. Procter, *et al.,* FPS-96R-E-BPA-05, at 3. It has been BPA's stated opinion from the outset that there are two distinct classes of contracts to which this rate can apply. *Id.* The first category consists of contracts executed on or before September 30, 1996. *Id.* The second category consists of contracts executed in the future between BPA and its customers which apply the relevant portion of the FPS-96 rate schedule. *Id.* SCE's contention in its Brief on Exceptions, that proper notice to potential new customers was not given, is misplaced. BPA believes any confusion about the general applicability of the rate was cured at the pre-hearing conference. BPA also believes that its decision not to project any sales or revenues under this proposed rate does not change its general applicability..

In its Brief on Exceptions, SCE raises for the first time the contention that BPA is legally prohibited from amending the FPS rate schedule to add a posted rate for capacity without energy. This issue was not raised in SCE's Initial Brief and is therefore waived. To the extent the issue has not been waived, BPA believes it not only has the right, but also, the obligation to modify a rate schedule when it finds such an egregious omission like the one being corrected here.

Evaluation

The applicability of the FPS-96 rate correction is quite simple. The rate applies to existing and future contracts that reference that portion of the FPS-96 rate schedule that is being corrected in this proceeding. *Id.* Currently, BPA is only aware of one existing contract, with SCE, that would apply the corrected rate. *Id.* If there were others, they would also be properly subject to the revised rate. *Id.* In addition, the proposed rate applies to future contracts that reference the corrected section of the FPS-96 rate as the price that applies to that new power sale. There has been some confusion regarding the applicability of the rate proposed in this proceeding, but the record shows that it has been BPA's intent from the outset that this be a rate of general applicability. BPA counsel Mr. Casad's statements at the prehearing conference clearly demonstrate BPA's intent:

> 10 KURT CASAD: If I could make a couple of points,
> 11 also. I think that the rate at issue, while there may
> 12 only be one current contract using that particular rate,
> 13 does not preclude the possibility that BPA would enter
> 14 into subsequent contracts with customers during the rate
> 15 period that would apply that same rate that's being
> 16 revised.
> Pr. Tr. 8.

The language in the FRN should not be narrowly interpreted so as to preclude BPA from using the rates developed in this proceeding in the future. The language in the FRN was intended only to alert existing contract holders how this proposed rate would be applied. The language in the FRN was not intended to be interpreted as a limitation to general applicability of the rate. Indeed, it would be absurd to correct an error in the rate and then fail to charge the corrected rate to future sales of the product. BPA has posted rates for capacity without energy under the NR-96

and PF-96 rate schedules which are set to expire on September 30, 2001. *Id.* The modification to the FPS-96 rate schedule will assure that BPA has posted rates for capacity without energy after the expiration of the current posted rates.

SCE raises for the first time in its Brief on Exceptions the argument that BPA is prohibited from amending the FPS rate schedule. Under the BPA Rules of Procedures, a party who fails to raise an issue in its initial brief is deemed to have waived that issue. 1010.13 (b) and (d). SCE's Initial Brief does not contain any arguments regarding legal impediments to amending the FPS rate schedule. By failing to raise this issue in the initial brief it is deemed waived.

Even if the issue has not been waived, SCE provides no legal or evidentiary support for this position. SCE's argument that the FPS rate schedule was designed to allow BPA only to have negotiated rates, prohibiting posted rates, as proposed in this proceeding, is not supported by any evidentiary, statutory, or legal reference. The argument also ignores the simple fact that the FPS-96 rate schedule does contain posted rates. While SCE is correct that the FPS-96 rate schedule was designed, in part, to provide BPA a certain amount of flexibility in the market to negotiate rates for the sale of products, it also contains posted rates for energy and a demand charge. In fact, SCE contends that the posted rate for the contract demand charge is the appropriate rate for its contract.

As noted above, BPA is legally required to establish rates to recover its costs. See Section 1.3 ROD. In this situation, where BPA has identified an error in the establishment of a rate that results in a customer receiving a windfall by paying a rate that was not intended to apply to a product, BPA has the statutory responsibility to correct the error and price the product properly. *Id.*

Decision

This proposed rate is one of general applicability, which applies to existing and future contracts for power sales of the capacity without energy product.

3.6 Good Faith and Fair Dealing

Issue

Whether the proposed rate correction violates BPA's general obligation of good faith and fair dealing under its contract with SCE.

Parties' Position

SCE argues that BPA cannot use its general ratemaking authority to propose rates that "renegotiate" the contract or "reprice" products available under the contract in a manner that violates its obligation of good faith and fair dealing. FPS-96R-B-SO-01, at 15.

In SCE's Brief on Exceptions, SCE restates its earlier contention that BPA violated the duty of good faith and fair dealing. FPS-96R-B-SO-02, at 15. SCE maintains BPA violated this duty by

limiting issues raised in the rate case, thwarting the ability to verify the marginal cost analysis, and foreclosing inquiry into other rates. *Id.*

BPA's Position

BPA's proposed rate correction is appropriate and permitted by the contract. BPA has implemented its contract with SCE in good faith and in a fair manner. To the extent SCE's argument claims a breach of contract, its claim is outside the scope of this proceeding.

Evaluation

BPA has properly exercised its ratemaking authority to correct a clear error in the FPS-96 rate schedule. FPS-96R-E-BPA-01, at 1-2. This action is consistent with BPA's contract with SCE. Grosz, *et al.*, FPS-96R-E-SO-03, Attachment 1. To the extent questions regarding BPA's alleged violation of its duty of good faith and fair dealing are breach of contract claims, they should be resolved in another forum.

Decision

BPA's ratemaking action is appropriate. To the extent questions regarding BPA's alleged violation of its duty of good faith and fair dealing are breach of contract claims, they should be resolved in another forum.

3.7 Seasonally Adjusted Rates

Issue

Whether it is appropriate in this proceeding to determine the issue of whether SCE's contract allows for seasonally adjusted rates.

Parties Position

In SCE's Brief on Exceptions, SCE contends that its contract with BPA does not allow for seasonally adjusted rates for capacity without energy. FPS-96R-R-SO-01, at 25.

