Rules and Regulations

Federal Register
Vol. 60, No. 203
Friday, October 20, 1995

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DEPARTMENT OF ENERGY

Western Area Power Administration

10 CFR Part 905

Energy Planning and Management Program

AGENCY: Western Area Power Administration, DOE.

ACTION: Final rule.

SUMMARY: The Western Area Power Administration is publishing this final rule to adopt an Energy Planning and Management Program. The Program is being developed in part to implement section 114 of the Energy Policy Act of 1992. The Program requires the preparation of integrated resource plans by Western's customers and establishes a framework for extension of existing firm power resource commitments.

EFFECTIVE DATE: These regulations will become effective November 20, 1995.

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I. Background

On April 19, 1991, the Western Area Power Administration (Western) proposed an Energy Planning and Management Program (Program) (56 FR 16093). The goal of the Program was to require planning and efficient electric energy use by Western's long-term firm power customers and to extend Western's firm power resource commitments. On May 1, 1991, Western announced its intention to prepare an environmental impact statement (EIS) on the Program due to potentially significant environmental and economic issues that may be of interest to the public (56 FR 19995). Combined public information/environmental scoping meetings on the Program were held in seven States in June of 1991. Based on the feedback received from these meetings, Western developed alternatives to be analyzed in the EIS. Alternatives workshops were held in eight cities during March and April 1992. Based on further public input received during these workshops, as well as comments previously received, Western announced a tentative preferred alternative for the EIS in a Program newsletter in June of 1992.

On October 24, 1992, the President signed the Energy Policy Act of 1992 (EPAct), Public Law 102-486, into law. Section 114 of that legislation requires the preparation of integrated resource plans (IRP) by Western's customers and amends Title II of the Hoover Power Plant Act of 1984. Western has adjusted its Program to reflect fully the provisions of this law.

On March 31, 1994, a notice of public availability of the draft EIS was published in the Federal Register (59 FR 15198). The Environmental Protection Agency also published a notice of availability of the draft EIS on April 1, 1994, officially starting a 45-day public comment period. Eight hearings were held throughout Western's service territory, with more than 130 members of the public in attendance. About 200 written comments were received on the draft EIS.

The Program goal is to promote the efficient use of electric energy by Western's customers and to extend Western's long-term firm power resource commitments in support of customer IRPs. A major purpose of this action is to assure the customers which purchase Federal power greater stability in planning for future resources than would exist in the absence of the Program. The Program has two major components: (1) An integrated resource planning provision conforming to the requirements of EPAct and (2) a Power Marketing Initiative (PMI). The IRP provision, formerly known as the Energy Management Program, would require most long-term firm power customers to (1) develop and implement an IRP, (2) submit an updated IRP every 5 years, and (3) submit an annual progress report. A different requirement for small customers with an annual load or usage of 25 GWh or less is established, as allowed in the EPAct. This IRP provision and small customer provision will amend Western's Final Amended Guidelines and Acceptance Criteria (G&AC) for Customer Conservation and Renewable Energy (C&RE) Programs of August 21, 1985 (50 FR 33892). Western will continue to provide a wide range of technical assistance to customers. As provided by EPAct, 42 U.S.C. (7276b(e)), a penalty provision for noncompliance with the IRP provision will consist of a 10-percent surcharge for the first 12 months of noncompliance, 20 percent for the next 12 months of noncompliance, and 30 percent thereafter for as long as noncompliance persists. In lieu of a surcharge after the first 12 months of noncompliance, Western may impose a 10-percent resource reduction penalty if

such an approach is more effective in assuring compliance or is more cost-effective for Western. The penalties in this Program will be incorporated into the contracts that extend resources and will be effective upon contract execution. Penalties in existing contracts will continue to be in effect until changed.

The PMI establishes a framework for extending a major portion of the power currently under contract with existing customers. Western will extend its existing long-term firm resource commitments, subject to the outcome of project-specific environmental analysis as appropriate. Initially, the Pick-Sloan Missouri Basin Program-Eastern Division and the Loveland Area Projects are covered by the PMI. The term of the extension would be 20 years from the date that existing contracts expire. The level of the commitment to existing customers would be a project-specific percentage of the marketable resource determined to be available when future resource extensions begin, as described in section 905.33 of the regulations, with two withdrawals at 5-year intervals after the new contracts become effective. Unextended resources would be available for allocation to new customers and other purposes as determined by Western. In addition, marketable resources placed under contract could be adjusted on 5 years' notice, and then only in response to changes in hydrology and river operations.

