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

2007 Supplemental Wholesale Power Rate Case	**BPA Docket No. WP-07**

BRIEF ON EXCEPTIONS OF IDAHO POWER COMPANY

I. INTRODUCTION

Idaho Power Company ("Idaho Power") submits its Brief on Exceptions.[1] By submitting testimony, briefing, and argument, or otherwise participating in this proceeding, Idaho Power does not waive or prejudice any arguments, rights, claims, or remedies it has or may have under or arising out of any settlements pertaining to the Residential Exchange Program (or under or arising out of any other agreement), or benefits thereunder, for any period of time. Idaho Power expressly reserves and does not waive any and all such arguments, rights, claims, and remedies, whether any such argument, right, claim, or remedy arises under law, equity, or otherwise, and specifically reserves its rights to challenge any determination by the Bonneville Power Administration ("BPA") in connection with this proceeding, including but not limited to the scope of this proceeding.

[1] In addition to filing this Brief on Exceptions, Idaho Power is also joining a Brief on Exceptions filed by Pacific Northwest Investor Owned Utilities (WP-07-R-JP6-1).

II. ARGUMENT

A. It is unnecessary and prejudicial to Idaho Power for BPA to assume in this case that companies owe deemer balances.

BPA concedes that deemer issues are contract issues to be resolved by the contracting parties as part of the implementation of the REP. WP-07-A-03 at page 176. Additionally, BPA concedes that deemer issues were not before the Ninth Circuit, and were not remanded by the Court to BPA to resolve. WP-07-A-03 at page 178. Finally, BPA notes that deemer balances have a *di minimus* effect on the over-all BPA revenue requirement (representing only an under-recovery of 0.6 percent if the deemer balances were collected and subsequently refunded to the parties). WP-07-A-03 at page 181. Given these determinations, any references to deemer balances in the final ROD is unnecessary as a practical matter.

Moreover, the relevance of BPA's analysis of deemer issues is more than outweighed by the prejudice to Idaho Power resulting from the discussion of the deemer issue appearing in the Draft ROD. The Administrator, or his designee, will ultimately have to review all the evidence and relevant law to determine the government's position with respect to resolving deemer balances in another forum. It is unfair and a denial of Idaho Power's due process rights for BPA to predict for ratemaking purposes the outcome of a contract dispute, which is yet to be fully and fairly considered by the Administrator, and then use that prediction to design rates to the disadvantage of Idaho Power and its eligible customers.

Illustrative of the prejudicial analysis contained in the Draft ROD is BPA's assertion that it is not bound by a Department of Energy regulation establishing a ten-year limitation upon exercising a right of administrative offset. Why would BPA choose to ignore the policy

represented by 10 C.F.R. § 1015.203(a)(4), and claim a largely unrestricted common law right to offset deemer balances, when the Draft ROD, in effect, admits that BPA cannot articulate its reasoning for key components of the deemer calculation because of the passage of time? *See* WP-07-A-03 at page 184. Pursuant to 10 C.F.R. § 1015.203(a)(4), BPA has sound reasons for finding that deemer balances have been discharged by the passage of time. Yet, the Draft ROD takes these balances into account in a manner that will, in conjunction with its treatment of lookback balances, insure that Idaho Power's residential and small farm customers will not receive REP benefits for many decades, if ever. BPA should find for purposes of this rate case that the methods for determining deemer balances cannot be adequately authenticated or explained, and claims for deemer balances are barred by the passage of time. Alternatively, the Administrator need not and should not make any assumptions at all about deemer balances in this case.

B. The Draft ROD arbitrarily and in violation of law selects different interest rates to apply to similarly situated utilities, even assuming *arguendo* that the deemer clause has legal vitality.

The Draft ROD claims that interest assumptions used to calculated deemer balances are derived directly from agreements executed by representatives of the deeming utilities. WP-07-A-03 at page 184. It claims that these agreements were "voluntarily." *Id.* However, the Draft ROD is unable to articulate any legal justification or commercial reason why BPA required different interest rates for similar obligations of similarly situated utilities in the first instance. Unable to articulate any commercial reason that BPA had for requiring different

interest rates nearly twenty years ago, the Draft ROD peremptorily dismisses the issue for purposes of this case:

> Making such a request [for an explanation as to why different interest rates apply to similarly situated companies] *may* have been reasonable in 1988 when the memories of the representatives who negotiated the agreements were fresh, and any documentation still available. Making such a request *twenty-years* later, however after memories have faded and documents lost or destroyed, is patently absurd."

WP-07-A-03 at page 184.

Regardless of what may or may not have happened nearly twenty years ago, BPA should not assume the continuation of an apparent illegality for purposes of designing rates in this case. Nothing in the record indicates that the affected utilities even knew when they executed their suspension agreements nearly twenty years ago that BPA was requiring different interest rates of different companies, and it is therefore questionable whether the companies would have known of the discrimination in time to protest it. Additionally, although the Draft ROD characterizes the arrangements entered into nearly twenty years ago as "voluntary", nothing in the record supports an inference that documents signed over nearly twenty years ago memorialize truly voluntary and mutual bargains. It is more reasonable to infer that BPA, as a contracting party with all the exchanging utilities (and therefore privy to information about the negotiations with individual utilities that other utilities would not have shared), and as the rule-maker of the Average System Cost methodology, had superior bargaining power that could induce affected utilities to agree to language requested by BPA. Supporting this inference is the fact that a BPA attorney authored the interest rate language that appeared in a document signed by an Idaho Power representative requesting termination of the exchange agreement. *See* WP-07-E-ID-2-A10.