BPA's Position

This issue was not addressed in SCE's Initial Brief and thus is deemed waived. To the extent the issue has not been waived, BPA believes questions regarding the ability to charge seasonally adjusted rates under SCE's contract are issues of contract interpretation and are beyond the scope of the issues in this proceeding.

BPA also believes that questions regarding rights and obligations under SCE's contract are beyond the scope of this proceeding. Whether the contract prohibits seasonally adjusted rates should be addressed in another forum.

Evaluation

SCE's contention that the contract does not allow for seasonally adjusted rates is a matter being raised for the first time in the Brief on Exceptions. SCE's Initial Brief did not address this issue. Under BPA's Rules of Procedure a party's failure to raise the issue in its initial brief is deemed to be a waiver of the issue. Procedures, § 1010.13(b).

Whether SCE's contract prohibits BPA from charging seasonally adjusted rates is a matter of contractual interpretation beyond the scope of this proceeding. SCE's contract rights are not at issue in this proceeding. The scope of this proceeding is defined by the FRN. The FRN stated: "Pursuant to Rule 1010.3(f) of BPA's Procedures the Administrator limits the scope of this hearing to issues respecting the correction of the FPS-96 rate schedule as described in section II hereof. Other provisions of the existing FPS-96 rate schedule are not matters for the purpose of this hearing." 64 Fed. Reg. 44361 (1999). Section II of the FRN provides: "The purpose of the proposed changes to the Firm Power Products and Services (FPS-96) rate schedule is to clarify and establish the rates that apply to the capacity without energy product." *Id.* at 44363. Whether or not seasonally adjusted rates are appropriate for SCE's contract is beyond the scope of this proceeding.

Decision

The issue of whether the SCE contract provides for products to be sold at seasonally adjusted rates is a matter of contract interpretation beyond the scope of this proceeding.

4.0 PROCEDURAL ISSUES

4.1 Expedited Hearing

Issue

Whether BPA's use of an expedited rate proceeding limited SCE's participation and resulted in a record that is neither full nor complete.

Parties' Position

SCE argues in its brief that BPA has failed to follow the requirements of section 7 of the Northwest Power Act, and that SCE has consistently been denied procedural rights conferred by the Act and BPA's own procedural rules. FPS-96R-B-SO-01, at 6-7. SCE argues that the nature and complexity of the issues in this matter, including issues surrounding discovery, have made it virtually impossible to compile a full and complete record within the time frame provided by the expedited case schedule. *Id.* at 7. Therefore, SCE concludes that BPA's use of an expedited proceeding was inappropriate. *Id.*

In SCE's Brief on Exceptions, SCE reargues its contention that the expedited rate proceeding was inappropriate. FPS-96R-R-SO-02, at 32. Because BPA had never used the methodology employed to establish the proposed rates before this proceeding, SCE believes the process was complicated. SCE further contends that because BPA represented the proposed rate as being one of limited applicability, as opposed to one of general applicability, BPA discouraged participation in the proceeding. *Id*. at 33.

BPA's Position

In the Federal Register Notice initiating this proceeding, BPA noted that the proposed corrections for the FPS-96 schedule would not impact any other part of the FPS-96 schedule, or any other rate schedule. The issues would therefore be fewer and of more limited scope than the issues in a proceeding to adjust all BPA power rates. 64 Fed. Reg. 44361, 44362 (1999). The purpose of the proposed adjustments to the FPS-96 schedule was limited to establishing the posted rate that would apply to a single product, the capacity without energy product. Rate Adjustment Study, FPS-96R-E-BPA-01, at 1. In addition, BPA believes it was necessary to establish a posted rate for this product before June 2000 in order to accommodate the Sale and Exchange Agreement by and between BPA and SCE. Procter, *et al.*, FPS-96R-E-BPA-05, at 9.

BPA does not believes that the marginal cost methodology used to develop these rates was novel. Tr. 121-122. BPA also believes that the lack of broad participation in this proceeding is a not a result of BPA misleading parties about the scope of the proposed change. Pr. Tr. 8.

Evaluation

SCE concludes that an expedited proceeding was inappropriate in this case, but provides no legal or coherent factual rationale for its conclusion other than to note that the proceeding has been

complicated by discovery disputes. FPS-96R-B-SO-01, at 7. However, BPA's testimony establishes that BPA does not currently have a posted rate for a capacity without energy product in the FPS-96 rate schedule. Procter, *et al.*, FPS-96R-E-BPA-03, at 2-3. BPA's direct testimony also states that the Sale and Exchange Agreement between BPA and SCE specified the demand charge in the Contract Rate section of the current surplus power rate schedule as the applicable rate for a capacity without energy product. *Id.* at 4. SCE specifies that SCE may purchase the capacity without energy product from BPA during the five-month period from June-October. Grosz, *et al.*, FPS-96R-E-SO-03, Attachment 1. Therefore, it was necessary for BPA to use an expedited proceeding to develop this rate in the event that SCE should elect to purchase this product for the delivery period June-October 2000. The fact that the only existing contract subject to this rate will be the SCE Sale and Exchange Agreement is irrelevant. Neither BPA's proposal nor its decision to apply the expedited procedures to this proceeding would have been different if there were additional existing contracts requiring this rate.

BPA's general rate proceeding, which was commenced approximately the same time as this proceeding, is not scheduled to be completed, with the issuance of a Final ROD by BPA, until April 21, 2000. However, FERC rules require that BPA's rates for which interim approval by the Commission is requested must be filed no later than 60 days in advance of the proposed effective date. 18 C.F.R. § 300.10 (a)(3)(ii). Even if the general rate case does conclude on schedule, this would have made it impossible for BPA to have a posted rate for the capacity without energy product in the FPS-96 schedule in time to accommodate the SCE Agreement.

SCE states in its brief that the issues in this proceeding were complex and that formulating a full and complete record was "virtually impossible within the time frame of this proceeding." FPS-96R-B-SO-01, at 7. In fact the single substantive issue to be addressed by the parties in this proceeding concerned the technical and economic validity of the methodology proposed by BPA for establishing rates for the capacity without energy product in the FPS-96 schedule. Procter, *et al.*, FPS-96R-E-BPA-03, 4-5.