II. Discussion of Comments

On August 9, 1994, a notice of the proposed Program and request for public comments was published in the Federal Register (59 FR 40543). Seven combined public information/comment forums were held throughout Western's service territory in September 1994. The original comment period of 60 days was extended in response to a public request. 59 FR 53976 (October 27, 1994). The comment period closed 90 days after publication of the notice of the proposed Program.

Western has received numerous comments as a result of publication of the proposed Program in the Federal Register on August 9, 1994. The following section responds to those comments. Each issue is presented in a format featuring background, public comments and discussion. Responses to all comments on Native American issues are in section C.8. Comments pertaining to the environmental impact statement are addressed in Appendix G of the final EIS.

A. Energy Planning and Management Program—Overview

1. General

a. Background

Western initially proposed the Program in April of 1991, and has devoted over 4 years to public process and Program development. The publication of the proposed program on August 9, 1994, included comprehensive responses to public comments received as of that date. This response to comments section includes only those comments received since that date.

b. Comments and Discussion

Comments were received in favor of finishing the public process quickly. Public comment was received in support of the spirit of compromise that is reflected in the Power Marketing Initiative. Western was asked to keep the hydroelectric resource reliable and cost-based. Others commended Western for the time and attention it has devoted to produce an improved Program proposal. The proposed rule was viewed as a substantial improvement over the alternatives presented in the draft EIS. This Federal Register notice represents the final step in the development of the Program. The Power Marketing Initiative and the Integrated Resource Planning Provision will become effective 30 days after publication of this rule in the Federal Register. Western is appreciative of the widespread participation in the public process by customers, Indian tribes, environmental groups and other interested parties. This extensive participation has resulted in an improved Program that is responsive to the comments of the public.

Western was asked to publish the final Program as a rule within the Code of Federal Regulations. Western agrees with this comment. The Program regulations will appear in Title 10, which deals with energy-related subjects. Explanatory text and the detailed description of the future application of the PMI have been moved to the preamble.

Another comment suggested that Western adopt the section of the Federal Register publication entitled "Response to Comments on the Energy Planning and Management Program," specifically found at 59 FR 40552–40562, as interpretative guidelines to accompany the IRP rules. Western concurs that the responses to comments contained in the August 9, 1994, Federal Register notice are useful in providing insight and guidance to assist the public in understanding Western's rationale for the proposed Program. The responses to comments in this notice of final rulemaking play a similar role. Although Western's responses to comments will not be published in the Code of Federal Regulations, they serve the purpose of interpretative guidelines and are available to clarify the intent of Western in promulgating the final Program.

Western received a request for an additional 120 day extension of the comment period. Western initially provided for a 60 day comment period, and later extended the comment period by 30 days in response to a public request. The total comment period of 90 days presented ample opportunity for the public to understand and comment on the proposed Program.

B. Integrated Resource Planning

1. Specificity of Regulations

a. Background

Section 114 of the EPAct provides the framework for the IRP requirement. It sets forth IRP criteria as well as administrative principles and requirements. As set forth by section 114, Western shall approve an IRP if, in developing the plan, the customer has addressed the criteria provided.

b. Comments and Discussion

A number of customers commented that the distinction between customers and purchasers should be dropped because the terms are defined differently but used synonymously, so the term "purchaser" has been deleted from the rule to avoid confusion.

A commenter asked for clarification of the relationship between the IRPs required under section 114 of EPAct and the requirement to consider integrated resource planning under Section 111. Section 111(a)(7) of EPAct is an amendment to the Public Utility Regulatory Policies Act. If a Western long-term firm power customer falls under this regulatory authority, only one IRP will be required as long as the IRP submitted to the State regulatory authority and to Western also meets the approval criteria addressed in the IRP regulations and section 114 of EPAct.

