

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

**2007 SUPPLEMENTAL WHOLESALE)
POWER RATE ADJUSTMENT PROCEEDING) BPA DOCKET WP-07 SUPP
_____)**

**BRIEF ON EXCEPTIONS
OF THE
IDAHO PUBLIC UTILITIES COMMISSION**

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RETROACTIVE RATEMAKING ISSUES

1. BPA is not Exempt from the Rule Against Retroactive Ratemaking. BPA has boldly proclaimed in the Draft ROD that, as a Power Marketing Administration (“PMA”), it is absolutely exempt from the well-settled restrictions of the filed-rate doctrine and the rule against retroactive ratemaking. DROD¹ at 17, 21-29, and 34-38. In support of this claim, BPA cites several cases, including *Central Electric Power Cooperative, Inc. v. Southeastern Power Administration (SEPA)*, 338 F.3d 333 (4th Cir. 2003), where courts have allowed federal PMAs to “recover revenue shortages incurred during prior rate periods.” *Id.* at 335. However, BPA has conveniently failed to mention that the exemptions contained in these court decisions² have all been premised upon the presence of unanticipated additional costs leading to revenue shortages.

In *Central Electric*, the Fourth Circuit Court ruled that SEPA did not act in an arbitrary and capricious manner when it asked its preference customers to either amend their

¹ The Draft Record of Decision is designated as WP-07-A-03. For citation purposes, the Draft ROD is cited in this Brief as “DROD.”

² See also *Southeastern Power Admin.*, 49 F.E.R.C. ¶ 62,109 (1989); *Southeastern Power Admin.*, 55 F.E.R.C. ¶ 61,016 (1981); *Southwestern Power Admin.*, 18 F.E.R.C. ¶ 61,052 (1982); *Southeastern Power Admin.*, 23 F.E.R.C. ¶ 61,403 (1983).

“fixed-rates” contracts with SEPA or pay a “surcharge” in the next rate period in order to recover “unexpected revenue shortfalls.” *Id.* at 337-38. SEPA was able to secure the assent of 168 out of 174 of its preference customers to modify their contracts with the federal agency and immediately pay an increased “short-term” rate to recover their portion of the revenue shortfall. *Id.* at 336. SEPA then added a surcharge in the next rate filing to those preference customers who previously declined to modify their contracts to recover the portion of the revenue shortage attributable to them. *Id.* The non-agreeing preference customers protested and asserted, *inter alia*, that the surcharge was discriminatory and constituted retroactive ratemaking. *Id.*

Ultimately, SEPA was permitted to deviate from the rate schedule designated in its power supply contracts because a “severe drought” created river conditions that “forced SEPA to make separate power purchases in order to honor its power supply contracts.” *Central Electric*, 338 F.3d at 335.³ “These extra power purchases in turn caused SEPA to incur costs exceeding those contemplated by [SEPA’s 1985-1990] rate schedule.” *Id.*

In contrast, BPA is not seeking, in this Section 7(i) rate proceeding, to impose a “surcharge” in order to recover certain unanticipated costs but rather it has proposed a full-scale recalculation of the REP benefits already awarded to IOUs during the 2002-2006 rate period as part of its WP-07 supplemental proposal. DROD at 15. The Lookback approach, developed in

³ Similarly, in *Southeastern Power Admin.*, 55 F.E.R.C. ¶¶ 61016, 61045 (1991), SEPA was permitted to modify its rates retroactively in order to “meet its cost of providing service” and rectify its “revenue shortfall” which occurred as the result of a prolonged drought that affected its ability to deliver hydroelectric power to its customers. *Id.* at 61,0xx. SEPA approached its customers with a proposal to raise its rates prospectively, even though “Southeastern’s contracts with its customers limited its ability to adjust rates until the end of the then-existing five year rate approval period.” *Id.* at 61,0xx (emphasis added). The factual record shows that 167 out of 173 of SEPA’s customers consented and allowed SEPA to breach this provision of the contract. *Id.* at 61,0xx. SEPA then proceeded to increase its rates yearly to recover its costs of providing service. *Id.*

response to the Ninth Circuit's *PGE* and *Golden Northwest* decisions,⁴ is unrelated to its duty under the Flood Control Act of "recovering revenue shortages." *Central Electric*, 338 F.3d at 337. Instead of recovering revenue shortfalls, BPA's actions are concerned solely with extracting past REP benefit amounts already awarded to its IOU customers and reapportioning them amongst its preference customers. *Id.*