BPA's Procedures Governing Bonneville Power Administration Rate Hearings specifically provide for the use of expedited rate proceedings. 51 Fed. Reg. 7611 (1986). Section 1010.10 of the Procedures contemplates a 90-day process from initiation of an expedited proceeding to issuance of the Final Record of Decision (ROD). BPA's proposed schedule in the FRN, however, extended the time for this proceeding beyond the 90-day time frame to 115 days. 64 Fed. Reg. 44,361, 44,363 (1999). At the prehearing conference, SCE objected to the proposed schedule, and following negotiations with BPA and other parties at the pre-hearing conference, it was agreed that the Hearing Officer would propose to the Administrator that the schedule be extended an additional 43 days. Pr. Tr. 33. At the pre-hearing conference counsel for SCE stated that SCE

> "would certainly support the revised schedule and very much appreciate Bonneville's willingness to make this a speedy proceeding, if not an expedited one. And Bonneville is willing to support us on that, and it's most appreciated." Pr. Tr. 27.

The Administrator approved the new schedule and the date for the final ROD was moved from December 6, 1999, to January 18, 2000. Therefore, in an attempt to accommodate SCE's requests, a schedule was developed for this proceeding that actually extended by nearly two-thirds the time normally afforded for expedited proceedings.

SCE contends in its Brief on Exceptions that the methodology employed by BPA to establish rates was both new and novel and as a consequence it was inappropriate to use an expedited rate proceeding to set the rates. FPS-96R-R-SO-01, at 32. Whether the propose rate methodology was new or novel is not relevant, unless it somehow prohibits the development of a full and complete record or it limits a party's ability to participate. SCE contends that a full and complete record was not developed due to the expedited nature of this proceeding, the limited discovery, the inability to fully analyze data, and abbreviated hearing. *Id*. at 33. SCE fails to provide any evidentiary or legal support for these conclusions. The record in this proceeding, however, does provide substantial evidence to the contrary. *See* section 4.3 of ROD. A review of the transcript from the hearing is devoid of any request by SCE for additional time to continue cross-examination. As noted above SCE cross-examined BPA witnesses for almost an entire day. Contrary to SCE's apparent contentions, it was given considerable latitude during cross-examination to question BPA witnesses. Additionally, as noted in section 4.2 of the ROD, discovery problems were a creation of SCE's own making. Documents were made available to SCE for inspection and copying in September. Rather than availing itself of the opportunity to review these materials SCE chose to file a motion to compel. When the motion was denied, SCE found itself with little time to review the materials available. It was not the expedited nature of this proceeding that caused SCE problems with discovery, but rather, SCE's limited opportunity to review materials was a consequence of its own decisions.

The other issue SCE raised in the Brief on Exceptions involves a concern that the FRN may have misled parties about the scope of this proceeding thus limiting participation and leading to a incomplete record. SCE has provided no evidentiary or legal support for this conclusion. The record does provide evidence to the contrary. There are 65 parties to this proceeding and they account for a large percentage of BPA's customer classes. Each party has been served with all of the filings in this proceeding. BPA's filings have indicated that it considers the proposed rates to be generally applicable rates. Procter, *et al.*, FPS-96R-E-BPA-05, at 3. In addition, at the prehearing conference, which all parties to this proceeding were expected to attended, BPA unequivocally stated that the proposed rates would be generally applicable. Pr. Tr. 8. Any doubts about the applicability of the rate to future contracts should have been erased at that time. Speculation about the lack of active participation in this proceeding by other parties does not demonstrate the lack of a full and complete record. This is particularly true given the evidence to the contrary.

Decision

BPA must secure interim approval from FERC prior to June 2000 for a posted rate for the capacity without energy product in the FPS-96 schedule. The substantive issues with respect the proposed rate were limited, and the schedule adopted by the Administrator, including the addition of time added at the request of SCE, has afforded the parties ample time to present their cases.

4.2 Discovery Issues

Issue

Whether the Hearing Officer erred by denying certain SCE discovery requests resulting in a record that is neither full nor complete.

Parties' Position

SCE claims in its brief that the direct case filed by BPA was inadequate for SCE to understand BPA's proposal. According to SCE, this fact, combined with the omission of clarification of BPA's initial proposal, prompted a need for extensive discovery of BPA through data requests. FPS-96R-B-SO-01, at 7. SCE states that it filed 92 data requests to elicit information to determine whether BPA erred in developing the FPS-96 rate in 1996, and if so, whether the proposed corrections to the rate are consistent with the assumptions, policy and methods used to establish BPA's power rates in 1996. *Id.*

SCE argues that BPA was obligated to explain through these data requests any differences between the way a capacity without energy product was priced in 1996 and BPA's proposal for pricing that product in this proceeding. *Id.* at 8. In addition, SCE asserts it was entitled to know why any changes in methodology were being proposed, and to have BPA articulate a sound basis for any inconsistencies, assumptions, or policies employed in developing rates in the concurrent 2002 rate proceedings. *Id.* They state that BPA was obligated through the data requests to articulate why it had chosen the specific methodology it did in light of the "inequitable rate increase resulting from the use of that methodology." *Id.*

SCE believes that BPA gave misleading and incomplete answers to the data requests and that the responses it did give were virtually useless. As a consequence SCE filed a motion to compel responses to certain of the data requests. FPS-96R-B-SO-01, at 8. SCE argues that the Hearing Officer improperly made the legal determination that because the rate at issue in this proceeding was not developed in the 1996 rate case, the manner in which other non-related 1996 rates were developed is not relevant. *Id.* at 9. SCE argues the Hearing Officer thereby made a legal determination on an issue SCE feels was not briefed and was beyond the scope of her authority. *Id.* SCE maintains that it required responses to its data requests regarding a number of different rates developed in BPA's 1996 general rate case because even if those rates were for products that were only similar to the capacity without energy product, the information it sought was relevant and important to making its case. FPS-96R-B-SO-01, at 10. SCE contends that the FPS-96 rate schedule, as well as the PF-96 and NR-96 rate schedules and contract demand charge, were "related" rates that were within the scope of inquiry in this proceeding. *Id.* at 10. Finally, SCE contends BPA has been allowed to develop the rate "in a vacuum without explaining why it no longer follows the 1996 approach." *Id.*

In SCE's Brief on Exceptions, it realleges the argument that it did not have sufficient meaningful discovery. FPS-96R-R-SO-01, at 34. SCE believes the record was restricted to only those facts that BPA wanted and precluded any contrary view. *Id.* SCE complains that the Hearing Officer denied the motion to compel, even though statements in support were untrue. SCE claims

additional prejudice because the order denying SCE's motion to compel issued on a Friday, October 17 was not received until Monday, October 20. Additionally, SCE argues that when BPA produced the record for the 1996 Rate Case, it was too voluminous for SCE to analyze.