A few customers requested a refinement of IRP regulations to make them "more suitable for non-generating and end-use customers." Most end-use customers will qualify for small customer status, which requires that they submit a plan that (1) considers all reasonable opportunities to meet future energy service requirements using demand-side management (DSM) techniques, new renewable resources,

and other programs that are cost-effective, and (2) minimizes adverse environmental effects to the extent practicable. For those that do not qualify, Western will review IRPs based on the customer size, type, resource needs, geographic area, and competitive situation. There is no need to tailor these regulations further as the capabilities of non-generating end-use customers are adequately recognized under the "reasonableness" review standard in 905.13.

Western was requested to delete the word "new" from the definition of IRP, based on the viewpoint that integrated resource planning is a planning process that can be applied to all resources. Western has not removed the word "new" from the definition of IRP because Congress included this adjective in section 114 of EPAct. However, analysis of all resource options would allow the customer to incorporate cost-effectiveness of current resources into utility decision-making which in turn provides for sound long-term decisions based on least-cost resource planning. To remain competitive in a dynamic utility industry, Western's customers may find value in evaluating continuously all costs, including those from both existing and potential future resources.

2. IRP Content

a. Background

Section 114 of EPAct defines the elements and content that must be addressed in an IRP. Although these requirements must be addressed, Western understands the importance of balancing needs for flexibility and equity among a diverse customer base. Western's primary interest is in providing an adequate framework for customer use of the IRP process as a tool for meeting resource needs.

b. Comments and Discussion

Many commenters requested that Western remove the "Other Criteria" because it is overly broad. Western included element 8, "Met such other criteria as the Administrator shall require," in the proposed rules primarily to track the language and format of EPAct, and to give the flexibility to add other requirements as might later become necessary. In order to give customers reassurance that Western will not arbitrarily change or add requirements without the proper public review and comment process, this element has been dropped.

A stakeholder suggested that each IRP or small customer plan submitted to Western should describe the formal and informal service relationships the customer has with trade allies that can provide DSM sales and service delivery to the utility and its customers if the IRP or small customer action plan includes DSM resources. If a customer chooses, partnerships can be formed with trade allies that can provide DSM sales and services in support of IRP implementation plans. However, it is not the intent of EPAct nor appropriate for Western to require IRP or small customer plan submittals to describe the service relationships that Western's customers have with trade allies. A trade ally has the opportunity to participate in a customer's IRP process and DSM pursuits through the customer's public process, and pursue a voluntary partnership with Western's customers.

Western was asked to define practicable. EPAct states that IRPs must identify and accurately compare all practicable energy efficiency and energy supply resource options available to the customer. Using the reasonableness test set forth in section 905.13(a), practicable in this case means those energy efficiency and energy supply resource options which are appropriate for the customer's size, type, resource needs, geographic area, and competitive situation. Practicable resource options are both economically and technically feasible. Western will not dictate resource choices.

One customer noted that there is no option in the action plan to report that there is nothing further that a customer can do than it is already doing, and that this language needs to be added. Language has been added in section 905.11 so that there is an option for customers to report in an action plan that they are not experiencing or anticipating load growth. Even when customers are not experiencing load growth, action plans may describe how otherwise "lost opportunities" have been pursued, such as encouraging energy efficiency in new housing to avoid the expense of retrofitting in the future.

Comment was received on the criteria for determining that customers have complied with the requirements for minimizing adverse environmental impacts associated with resource choices. The criteria for assessing whether customers have complied with the requirements for minimizing adverse environmental impacts of new resource acquisitions are stated in EPAct and supplemented by this rule. In addition, Western cannot exempt any organization from complying with existing environmental laws and regulations due to customer size. Western will not determine for its customers the level of environmental compliance appropriate for each action.

A number of customers and stakeholders submitted comments regarding environmental externalities. Western will not require customers to include a quantitative analysis of environmental externalities in their IRPs for the following reasons: (1) EPAct, which did not use the term "externalities," created a different "minimization to the extent practicable" review standard for IRPs; (2) the externality issue continues to be subject to public debate and scientific analysis, with no consensus being reached; (3) there is no consensus on the numbers that should be used to value certain emissions and pollutants; (4) quantification of externalities is a policy question that appears to fall under state jurisdiction at the present time. Establishment of a Western standard would not appropriately reflect comity between the states within Western's service territory and the Federal government. Complicating the issue is the fact, as described in more detail in the EIS, that the Western states have widely varying policies on quantification of externalities; (5) it would be impossible to reconcile a common externality standard with the heterogeneous approaches of the states; and (6) if Western were to require quantification of externalities, Western's customers could find themselves at a inappropriate competitive disadvantage as compared to noncustomer utilities not bound by such a stringent standard under state laws and regulations.