In addition, BPA's Lookback approach does not coincide with any demonstrated need by BPA "to ensure recovery of both costs of producing power and [recovering] the Federal investment." *Southeastern Power Admin.*, 55 F.E.R.C. ¶¶ 61016, 61045 (1991). BPA does not labor, as SEPA did, under a revenue shortage or revenue shortfall.⁵ BPA has not suddenly been presented with unanticipated or additional costs associated with the 2000 REP Settlement Agreements for which BPA must recover or risk not being able to make its Treasury Payment on time. In fact, *assuming arguendo* that BPA's interpretation of the Ninth Circuit's remand instructions in *PGE* and *Golden Northwest* is an accurate one, those decisions merely invalidate BPA's determination of which customer group should bear those costs. *See* DROD at 15 *citing PGE*, 501 F.3d at 1009.

BPA cannot be heard to argue that its actions fall under the mandate found in Section 5 of the Flood Control Act of 1944 "to protect the public fisc" while it currently possesses \$1.5 billion in its reserve account going into FY 2009, \$1.031 billion of which represents reserves available for risk. DROD at 24, 264-65 *quoting U.S. v. City of Fulton*, 475 U.S. 657, 668 (1986); *see also* 16 U.S.C. § 825s. This reserve amount, available for risk, is set aside in order to ensure

⁴ *Portland Gen. Elec. Co. v. BPA* ("PGE"), 501 F.3d 1009 (9th Cir. 2007), *cert. denied* ___ U.S. ___ (2008); *Golden Northwest Aluminum Inc. v. BPA* ("Golden Northwest"), 501 F.3d 1037 (9th Cir. 2007), *cert. denied sub nom.* PGE ___ U.S. ___ (2008).

⁵ The terms "revenue shortage" and "revenue shortfall" appear in the Draft ROD on pages 24-25, 45, and only in the context of the cases cited by BPA.

that BPA meets its one-year Treasury Payment Probability (TPP) Standard goal of 97.5%. Thus, it is clear BPA's actions in this case could not be more factually inapposite to the scenario presented in the aforementioned SEPA cases.

In summary, the Flood Control Act does not represent an absolute shield against the application of the rule against retroactive ratemaking. PMAs can avail themselves of this protection only in cases where they propose to implement rates that are the "lowest possible consistent with sound business principles and will generate sufficient revenues to pay the cost of producing the power and repay the Federal investment with interest in a timely manner." 55 F.E.R.C. at ¶ 61,xxx. BPA's predicament (i.e., the proper allocation of the 2000 REP Settlement Agreement costs) is of its own making and does not require that it collect additional revenues in order to meet those costs. Thus, BPA does not merit the protection of the Flood Control Act for its otherwise impermissible retroactive remedy.

2. BPA's Lookback Approach is Retroactive in Nature Because it Seeks to Extract REP Benefit Amounts Already Awarded to its IOU Customers. BPA's argument in the Draft ROD that the "Lookback Proposal does not have retroactive effect, in the legal sense, because it does not 'render unlawful . . . an act lawful at the time it was done'" is disingenuous. DROD at 28 quoting *Ralis v. RFE/FL Inc.*, 770 F.2d 1121, 1127 (D.C. Cir. 1985). BPA readily admits in its Draft ROD that its interpretation of the *PGE* and *Golden Northwest* decisions compels it to institute "some sort of retrospective relief." DROD at 22 (emphasis added). It is difficult to fathom how BPA can admit on one hand that it has fashioned a retrospective remedy and argue on the other that said remedy "does not have a retroactive effect." *Id.* at 28.