BPA's Position

SCE contends that denial of its motion to compel is evidence that it was deprived of the opportunity to fully develop its case, but SCE's brief does not identify any individual data requests or groups of requests, which resulted in the apparent inability to fully present its case. It is BPA's position the Hearing Officer did not err in denying SCE's motion to compel.

BPA believes it fulfilled all of its discovery obligations, and the order on the motion to compel supports this position, Order, FPS-96R-O-06, but that in any case SCE has been provided with all the materials it would need to evaluate BPA's proposal and present its own case in response. BPA also does not believe the Hearing Officer made a determination that materially impacted SCE's presentation of its case. BPA believes SCE was not prohibited by the Hearing Officer's discovery order from using the NR-96 and PF-96 rate schedules and demand charge in developing or presenting its case. BPA believes its direct case and rebuttal testimony fully explains the methodology behind the proposed rates, and therefore that BPA did not develop these rates "in a vacuum."

BPA believes SCE's arguments in the Brief on Exceptions also lack merit. BPA believes it complied with all discovery obligations. BPA believes any problems that SCE experienced in discovery were a consequence of its own making since all materials requested were made available for inspection and copying in September. BPA believes that SCE cannot now argue it was denied discovery when it failed to afford itself of the opportunity to review the materials when made available.

Evaluation

SCE appears to argue that it was improperly denied relevant discovery by the Hearing Officer in two ways, FPS-96R-B-SO-01, at 9-10, and that as a result it was not provided sufficient information in this proceeding to prepare its case. *Id.* SCE also contends that the Hearing Officer's decision precluded it from determining whether BPA used different assumptions and methodologies from BPA's 1996 proceeding. *Id.* Neither of these arguments is supported by the facts.

Rather than identifying the data requests alleged to support its argument, SCE merely makes a generic contention that BPA's responses did not fulfill its requirements under the discovery rules and the Hearing Officer's order upholding BPA's responses was likewise in error.

However, it appears there were two groups of data requests that may be the source of SCE's concern. One group of the requests in the motion to compel involved requests for analysis of information BPA had not developed as part of its initial proposal. These data requests, in general, sought to elicit a comparative analysis between the 1996 (WP-96) and 2002 (WP-02) rate cases and the present rate proceeding. BPA explained in response to these requests that the

requested analysis had not been performed, but that it would make the underlying information available to SCE so that it could perform the comparisons it was seeking from BPA. In addition to making the materials generally available to SCE, BPA produced for SCE the entire record from the WP-96 proceeding. As a party to the WP-02 proceeding, SCE had previously been provided all studies, documentation and testimony from that proceeding. Therefore, SCE was provided all materials that could have been relevant to preparing the comparative analysis that it claims was critical to both its understanding of BPA's proposal in this case, and to the preparation of its own case in response. The Rules of Procedure Governing Rate Hearings state that no party shall be required "to perform any new study or to run any analysis or computer program" in response to a data request. Procedures, § 1010.8(b). Thus no party can compel another party through a data request to perform the type of comparative analysis SCE's data requests sought.

A second group of SCE's data requests asked BPA to provide materials which were background materials to the CCCT power plant capital costs study used to develop the proposed rates. In developing the proposed rates, BPA stated it did not independently evaluate the assumptions relied upon by the Northwest Power Planning Council (NWPPC) to develop the capital costs. Procter, *et al.*, FPS-96R-E-BPA-03, at 4. Rather than evaluating the assumptions, BPA adopted the materials because BPA believed the study was sound and reliable. *Id.*[1] In its direct case, however, BPA included a summary of the materials used from the NWPPC's power plan to give some guidance to the reader about the development of those capital costs. *Id.*, at 4-5.

In addition, BPA also identified how that cost data was used in developing its proposed rates. Specifically, BPA has: 1) identified the proxy plant method as the approach to rate estimation; 2) identified the plant being used; 3) identified the cost of that plant as developed by the NWPPC in conjunction with discussion with the owner of the plant; 4) identified how the plant cost data were used by BPA in developing the proposed rates; and 5) provided access to the Power Plan from which the information could be obtained. In short, all the material that SCE could have conceivably required to evaluate BPA's proposal on this particular issue, and formulate its own case in response, was provided to SCE, notwithstanding anything in the Hearing Officer's order on discovery.

In a related argument, SCE states that it was not afforded the opportunity to explore and compare the proposed rate to "related" rates from the 1996 case. SCE contends that the Hearing Officer made a separate error when she made a "legal finding" that "since the Rate at issue in this docket was never developed in the 1996 case, how the other non-related 1996 rates were developed is not relevant." Order, FPS-96R-O-06, at 3. SCE argues the Hearing Officer made no factual inquiry to determine what 1996 rates were "related." FPS-96R-B-SO-01, at 10. SCE fails to explain what relevant rates it was denied the opportunity to compare to the rate being proposed in this proceeding. In its brief, SCE notes that the rates under the PF-96 and NR-96 rate schedules were "related." *Id.* However, the fact that the Hearing Officer did not require BPA to conduct a comparative analysis of certain existing rates with its proposed rates did not prevent SCE from doing so and, in fact, SCE did so in its testimony. Grosz, *et al.*, FPS-96R-E-SO-04, at 2 and 8.

[1] In its brief SCE has not challenged BPA's use of the study.