Customers asked what Western considers public involvement for a rural electric cooperative. Additionally, customers and stakeholders stated that Western should allow flexibility in interpreting the public process requirements; outside entities should have the opportunity to review and comment on submitted IRPs once Western receives them; and Western should require that customer utilities meet minimum standards for public participation, including the creation of public advisory groups. Given the diversity of customers Western serves, Western intentionally defined the term "public participation" in general terms so as to allow customers the flexibility they need to comply with this requirement. Full public participation will be interpreted to mean that ample opportunity was provided for the public to participate in or influence the preparation and development of an IRP, as required by 905.11. The summary of the public participation process in the IRP should describe how the customer

(1) gathered information from the public, (2) identified public concerns, (3) shared information with the public, and (4) responded to public comments. Additionally, Western feels that public participation at the local/regional level is adequate and that it is not necessary to provide another opportunity for public comment once the IRP has been filed with Western.

One customer commented that the load forecasting examples in the rule "make no sense" for Federal load. No load forecasting examples are given in the Rule except as referred to for a methodology (i.e., time series method, end-use method, econometric method). These are the three methods most used for load forecasting, but they are not required by Western. The customer should determine the method(s) best suited for its own needs, though that method should use an accepted methodology such as one or more of the three listed above. Customers should develop forecasts upon which to base their IRPs. EPAct requires that, with the exceptions addressed in section 905.11(b)(3), least-cost options must be adopted by customers under the IRP.

Many customers commented on quantification and resource tests. The following questions were asked: Is Western prescribing that a levelized cost method be used? If renewable resources are not cost-effective, how can they be included in the least-cost plan? If they are cost-effective, why should they be given priority if they will be in the least-cost plan? Additionally, customers stated that they preferred that Western not prescribe a method. There is concern about how utilities will deal with the least-cost provisions or whether they can still use supply- and demand-side projects in the IRP process and still do their planning in order to minimize rates and remain competitive. Comment was also received that Western needs to address the additional exemptions to least-cost based decision-making related to state law requirements; and that Western's IRP requirement should impose no standard stricter than the standard used by the state public utility regulatory agency in which a given customer does business. Western is not prescribing that a levelized cost method be used. Instead, the final rule requires that evaluation of demand and supply resource cost effectiveness for larger customers be done on a comparable basis. Examples of types of methods Western expects from a larger customer are given, but no specific method is required. The least-cost provisions, as part of the IRP, are meant to allow utilities to be more competitive. Analyses of a variety of situations—including possible exceptions to least-cost based decisions—will promote competitiveness as well as rate minimization. Renewables do not have to be given priority, but must be fully evaluated alongside demand- and other supply-side resources. EPAct states that to the extent practicable, energy efficiency and renewables *may* be given priority in any least-cost option. Language has been added, under section 905.11, stating that exceptions to least-cost-based decisions may be made where Federal or State requirements mandate other than a least-cost based decision. EPAct allows the choices in this area to be made at the reasonable discretion of the customer as long as supply- and demand-side resources are compared using a consistent economic analysis. As long as the customer meets the criteria as defined in EPAct and these regulations, Western will not impose any standard stricter than the standard used by the state public utility regulatory agency in which a given customer does business.

Western received comment that the rule needs to better define economic tests and more clearly describe the economic evaluations made. Comment was received that Western should require customers to use the total resource test to screen demand-side measures and the societal test to evaluate demand-side programs; and that customers should be required to use minimization of revenue requirements as the standard to choose least-cost options. Western will not mandate the use of a particular test to screen resource options or as a standard in the resource selection process. While examples of analyses are set forth elsewhere in this Federal Register notice, EPAct does not require the use of any particular tests. There is no compelling reason to force customers to take the same approach when a number of different tests are currently used in IRP preparation by utilities and utility commission review throughout the United States. Western will review the approach chosen by its customers for reasonableness, taking into account each customer's size, type, resource needs, geographic area, and competitive situation.