Equally vexing is BPA's argument that the 2000 REP Settlement Agreements with the IOUs are "void *ab initio*" and thus, "in legal terms, no past transaction or consideration to

which a new duty or disability could attach.” *Id.* at 28. Neither the *PGE* nor the *Golden Northwest* decision contained any language suggesting that the Ninth Circuit had voided the 2000 Settlement Agreements. The Court certainly had the opportunity to do so. Instead, the Ninth Circuit chose to simply grant the petitions, rule that the “settlement agreements entered into between BPA and the IOUs are inconsistent with the NWPA,” and remand the case with an instruction that BPA “set rates in accordance with this opinion.” *Golden Northwest*, 501 F.3d at 1053; *PGE*, 501 F.3d at 1037.

BPA’s actions (e.g. recalculating and reapportioning past REP benefits in response to the Ninth Circuit decisions) are retrospective/retroactive in nature. BPA can adhere to the rule against retroactive rulemaking and comply with the remand order. The two mandates are not mutually exclusive.

3. The IOUs did not have Adequate Notice that Their Benefits under the REP were Subject to Change. In order to justify its Lookback approach, BPA has been forced to argue that the WP-02 rates were not final because they were subject to a “timely challenge” after FERC’s approval. This argument flies in the face of both Commission rules of procedure and established precedent. The case cited by BPA, *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999), in support of this contention can easily be distinguished from the WP-02 rate proceeding by simply reviewing the extensive remand history of the case.

In *Exxon*, the parties were deemed “on adequate notice that some specific issue may cause a later adjustment to the rate collected” because the D.C. Circuit had remanded the case and “in response to the [Court’s] opinion, FERC initiated settlement proceedings regarding these remanded issues.” *Id.* at 36 quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992).

The Circuit Court reiterated that “the goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed.” *Id. quoting OXY, USA Inc. v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995). The Court ultimately vacated the Commission’s decision to implement the parties’ settlement on a prospective basis only and remanded the case for further proceedings. *Id.* at 34. The Court held that a retroactive application was warranted because the parties lacked any “reasonable and detrimental reliance” and FERC failed to offer an “adequate explanation” as to why it declined to make the effective date of its valuation method and rate adjustments retroactive. *Id.* at 50.

Contrary to the parties in the cases cited in BPA’s Draft ROD, the IOUs and their small farm and residential customers, and the state utility commissions received no such warning and thus lacked “adequate notice” that the WP-02 rates were subject to change. The approval of the WP-02 rates by the Commission allowed these parties to reasonably rely that they would be effective and, in fact, the rates remained effective throughout their term and eventually expired in 2006. Additionally, the parties were not involved in an ongoing settlement of any issues pertaining to the WP-02 rates, much less a remand order and subsequent proceeding.

BPA’s reliance upon *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992) is also misplaced because the case is clearly distinguishable upon its facts. In *Clearinghouse*, FERC allowed retroactive surcharges as an exception to the filed-rate doctrine. As the U.S. Supreme Court has acknowledged, the filed-rate doctrine “forbids a regulatory entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.” *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 2930 (1981). The Court in *Clearinghouse* noted that the case illustrated one of the exemptions to

the filed-rate doctrine in that the parties had noticed that FERC approved tariffs “subject to” a pending appeal before the Court. *Clearinghouse*, 965 F.2d at 1075. In the underlying administrative case, FERC approved tariff rates that were “*subject to the outcome of [the applicant’s rate] proceeding* and, accordingly, will require that the rates proposed here be subject to the outcome of those proceedings.” *Id.* at 1076 (emphasis original). The Circuit Court found that the “filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.” *Id.* In other words, the parties were clearly on notice that the rates could be subsequently adjusted depending on the outcome of the pending proceeding.