In this respect, SCE's interpretation of the impact of the Hearing Officer's order regarding this aspect of the discovery dispute is wrong. Reviewing the paragraph as a whole demonstrates that SCE is interpreting the sentence much more broadly than was intended. The relevant portion of the order states:

> A review of the data request and responses contained under tab B which are still the subject of dispute, do not require additional responses. Those data requests seek information that is beyond the scope of this hearing, or ask for contract interpretation or other legal analysis that BPA is not required to provide. Some additional information was given to SCE, even in response to these disputed data requests and that should be sufficient for SCE to make its direct case. Since the Rate at issue in this docket was never developed in the 1996 case, how the other non-related 1996 Rates were developed is not relevant. As BPA pointed out, it has made no attempt to use the same methodology here that it used in 1996.

FPS-96R-O-06, at 3.

The order did not preclude SCE from raising the PF-96 and NR-96 rate schedules, or any other rate or analysis or other issue contained in the WP-96 rate case. Rather, the order merely states that some of the data requests involve matters outside the scope of the proceeding. The Hearing Officer correctly limited the discovery to the issues framed by the FRN. The decision did not preclude SCE from presenting evidence, but rather only shaped BPA's obligation to respond to the discovery request.

Finally, SCE contends the Hearing Officer's order allowed BPA to develop its rates "in a vacuum without explaining why it no longer follows the 1996 approach." FPS-96R-B-SO-01, at 10. BPA did not develop this rate in a "vacuum" and SCE has presented no evidence that it did so. BPA's rate directives do not require that it continue to follow the same methodology in perpetuity in developing rates. BPA explained in its rebuttal testimony the reasoning behind the change in methodology for pricing the capacity without energy product and these are sound reasons for the change. Procter, *et al.*, FPS-96R-E-BPA-05, at 13. Most importantly, SCE was in no way denied any materials needed to evaluate BPA's proposal or formulate its response, either by BPA or by the Hearing Officer's discovery order. SCE's complaint is that BPA did not conduct certain pieces of analysis that SCE wanted it to conduct, but BPA is under no obligation to perform any and all analysis or comparative analysis that the parties feel is relevant. Procedures, §1010.8(b).

SCE's Brief on Exceptions makes the seemingly contradictory and inaccurate contentions about the discovery process. In its Brief on Exceptions, SCE states: "What little discovery that was produced was not produced until after that date, (October 17) allowing SCE less than a week to analyze the materials produced. And what was produced? More than 80 volumes of materials from the 1996 rate case with no indication of where to find any of the materials requested." FPS-96R-R-SO-01, at 34 (*parenthetical added*).

SCE's complaints about discovery in the Brief on Exceptions do not accurately reflect the circumstances. In those instances where SCE sought materials in response to data requests, BPA

made those materials available for inspection and copying. These materials were available for inspection after BPA responded to the data request on September 24, 1999. Rather than availing itself of the opportunity to inspect and copy the materials requested, SCE chose to file the motion to compel and in addition sought to extend the time for the rate proceeding. The Hearing Officer denied all of SCE's requests for documents and gave SCE an additional 11 days to file its direct case. The extension of time was significantly less than the extension sought by SCE in its motion. FPS-96R-O-06. Even though not required by the Hearing Officer's order, BPA voluntarily produced the record from the 1996 Rate Case. These documents were part of the materials previously made available for inspection. To the extent that SCE did not have time to analyze the materials, it is a problem of its own creation.

SCE also takes the contradictory positions that BPA produced very little material yet the materials produced were more than it could successfully analyze in the time allotted. Apparently, when BPA voluntarily produced materials SCE considered it to be very little material. *Id*. Yet, SCE acknowledges and complains in its Brief on Exception, that 80 volumes of the 1996 rate case record BPA voluntarily produced were more than SCE could successfully analyze. SCE cannot have it both ways. It cannot argue that BPA produced little material and still maintain that it was overwhelmed by the amount of materials voluntarily produced by BPA. Any problems SCE had reviewing the materials BPA voluntarily produced is a problem of its own making by not availing itself of the opportunity to review the materials before the order on the motion to compel.

Decision

The Hearing Officer's denial of SCE's motion to compel did not deny SCE materials critical to its case or the ability to present those materials in any way it desired.

4.3 Complete Record

Issue

Whether the Hearing Officer erred by not allowing SCE a sufficient opportunity to present evidence to establish a complete record.

Parties' Position

SCE argues that the record demonstrates its inability to present a full and complete record. FPS-96R-B-SO-01, at 10-13. SCE contends that the Hearing Officer erred when she struck portions of SCE's direct testimony that addressed discovery issues. *Id.* at 10. SCE believes that striking portions of its testimony related to discovery disputes "improperly gives the appearance that SCE failed without explanation to address certain issues, when in fact SCE could not address the issues due to a limitation on discovery." *Id.* at 10-11.

Second, SCE argues that the Hearing Officer foreclosed further inquiry into contract matters during cross-examination after acknowledging the relevance of this matter in her order on the motion to strike. *Id.* at 11.

Third, SCE argues that the Hearing Officer's decision granting SCE's motion for leave to file supplemental testimony evidences an apparent desire by the Hearing Officer "to limit the record and evidence SCE was able to bring forth." *Id.* SCE also argues that it was an error to strike SCE's reply to BPA's memoranda in opposition to SCE's motion to file supplemental testimony. *Id.*

Fourth, SCE argues that there was "fundamental unfairness" in the manner in which cross-examination was conducted. *Id.* at 11. SCE believes that BPA attempted to improperly frustrate SCE's cross-examination by making objections to questions in a way that mischaracterize SCE's question. In addition, SCE alleges that BPA used objections "to tell the BPA witnesses what they were to say in response" to SCE's questions. *Id.* Finally, SCE contends that the Hearing Officer "solicited objections or completed the objections raised by BPA before sustaining them" and that the Hearing Officer unfairly supported BPA in its inappropriate actions during cross-examination. *Id.*