A few customers commented that they are opposed to quantification of savings. Western is not requiring unreasonable efforts by customers to quantify savings. Section 905.11 describes the need for customers to establish methods of validating predicted performance.

3. IRP Review and Approval

a. Background

Western has proposed that the required elements of an IRP or a small customer plan must be addressed in a reasonable manner by a customer before Western approves the IRP or small customer plan.

b. Comments and Discussion

Customers commented that the flexibility to amend IRPs at any time should be incorporated into the regulations. Western was asked to clarify the difference between good faith efforts and mitigating circumstances. Comment was received regarding an apparent conflict between the time tables for requesting small customer status and the general time line when activities need to be accomplished. One customer stated that the size of the Western allocation should be a factor in IRP review. Western will apply a reasonableness test in its review and approval of customer IRPs and small customer plans which asks the following two questions:

1. Is the customer's application of the IRP or small customer criteria consistent with the intent of EPAct and these regulations?

2. Is such application appropriate for the customer's size, type, resource needs, geographic area, and competitive situation?

Western will use the reasonableness test, as applied to the criteria in Subpart B, as a basis for plan review and approval. Western will not use the size of the Western allocation as a factor in review, as EPAct does not allow for such an approach.

In using this reasonableness test as the basis for approval of plans, other language has been incorporated into the regulations which clarifies the review and approval process. Specifically, language has been added which: allows amendments and revisions to IRPs to be submitted at any time (under section 905.12(c)(5)); delineates "good faith effort" and deletes the term "mitigating circumstances" (under section 905.17(b)); and amends the originally proposed time table for IRPs and small customer plans (under section 905.12(c)), so that requests for IRP cooperative and small customer status must be made to Western within 30 days (not 60) of the effective date of the Program, allowing the time tables to match and allowing for a more expedient process. Additionally, there is no longer a requirement for customers to submit a notification of intent to prepare an individual or MBA IRP.

One customer asked how customers should act when preparing their IRPs which are dependent on time-limited offers of power from third parties. When preparing plans dependent upon time-limited resource offers, a customer should develop the plan based upon the best information available. The customer determines its own resource needs, so it should accept the time-limited offer if that is in its best interests, and then let Western know through its annual progress report or an amended action plan. Western will not disapprove such a decision if it is in the best interests of the customer, was evaluated alongside supply- and demand-side resources, and was a "least-cost option" (or is an adequate cost-effective exception as addressed in section 905.11).

4. Member-Based Associations

a. Background

There is considerable variety in the contractual arrangements among Western's member-based association (MBA) customers. Some MBAs are the sole supplemental power supplier for the members and have load growth responsibility, others act as a representative for the members and have no generation or transmission capabilities, and others act as agents for or subcontract with but do not assume power supply responsibility for their principals or subcontractors.

b. Comments and Discussion

Concerns were raised over the role of the MBA and its members. Comment was received that the submittal requirements need to be defined for an MBA and its members. One customer stated that Western needs to broaden the definition of MBA to cover both parent-type entities and their user members and entities which act as agents for, or subcontract with but do not assume power supply responsibility for, their principals or subcontractors. The definition of MBA has been broadened to include both parent-type entities and their user members and entities which act as agents for or subcontract with but do not assume power supply responsibility for their principals or subcontractors so that the wide variety of Western customers which are MBAs under the revised definition can submit IRPs on behalf of one, some, or all of their customers. In adding this definition, the submittal requirements have been further delineated.

Two additional questions were asked: (1) To what extent must members of an MBA be identified in the IRP and action plans? (2) What is the responsibility of an MBA with members outside of its marketing area for an IRP? While Western agrees that members should support the IRP process with data and during the decision making process, it is the responsibility of each MBA to work with its affected membership on these issues. Each member receiving the benefit of long-term firm power from Western will be required to sign the IRP or a resolution accepting the IRP prior to submittal to Western. Additionally, for IRPs developed and submitted on behalf of the MBA's members, the IRPs must clearly show how each of the seven approval criteria is addressed for each member. MBA members outside of Western's service territory need not be included in the MBA's IRP, but the benefits of joint planning may be diminished by such an approach.

5. Economic Feasibility and Administrative Burden

a. Background

A number of Western's customers are small or medium-sized utilities. Western is not proposing to define how much time and money a customer should invest in IRP and small customer plan development and implementation. Rather, Western's review will be focused on the end-product IRP or small customer plan.