The facts of the current BPA proceeding are precisely inapposite. The rates in the WP-02 case became final when FERC granted “final approval of the WP-02 rates on July 21, 2003.” WP-07-E-BPA-53 at 6 (emphasis added). The WP-02 rates expired September 30, 2006 (about six months before the germane Ninth Circuit opinions in this case). The WP-02 rates were superseded by the WP-07 rates which received interim approval by FERC on September 21, 2006. 116 FERC Rec. ¶ 61,264 (2006). Parties to this case had no notice that the rates were not “final” because no party sought a stay of the WP-02 rates. 5 U.S.C. § 705 (a court may “preserve status or rights pending conclusion of the [judicial] review proceedings”); *see also* F.R.A.P. 18 (stay pending appellate review).

In addition, the terms of the REP Settlement Agreements further support that the parties – BPA and the individual IOUs – did not anticipate the rates were subject to future change or repayment. Indeed, the REP Settlement Agreements provided:

In the event the United States Court of Appeals for the Ninth Circuit finally determines, after all appeals and requests for reconsideration, that the Settlement Agreement (or payment of monetary benefits under the Settlement Agreement) is unlawful, void, or unenforceable, then: . . . (B) the Parties

hereby agree that the provisions of section 3(a) above shall be of no further force or effect. In the event of the court's final determination, the Parties intend and agree that: (1) the cash payments pursuant to section 4 of this Agreement and the Monetary Benefits provided under the Settlement Agreement provided prior to such final determination shall be retained by [the IOU]; and (2) the satisfaction of BPA's obligation to [the IOU] under section 5(c) of the Northwest Power Act prior to such final determination shall be preserved, to the maximum extent permitted by law.

REP Settlement Agreement § 3(b)(1 & 2) (emphasis added). Clearly, both BPA and the IOUs executing the REP Settlement Agreements did not contemplate that any legal challenge would necessitate a change in rates. In fact, their Agreements contemplated that the IOUs “shall retain” previous cash payments. There is no mention of a future offset, correction, or repayment.

4. The WP-02 Rates were “Final Rates” Because They were Declared Final by FERC. BPA strains credulity when it argues that the expired WP-02 rates never qualified as “final rates” because they were “never affirmed by a Court.” DROD at 124. BPA purports to make a distinction between what it refers to as “final rates” and “final actions under Section 9(e) of the Northwest Power Act.” *Id.* at 26-27.⁶ However, BPA cites no legal authority establishing this novel and legalistic distinction. Its argument that BPA rates that receive Commission approval are not final unless and until they are affirmed by a court of law is disingenuous and would lead to an illogical result.⁷

Despite the paucity of law to support BPA's claim of a distinction, a wealth of precedent and statutory guidance, *see* 16 U.S.C. § 839f(e)(4)(D), exists defining when BPA rates become final. Congress has granted FERC final confirmation and approval authority over BPA rates submitted for approval under section 7(a) of the Northwest Power Act. *See* 16 U.S.C. §

⁶ Implicit in this ultra-fine distinction is the tacit acknowledgement by BPA that the submission of its WP-02 rates qualified as a “final action.”

⁷ For example, if BPA's rate submissions to FERC under Section 7(a) of the NWPA are never challenged or appealed to the Ninth Circuit does that mean that these rates are never final?

839e(i); 16 U.S.C. § 839f(e)(4)(D)(“rate determinations pursuant to section 7 shall be deemed final upon confirmation and approval by [FERC].”)(emphasis added); *see also* 18 C.F.R. § 300.21.

In *Fulton*, the Supreme Court found that a PMA’s interim rates were final after the assistant secretary submitted the “proposed rates to FERC for final confirmation and approval.” *Fulton*, 475 U.S. at 663. “A ‘final action’ under the Regional Act exists when a decision made by the BPA is not subject to any further review by the BPA or the Federal Energy Regulatory Commission (FERC).” *City of Seattle v. Johnson*, 813 F.2d 1364, 1367 (9th Cir. 1987).