SCE argues that, compared to the nature of cross-examination in the 1996 proceeding, the cross-examination in this proceeding was substantively different. *Id.* SCE contends that a comparison demonstrates that SCE's questions were neither objectionable nor inappropriate. *Id.* SCE contends that the record is notable for the number of questions BPA refused to answer on cross-examination with the assistance of the Hearing Officer. *Id.* at 12. In addition, SCE feels that its opportunity to present its case was thwarted by the Hearing Officer when she is alleged to have asked SCE to speed up or conclude its cross-examination. *Id.*

Finally, SCE argues that BPA's decision to waive cross-examination of SCE's witnesses deprived SCE of the opportunity to correct factual inaccuracies made by BPA witnesses. *Id.*

BPA's Position

BPA's position is that striking the testimony related to discovery issues was appropriate given the limited scope of issues in this proceeding. The testimony in question involved complaints that BPA failed to produce discovery materials or produced them in an untimely manner. As discussed more fully above BPA believes that it complied with all discovery requests. BPA believes that SCE has offered no evidence demonstrating how it suffered procedural due process harm as a result of the order denying certain aspects of SCE's request to file supplemental testimony.

BPA believes cross-examination was not fundamentally unfair and that the manner in which BPA made objections during SCE's cross-examination was reasonable.

BPA believes that its decision to waive cross-examination did not wrongfully deny SCE the ability to rebut factual matters. SCE had a full and fair opportunity during its cross-examination of BPA's witnesses to rebut any factual matters.

Evaluation

Despite the very limited issues in this proceeding, SCE filed thirty-nine pages of testimony in its direct and supplemental cases. SCE cross-examined BPA witnesses for virtually an entire day and at the end of the hearing submitted several documents into the record, including the NR-96 rate schedule. SCE has produced a substantial record given the limited issues in this proceeding.

SCE's initial contention that striking testimony from its direct case regarding discovery issues created a procedural deficiency is without merit. Striking the testimony did not deprive SCE of its right to raise any issue or to create a record of its position in this rate proceeding. In fact, SCE has raised these issues in its brief, (s*ee* FPS-96R-B-SO-01, at 8), which is the appropriate manner in which a party should raise procedural issues, rather than raising legal argument through lay testimony.

Furthermore, SCE misinterprets the order on the motion to strike. SCE was not precluded from presenting arguments about discovery issues to the Administrator. Rather, the Hearing Officer properly ruled that these matters were not appropriate for testimony. The order states that "[t]hese kinds of arguments are inappropriate for testimony and should be raised by counsel at the proper time." FPS-96R-O-08, at 5. In fact, SCE raised the very issues in question in its brief. FPS-96R-B-SO-01, at 8-9.

SCE next contends that the Hearing Officer's decision to "quickly foreclose" further inquiry on the contract related matters resulted in an incomplete record. FPS-96R-B-SO-01, at 11. SCE's contention is without merit. The applicability of the rate proposed in this proceeding to SCE's contract may be an issue of contract dispute between BPA and SCE, but it is not an issue in this rate proceeding. The order correctly limited SCE from turning this proceeding into an examination of SCE's contract rights. The order, however, specifically states that "its contract is relevant to the extent it may be used to demonstrate the necessity of and the reasons for, proposing a change in the rate schedule." FPS-96R-O-08, at 2. The portion of the transcript, referenced by SCE in its brief, demonstrates the Hearing Officer's intent was not to foreclose discussion, but rather was directed to focus on the issues relevant to this rate proceeding.

> HEARING OFFICER EDWARDS: Certainly you're entitled to explore the basis of the rate, the methodologies used in calculating that rate and the reasons for calculating that rate. It does seem to me, though, Ms. Fisher, that with respect to SCE and its contract you're tending to put the cart before the horse, here. You're looking at it as if the interpretation of SCE's contract is absolutely vital to whether or not the rate schedule is a rate schedule which should be adopted or not. When, in fact, the rate schedule, whether or not it's a rate of universal application or whether it's applicable to SCE, the underlying foundation of that rate is what should be explored to determine the reasonableness for the rate, per se, without concern for

what contract it will be applied to at any point in time.

Now, when I permitted you earlier in the proceeding to bring in some evidence based on your allegations of prejudice or bias, what I was seeing there was that you were making a claim that the motivation for introducing the rate schedule at this point in time in this proceeding and for pricing it the way it was priced was strictly to single out SCE for some kind of punishment; for whatever reason, I have no idea.

MS. FISHER: Yes, that would be consistent with my --

HEARING OFFICER EDWARDS: But I haven't heard much evidence yet that goes to whether or not that has even taken place, because just a disagreement over the terms of the contract is not going to establish the kind of bias we're looking at, here, because contract interpretation is something people argue over all the time. And when the rate schedule is adopted, whether or not it applies to SCE's contract would be determined after the fact in that case, because you're saying, well it doesn't apply. Well, if it doesn't apply, then why do you care about the rate schedule? If it can't possibly apply, then you shouldn't be in here arguing about it now. But if in fact what you have is some evidence to show that this rate schedule has been designed particularly targeted at SCE for some unfair purpose, then that's what you should be focusing on, not whether or not your contract says this or that or whether Bonneville is correct when it says this term means X and you claim it means Y. That isn't why we're here.

Tr. 163-165.

The Hearing Officer noted in this exchange that there was limited relevance to contract related matters. SCE was free to explore contract issues within the context of the rate issues relevant to this proceeding.

SCE's next argument involves the Hearing Officer's decision granting SCE's request to present supplemental testimony. Without explaining how its procedural due process rights were harmed, SCE contends it was harmed when it was denied the opportunity to file supplemental testimony. The source of SCE's concern may be the finding that only three (Nos. 1, 4 and 7) of the interrogatory responses accompanying the testimony were relevant. The order noted, however, that "[t]he other interrogatories and document requests, however, either refer to Nos. 1, 4 or 7 or

they provide no support for the issues raised in this proceeding." FPS-96R-O-09, at 2. In addition, SCE's supplemental testimony does not reference any of the rejected interrogatories or document requests. SCE's testimony merely references the interrogatories that were allowed under the order. Given the absence of any reference to the rejected material in SCE's testimony and no demonstration in its brief regarding how the rejected elements prejudiced its case, there is no support in the record for SCE's position.