In any event, it is not "absurd" to require BPA to articulate a legally sustainable commercial reason for continuing to insist on the application of discriminatory interest rates in calculating deemer balances that will be used as a basis for designing rates in this case. Nothing in the Northwest Power Act or its legislative history supports any inference that Congress intended the REP program to generate substantial net revenues from utilities to BPA. BPA simply does not have, and is unable to articulate, a statutory duty or legitimate commercial reason to maximize interest rates on deemer balances in order to diminish future REP benefits to future residential and small farm customers of selected utilities.

Additionally, it is elementary that the Constitution does not permit arbitrary classifications by the federal government. *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992) ("The Equal Protection Clause . . . keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.") While commercial arrangements between BPA and utilities are the mechanism for distributing REP benefits, the intended beneficiaries of Section 5(c) of the Northwest Power Act are eligible customers to whom REP benefits must ultimately flow. Continued imposition of substantially different interest rates will have the effect of disabling hundreds of thousands of eligible residents in southern Idaho and eastern Oregon from being treated equally with customers of other investor owned utilities elsewhere in the Northwest. The record is devoid of any commercial reason why this form of discrimination was implemented in the first instance or why the assumption of discrimination should be continued in this rate case.

C. The imposition of interest rates in excess of those set forth in the Average System Cost for purposes of calculating deemer balances is arbitrary and illegal, even assuming *arguendo* that the deemer clause has legal vitality.

The 1981 RPSA established the deemer accounts and recited that interest rates applicable to such balances were set forth in the Average System Cost methodology:

> During any period that such election is in effect, Bonneville shall debit to a separate account the net exchange payment to Bonneville, if any, that would have been required of the Utility if the Utility had not made such election and shall credit to that account any exchange payments that would have been made. *The net balance in such account shall accumulate interest at the rate specified in section IV. E. of Exhibit C.*

WP-07-E-JP21-1-CC1 at page 7 (emphasis added). Section IV.E. of Exhibit C (the Average System Cost Methodology), states in pertinent part:

> If Bonneville determines that the ASC computed by the Utility in Appendix 1 was excessive or inadequate, the injured party shall recover the excess or deficiency with interest which shall be computed from time to time on the outstanding balance at *the rate or rates of interest charged to Bonneville by the U. S. Treasury* during the period unless another form of refund is ordered by the Joint State Board, the FERC, or a reviewing court. If a final order of the Joint State Board, the FERC or a reviewing court revises Bonneville's ASC determination, the difference between this revised ASC and the ASC determined by Bonneville, together with the interest at the above rate, shall be paid to the party entitled thereto by the other party, unless another interest rate is so ordered.

WP-07-E-JP21-1-CC1, Exhibit C, at page 5 of 7 (emphasis added). Therefore, the rate of interest charged to Bonneville by the U.S. Treasury applied to deemer balances, unless another interest rate was ordered by the Joint State Board, the FERC, or a reviewing court. One must surmise from the complete silence of the Draft ROD on this issue that BPA failed to obtain any order of the Joint State Board, the FERC, or a reviewing court authorizing or ratifying BPA's decision to require higher and more onerous interest rates than the Treasury Rate, or to impose different interest rates on similarly situated utilities.

BPA might argue that the applicable RPSA interest rate was a purely contractual matter, and the Average System Cost was amended in 1984 (without apparently adopting new interest rate provisions). However, even if that is true, an interest rate established or approved by the Joint State Board, FERC, or a reviewing court presumably represents a clearly established and non-discriminatory standard for determining the interest rate applicable to deemer balances. BPA's departure from this standard (or some other legally based standard) for purposes of this case is arbitrary and illegal.

D. Because the Draft ROD ignores potential REP benefits that would have accrued in 2002 and diminished Idaho Power deemer balances, it further prejudices Idaho Power and its customers even assuming *arguendo* that the deemer clause has legal vitality.

The Draft ROD assumes for purposes of its lookback analysis that Idaho Power did not participate in the REP due to its large deemer balance. Draft ROD at page 175. However, it is not disputed that during 2002 Idaho Power's average system cost would have exceeded BPA's priority firm exchange rate. *See e.g.* Workshop_082708_REP Excel spreadsheet (Tab "2002-06 REP"), provided to the parties by BPA via e-mail on August 28, 2008. Any benefits that would have been generated by Idaho Power's participation in an exchange arrangement during 2002 are simply ignored by the Draft ROD. Therefore, the Draft ROD's selective choice of assumptions on this issue not only preserves, but, in effect, increases the assumed financial burden on Idaho Power and its customers to be discharged, before they can receive benefits under an REP program. This combination of assumptions and analysis is arbitrary and discriminatory as applied to Idaho Power. It is reasonable to assume that any

positive benefits that would have accrued in 2002 would have been applied to reduce Idaho Power deemer balances, and the ROD should not assume otherwise.

III. CONCLUSION

Idaho Power Company urges the Administrator to adopt the arguments contained in this Brief on Exceptions and to incorporate them into BPA's Final Record of Decision in this WP-07 supplemental rate case.

Respectfully submitted this 3rd day of September, 2008.

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