ISSUES ASSOCIATED WITH THE DEEMER MECHANISM

1. Idaho Power’s “Reconstructed REP Benefits.” On page 177 in the last paragraph, the Draft ROD states “BPA’s Lookback calculations indicate that Idaho Power has zero ‘reconstructed REP benefits’ over FY 2002-2008.” DROD at 177 (emphasis added); *see also* Draft Table 15.3, 1.14. However, the “Workshop_082708_REP” Excel spreadsheet (Tab “2002-06 REP”) provided to the parties by BPA via e-mail on August 28, 2008 shows that Idaho Power’s reconstructed ASC for FY 2002 is higher than the PF Exchange rate for the same year. Although the spreadsheet does not indicate a REP benefit for Idaho Power in 2002, performing the calculation using the data on BPA’s spreadsheet results in a reconstructed REP benefit for Idaho Power in FY 2002 of about \$9.574 million, as shown below.

Idaho Power ACS	\$44.65
PF Exchange Rate	<u>43.18</u>
	1.47
Residential Load	<u>6,512,942</u>
REP Benefit =	\$9.574 million

Consequently, it is incorrect to assert that the Lookback “calculations indicate that Idaho Power has zero ‘reconstructed REP benefits’ for FY 2002-2008.” DROD at 177.

BPA may assume that Idaho Power would not participate in the REP and sign the 2000 RPSA “due to its large deemer balance and relatively low ASC.” DROD at 175. However, none of the six IOUs signed a RPSA in 2000 because they all (including Idaho Power) executed REP Settlement Agreements. In this instance, it is reasonable and fair to credit Idaho Power’s deemer balance in draft Table 15.3 (Column D) with the projected \$9.574 million REP payment for FY 2002. This is consistent with BPA’s policy guidance to staff and the Draft ROD that states “reconstructed REP benefits are first applied to reduce a utility’s deemer balance each year until the deemer balance is exhausted.” DROD at 174; WP-07-E-BPA-52 at 14. In addition, the calculated “Settlement Payments [Idaho Power] would receive” in draft Table 15.3, line 3, columns J and K, should also be applied to any deemer balance of Idaho Power. Alternatively, BPA should credit Idaho Power’s 2002 REP benefits and the 2007-2008 settlement payments to Idaho Power’s Lookback amount. Draft Table 15.3, 1.19, col. L.

2. Draft Decision Issue No 1, § 8.11. On page 179 of the Draft ROD, the “Draft Decision” on Issue No. 1 states “BPA will reflect the Deemer Balances as of October 1, 2001 and the provisions of the 2000 RPSAs in the calculation of the IOUs’ Lookback amounts and FY 2009 rates.” DROD at 179 (emphasis added). The reference to the “2000 RPSAs” should be removed from this Draft Decision because it is irrelevant. None of the IOUs executed a 2000 RPSA – they all entered into REP Settlement Agreements.

On page 177 of the Draft ROD, BPA also observed that no party opposed the deemer mechanism on grounds that it was not authorized by the Northwest Power Act. However, Avista noted in its 2000 RPSA comments that “there is no mention of a deemer account in the

Northwest Power Act.” 2000 RPSA ROD at 52. The “provisions of the 2000 RPSAs” have no bearing on the calculation of any deemer balance and the phrase should be removed from the Draft Decision on page 179.

3. Final Determination of Disputed Deemer Issues. The Draft ROD states on page 179 that BPA’s “decisions in this proceeding do not constitute final determination of disputed deemer issues. . . .” DROD at 179. BPA makes similar assertions in other parts of Section 8.11 (Issues Associated with Deemer Balances). *Id.* at 176, 178. Despite BPA’s assertions that it is not making “final” determinations, it nevertheless is making determinations which affect the calculation of the deemer balances and Lookback amounts. More specifically, in draft Table 15.3, lines 5 and 25, BPA has applied REP benefits to deemer accounts. Line 65 of draft Table 15.3 indicates that BPA applied \$76.51 million of the reconstructed REP benefits between FY 2002 and 2007 to Avista’s and Northwestern’s Lookback amounts. In addition, BPA applied \$34.02 million for FY 2008, for a total of \$110.53 million for “REP benefits applied to Deemer Account.” Draft Table 15.3, l.65, col. K&L. The application of calculated REP benefits to the deemer accounts has the effect of **reducing** BPA’s cash outlay for REP benefits in the region by \$121.96 million, or 10% of total REP benefits. In light of the continuing dispute over the legality and calculation of the deemer amounts discussed above, the proposed application of such a significant amount, \$121.96 million, to the deemers in this rate case raises serious concerns.