SCE's next argument is that cross-examination was fundamentally unfair due to the manner in which BPA made objections during SCE's cross-examination. SCE did not raise this concern with the Hearing Officer during the hearing. SCE now believes the tactics employed were somehow unfair. However, SCE does not specify what objections crossed the line and how this prohibited SCE from presenting its case and developing the record it felt was appropriate. SCE contends that cross-examination in BPA's 1996 rate proceeding was fundamentally different. FPS-96R-B-SO-01, at 11. SCE makes this contention without offering any evidentiary support. The record does not support the allegation that cross-examination in the 1996 hearing was conducted in a fundamentally different manner.

SCE's final and most puzzling contention is that it was improper for BPA to waive cross-examination. SCE apparently wanted to use BPA's cross-examination as a means for SCE's witnesses to rebut alleged inaccurate statements by BPA witnesses. BPA was not obligated to cross-examine SCE's witnesses. Furthermore, if BPA witnesses made inaccurate statements in their direct rebuttal or cross-examination testimony, SCE had the opportunity to confront the witnesses with evidence that would impeach their testimony during cross-examination.

Decision

SCE was not denied its fundamental due process rights to develop a full and complete record in this proceeding.

4.4 Environmental Considerations

In response to the need for a sound policy to guide its business direction under changing wholesale electricity market conditions, BPA developed a Business Plan. BPA's Business Plan Final Environmental Impact Statement (BP EIS) (DOE/EIS-0183, June 1995) evaluated six alternative business directions. The BP EIS was intended to support a number of business decisions, including rates for products and services to be implemented in the 1995 and 1996 rate cases and future rate cases. The 19 key policy issues analyzed in the BP EIS included rates-related issues, such as bundling and unbundling products and services and pricing. In the Business Plan Record of Decision (BP ROD) (August 15, 1995), the Administrator selected the Market-Driven alternative. As documented in that ROD, this alternative struck a balance between marketing and environmental concerns. By competing successfully in the wholesale electric utility market, BPA ensured the financial strength necessary to maintain a high level of support for public benefits.

Consistent with the tiered ROD procedure established in the BP ROD, the Administrator reviewed the BP EIS and determined the actions embodied in the 1996 rates proposal were

adequately covered within the scope of the BP EIS. BPA's final 1996 rate proposal was found to be consistent with BPA's Business Plan, the BP EIS and the BP ROD. This determination was documented in section 14.3 (Environmental Analysis) of the 1996 Final Rate Proposal, Administrator's Record of Decision. WP-96-A-02, at 526.

The proposed adjustments to the FPS-96 rate schedule clarify the FPS-96 rate schedule and establish a posted rate that will apply to the capacity without energy product. As discussed previously, this clarification is consistent with the 1996 Final Rate Proposal, Administrator's Record of Decision (WP-96-A-02, at 323) which noted that the capacity without energy product would be offered under the FPS-96 rate at negotiated, rather that posted, rates. Therefore, the National Environmental Policy Act compliance for this Firm Power Products and Services Rate Adjustment is provided by the 1996 Final Rate Proposal, Administrator's Record of Decision.

5.0 CONCLUSION

As required by law, the rates established and adopted in this ROD have been set to recover the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and all other costs and expenses incurred by the Administrator in carrying out the requirements of the Northwest Power Act and other provisions of law. In addition, these rates have been designed to be as low as possible consistent with sound business principles, to encourage the widest possible use of BPA's power, to equitably allocate the recovery of transmission costs between Federal and non-Federal users, and to satisfy BPA's other ratemaking obligations. The Hearing Officer has assured that all interested parties and participants were afforded the opportunity for a full and fair evidentiary hearing, as required by law.

BPA must evaluate the proposed rates in a section 7(i) proceeding pursuant to the Northwest Power Act. BPA must also evaluate the potential environmental impacts of the proposed rates and alternatives thereto, as required by NEPA. In this instance, the environmental analysis provided by the Business Plan Final EIS details the environmental impacts of this final FPS-96R rate proposal. The environmental analysis contained in the Business Plan Final EIS has been considered in making the decisions in this Record of Decision.

Based upon the record compiled in this proceeding, the decisions expressed herein, and all requirements of law, I hereby adopt the attached Firm Power Products and Services FPS-96R Rate Schedule as final Bonneville Power Administration rates. In accordance with Federal Energy Regulatory Commission Requirements, 18 C.F.R. section 300.10(g), the Administrator hereby certifies that the Firm Power Products and Services FPS-96R Rate Schedule adopted herein is consistent with applicable laws and is the lowest possible rate consistent with sound business principles.

Issued at Portland, Oregon, this _____ day of March, 2000.

_____
Administrator

SCHEDULE FPS-96R
FIRM POWER PRODUCTS AND SERVICES

SECTION I. AVAILABILITY

This rate schedule is available for the purchase of Firm Power, Capacity without energy, Supplemental Control Area Services, Shaping Services, and Reservation and Rights to Change Services for use inside and outside the Pacific Northwest during the period beginning October 1, 1996, and ending September 30, 2006.

Products and services available under this rate schedule are described in the reprint of the 1996 GRSPs for FPS-96, Section III.A of BPA's General Rate Schedule Provisions (GRSPs). BPA is not obligated to enter into agreements to sell products and services under this rate schedule or make power or energy available under this rate schedule if such power or energy would displace sales under the PF-96, NR-96, IP-96, or VI-96 rates schedules or their successors. Sales under the FPS-96 rate schedule are subject to BPA's GRSPs. Transmission service over Federal Columbia River Transmission System facilities shall be charged under the applicable transmission rate schedule. Ancillary services shall be available under, or at charges consistent with, the Ancillary Products and Services (APS) rate schedule.

This rate schedule supersedes the Surplus Firm Power (SP-93) and Emergency Capacity (CE-95) rate schedules. Rates under contracts that contain charges that escalate based on rates listed in this rate schedule shall include applicable transmission charges. For sales under this rate schedule, bills shall be rendered and payments due pursuant to BPA's Billing Procedures and/or as agreed to in purchase agreements.