Although BPA insists that it is only making “assumptions” about the deemers, its calculation concerning the deemer offset has monetary consequences to Avista and Northwestern, as well as for Idaho Power in FY 2002 discussed above. These actions constitute final decisions. The mere possibility that BPA might discuss the merits of the deemer issues in future “negotiations, other processes or litigation” does not transform BPA’s final ratemaking

decisions in this proceeding to non-final decisions. *M-S-R Public Power Agency v. BPA*, 297 F.3d 833, 840 (9th Cir. 2002). Although the Idaho PUC stands ready to engage in serious negotiations regarding deemer issues, these issues have remained unresolved for more than two decades. The public interest requires that the deemer issues finally be resolved.

4. Calculation of the Deemer Balances. In the Draft ROD, BPA asserts that it used the deemer balances cited in the respective Suspension Agreements to calculate its assumptions about the current deemer balances for Idaho Power and Avista for inclusion in their Lookback amounts. DROD at 182-83. More specifically, the Draft ROD states that “Avista and Idaho Power agreed to the existing deemer balances. . . . In view of these undisputed facts, BPA does not believe it is arbitrary to base its deemer balances assumptions on terms and conditions that were voluntarily agreed to. . . .” *Id.* at 184 (emphasis added). However, when that section of the Suspension Agreement is read in its entirety, what is undisputed is that the parties agreed to disagree on the deemer balances. While the Idaho PUC recognizes that the two Suspension Agreements contain specific deemer amounts, BPA has overstated the validity of the calculations and failed to acknowledge that neither party – both BPA and Avista/Idaho Power – consented to the manner in which the amounts were calculated. The very same section of the Agreements quoted in the Draft ROD at page 183 goes on to state:

Notwithstanding the parties’ agreement to the aforementioned deemer account balances, which is a compromise, neither party, by entering into this Suspension Agreement, shall be deemed to have in any way approved, accepted, or consented to the facts, principal methods, or theories employed by either party in arriving at the stated balances for each jurisdiction of the deemer account as of July 31, 1988.

Suspension Agreement at ¶ 4, E-ID-2-AT6 and AT7 (emphasis added). Thus, the expressed provisions of the Suspension Agreements undercut BPA’s unconditioned reliance on the

specified deemer amounts. Moreover, BPA witnesses were unable at the hearing to substantiate the calculation or derivation of the cited deemer balances. TE, Vol. I, p. 137, ll.1-7.

5. Compound Interest for Avista after 1993. On page 185 of the Draft ROD, BPA argues that the record “strongly supports applying *compound interest* to both the deemer balances of Avista and Idaho Power” after they terminated their RPSAs in 1993. DROD at 185 (emphasis original). Despite having acknowledged in the preceding pages of the Draft ROD that BPA has a right to adopt different interest mechanisms in the two Suspension Agreements (i.e., compound interest for Idaho Power and simple interest for Avista), BPA subsequently states that it “could reasonably assume that compound interest was intended to apply to *both* Avista and Idaho Power’s deemer balances from 1993 to the present.” *Id.* (emphasis original). In other words, BPA suggests that it is reasonable to assume that compound interest was intended to apply to Avista after 1993. The lack of substantial evidence in the record does not support this assumption for three reasons.

First, it is illogical to assume that Avista would agree to increase its simple interest set out in its 1987 Suspension Agreement to compound interest in its 1993 Termination Notice. IPUC witness Westerfield discusses the significant monetary difference between using simple versus compound interest to calculate the deemer balances. WP-07-E-ID-2-at 8-9. Why would Avista voluntarily agree to a dramatic increase in its deemer balance by using compound interest when it and BPA agreed to employ simple interest for the prior six years? BPA has pointed to no substantial and competent evidence in the record which would support such an inference. The record in this case does not support BPA’s assumption that compound interest should apply to Avista’s deemer balance after 1993.

Second, the chronological sequence of facts does not support BPA's assumption. On September 21, 1993, BPA's counsel suggested specific "compound interest" language to the counsels for Avista and Idaho Power for inclusion in their respective Termination Notices. WP-07-E-ID-2-AT10. Despite this suggested language, Avista's September 29, 1993 Termination Notice does not contain the suggested "compound interest" text or even reference Section 10 of the RPSA. WP-07-E-ID-2-AT8. In other words, despite being supplied with BPA's preferred language that included a compound interest provision, Avista's Termination Notice does not contain the requested language. Given the absence of any mention of compound interest in Avista's Termination Notice, BPA responded to Avista's Termination Notice on October 19 and 20, 1993. BPA's October 19 letter to Avista states that termination of Avista's RPSA without continuing compound interest "is unacceptable to BPA as not meeting the requirements of the Company's RPSA and Suspension Agreement." DROD at 185 *citing* WP-07-E-ID-2-AT11. BPA did not offer and the record does not indicate that Avista replied to these letters or consented to the inclusion of compound interest post-1993.

Finally, one day after it submitted its Termination Notice to BPA, Avista also filed a "Notice of Termination of Rate Schedule" with FERC. FERC's Notice of October 26, 1993 invited "[a]ny person desiring to be heard or to protest said filing should file a motion to intervene or protest with" FERC on or before November 10, 1993. WP-07-E-ID-2-AT13. Despite the apparent dispute between Avista and BPA on the issue of compound interest post-1993, BPA did not comment, protest or intervene in the FERC proceeding. WP-07-E-ID-2-AT14, at 1. BPA did not avail itself of the opportunity to address the issue in the FERC proceeding. In addition, BPA sought no rehearing after FERC approved termination of the Agreement. In other words, BPA simply sat on its hands and allowed the dispute to continue.

It is clear that this evidentiary record does not support BPA's assumption that Avista consented to compound interest when it terminated its RPSA in 1993. Quite the opposite, Avista rejected BPA's suggestion about the compound interest and BPA did not advise FERC of this dispute when it had an opportunity to do so. BPA should remove the two full paragraphs and the block quotation from page 185 of the Draft ROD.

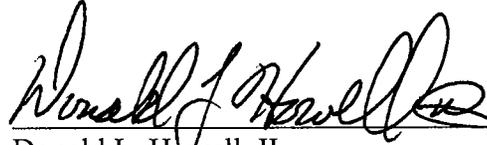
INTEREST ON THE LOOKBACK AMOUNTS

In Section 8.10 of the Draft ROD, BPA notes that it has no duty to pay interest on the Lookback amounts owed to the COUs. DROD at 167. Nevertheless, BPA believes that the facts of this case warrant the payment of interest at "an inflationary rate" for FY 2002 through 2008. Given BPA's Draft Decision to reduce the recovery period for the Lookback amounts from 20 years to 7 years, (DROD at 211), the Idaho PUC suggests that there be no interest applied to the Lookback amounts. Accelerating the recovery of the Lookback amounts negates the need for IOUs to pay inflationary interest. *See* Draft Table 15.3, n.3. Again as noted in the Draft ROD, BPA has no legal obligation to award interest at all. *Id.*

If BPA believes that inflationary interest payments are warranted for FY 2002-2008, the Idaho PUC suggests that this interest revenue be obtained from BPA's reserves. BPA has calculated the inflationary interest to be \$91.02 million for the period of FY 2002 to 2007. Draft Table 15.3, col. L, ll.68-69. We would recommend the same action for the post-2009 period. *See* DROD § 8.10.2, at 171-73.

Respectfully submitted this 3rd day of September 2008.

FOR THE IDAHO PUBLIC UTILITIES COMMISSION



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