SECTION II. RATES, BILLING FACTORS, AND ADJUSTMENTS

For each product, the rate(s) for each product along with the associated billing factor(s) are identified below. Applicable adjustments, charges, and special rate provisions are listed for each product. This rate schedule contains four subsections, corresponding to the products offered under this rate schedule:

Section II.A. Firm Power and Capacity without energy.

Section II.B. Supplemental Control Area Services.

Section II.C. Shaping Services.

Section II.D. Reservation and Rights to Change Services.

A. FIRM POWER AND CAPACITY WITHOUT ENERGY

1. RATES AND BILLING FACTORS

1.1 Contract Rate

The demand charge in the Contract Rate applies to purchases of a firm capacity with no energy return product exclusively, that is, a firm power sale product. Firm capacity with energy return (Capacity without energy) is available under the FPS-96 rate schedule at the prices identified in section 1.3. Contracts entered into on or before September 30, 1996, that refer to the demand charge in the Contract Rate section of the then applicable surplus power schedule for pricing this product will be priced under section 1.3.

1.1.1 Demand Charge

The charge for demand shall be $0.87 per kilowatt per month in all months of the year, *multiplied by*
the Contract Demand unless otherwise agreed by BPA and the Purchaser.

1.1.2 Demand Charge – Capacity without energy Sales

See section 1.3 for pricing.

1.1.3 Energy Charge

The total monthly charge for energy shall be the sum of (1) and (2):

(1) the applicable HLH rate for that month, *multiplied by*
the Purchaser's HLH Contract Energy unless otherwise agreed by BPA and the Purchaser; and

(2) the applicable LLH rate for that month, *multiplied by*
the Purchaser's LLH Contract Energy unless otherwise agreed by BPA and the Purchaser.

Applicable Months	***HLH Rate***	***LLH Rate***
September – December	49.63 mills/kWh	46.45 mills/kWh
January – March	50.39 mills/kWh	47.25 mills/kWh
April	44.74 mills/kWh	42.73 mills/kWh
May – June	24.36 mills/kWh	21.21 mills/kWh
July	29.94 mills/kWh	26.09 mills/kWh
August	42.68 mills/kWh	37.06 mills/kWh

1.2 Flexible Rate

Demand and/or energy charges may be specified at a higher or lower average rate as mutually agreed by BPA and the Purchaser. Billing factors shall be Contract Demand and Contract Energy unless otherwise agreed by BPA and the Purchaser.

1.3 Capacity without energy

1.3.1 Flexible Rate

For sales not covered by section 1.3.2 the rate(s) for Capacity without energy sales shall be as mutually agreed by BPA and the Purchaser.

1.3.2 Posted Rate

The posted rates shall be applied to contracts entered into on or before September 30, 1996, that include Capacity without energy provisions where payment shall be at the demand charge associated with the Contract Rate of the then applicable surplus power rate schedule. These rates may also be applied to contracts for Capacity without energy entered into on or after June 1, 2000. For sales pursuant to such contracts the monthly charge for Capacity without energy shall be the applicable rate for that month, *multiplied by* the Purchaser's Contract Demand associated with the purchase of Capacity without energy.

Applicable Months	***Rate***
September – December	$12.20/kW-mo.
January – March	$8.95/kW-mo.
April	$8.13/kW-mo.
May – June	$6.68/kW-mo.
July	$10.78/kW-mo.
August	$16.04/kW-mo.

2. ADJUSTMENTS, CHARGES, AND SPECIAL RATE PROVISIONS

Adjustments, Charges, and Special Rate Provisions are described in the GRSPs. Relevant sections are identified below.

2.1 Rate Adjustments

Rate Adjustment	***Section***
Energy Return Surcharge	II.H.
Reactive Power Charge	II.O.
Unauthorized Increase Charge	II.R.

2.2 Special Rate Provisions

Special Rate Provisions	***Section***
Cost Contributions	II.D.

B. SUPPLEMENTAL CONTROL AREA SERVICES

1. RATES AND BILLING FACTORS

The charge for Supplemental Control Area Services shall be the applicable rate(s) times the applicable billing factor(s), pursuant to the agreement between BPA and the Purchaser.

The rate(s) and billing factor(s) for Supplemental Control Area Services shall be as established by BPA or as mutually agreed by BPA and the Purchaser.

2. ADJUSTMENTS, CHARGES, AND SPECIAL RATE PROVISIONS

Adjustments, Charges, and Special Rate Provisions are described in the GRSPs. Relevant sections are identified below.

2.1 Rate Adjustments

Rate Adjustment	***Section***
Energy Return Surcharge	II.H.
Reactive Power Charge	II.O.
Unauthorized Increase Charge	II.R.

2.2 Special Rate Provisions

Special Rate Provisions	***Section***
Cost Contributions	II.D.

C. SHAPING SERVICES

1. RATES AND BILLING FACTORS

The charge for Shaping Services shall be the applicable rate(s) times the applicable billing factor(s), pursuant to the agreement between BPA and the Purchaser.

The rate(s) and billing factor(s) for use of Shaping Services shall be as established by BPA or as mutually agreed by BPA and the Purchaser.

2. ADJUSTMENTS, CHARGES, AND SPECIAL RATE PROVISIONS

Adjustments, Charges, and Special Rate Provisions are described in the GRSPs. Relevant sections are identified below.

2.1 Rate Adjustments

Rate Adjustment	***Section***
Energy Return Surcharge	II.H.
Reactive Power Charge	II.O.
Unauthorized Increase Charge	II.R.

2.2 Special Rate Provisions

Special Rate Provisions	***Section***
Cost Contributions	II.D.

D. RESERVATION AND RIGHTS TO CHANGE SERVICES

1. Rates and Billing Factors

The charge for Reservation and Rights to Change Services shall be the applicable rate(s) times the applicable billing factor(s), pursuant to the agreement between BPA and the Purchaser.

The rate(s) and billing factor(s) for Reservation and Rights to Change Services shall be as established by BPA or mutually agreed by BPA and the Purchaser.

2. ADJUSTMENTS, CHARGES, AND SPECIAL RATE PROVISIONS

There are no additional adjustments, charges, or special rate provisions for the Reservation and Rights to Change Services.