EPAct requires that customers develop and submit annual progress reports to Western, which Western will in turn use in developing its own annual report.

b. Comments and Discussion

Many customers asked what criteria will be used to determine that a small customer has "limited economic, managerial, and resource capability" to conduct an IRP. Three criteria will be used in determining small customer status: (1) Does the customer have total annual energy sales or usage of 25 GWh or less averaged over the previous 5 year period? (2) Is the customer *not* a member of a joint action agency or a generation and transmission cooperative with power supply responsibilities? (3) Does the customer have limited economic, managerial and resource capability to conduct integrated resource planning? Prior experience with customers under the 25 GWh threshold that are not members of a joint action agency or a generation and transmission cooperative with power supply responsibility has shown that many of these customers possess limited economic, managerial and resource capability to conduct integrated resource planning. If the customer meets all of these criteria, it will then be granted small customer status if requested.

Other customers also suggested that small customers be able to normalize or average over a period of time their energy use or sales in order to qualify for the 25 GWh threshold for small customer status which might otherwise not be met due to extreme circumstances such as weather. In order to account for weather-related or other circumstances which might put the small customer over the 25 GWh threshold, customers will be responsible for documenting average annual energy sales and usage for the 5 years prior to the initial request. Subsequent annual letters documenting energy sales and use will be averaged thereafter on a rolling basis to determine the under 25 GWh threshold. If the customer exceeds 25 GWh average sales and usage after already receiving small customer status, an IRP will be required.

Comments on annual progress reports included statements that the reports should not be required, to statements that they only be required every 2 or 3 years. Customers also commented that the requirements for the annual progress reports are excessive, especially the obligation to perform post mortem analysis to quantify the energy capacity and dollars saved under an IRP. EPAct requires that annual progress reports be submitted by customers to Western. The requirement can be satisfied by customers as long as the annual progress reports contain information describing the customer's progress towards the goals established in the plan submitted, including a report of the measured or estimated energy savings and renewable resource benefits achieved. Western is required by law to report to Congress annually "an estimate of the energy savings and renewable resource benefits achieved as a result" of customer IRP. Western cannot develop a credible estimate without customer input. In the absence of credible data, the accomplishments of Western's customers cannot be fairly described.

In lieu of a separate annual progress report, all information may be combined with any other report that the customer submits to Western, at the customer's discretion, as long as that report is submitted within 30 days of the IRP approval anniversary date.

6. IRP Cooperatives

a. Background

Customers may form IRP cooperatives under EPAct and request Western's approval to submit IRPs for those cooperatives. Approved cooperatives

shall have 18 months from the date of approval to submit their IRPs.

b. Comments and Discussion

Comments on IRP cooperatives concerned limitations to forming an IRP cooperative, and clarification of the formation of an IRP cooperative as being a matter solely between those potential members and Western. Comment was also received that IRP cooperative status should be based only on the determination that an appropriate resource planning decision block exists; and the "power supply chain" example be removed so that it is not read as an exhaustive sample. An IRP cooperative allows customers with common interests, such as where a resource decision block exists, to form an IRP cooperative for the purpose of jointly developing and implementing an IRP. Individual member responsibilities and participation levels, as with MBA IRPs, must be identified in the IRP. A resource planning decision block includes a situation such as if all entities covered by an IRP are contained within a power supply chain, or regional entities covered by an IRP will plan for joint supply-side, demand-side, and/or renewable resources above and beyond the Western resource. It is permissible for a customer to prepare an IRP jointly with an investor-owned utility. These are examples and are not all-encompassing definitions.

Section IV of this supplementary information section gives examples of entities that would be favorably considered for IRP cooperative status.

7. Technical Assistance

a. Background

Western has provided technical assistance to customers, which includes workshops, equipment loan programs, technical studies and analyses, peer-match evaluations, and other support, since 1980. EPAct authorizes Western to continue to provide technical assistance to help customers with integrated resource planning.

b. Comments and Discussion

One customer commented that Western should charge for technical assistance based on its use. At present, Western feels that technical assistance, offered through its energy services program, is more effective if offered to all customers without a use-based charge. Western realizes the greatest need for technical assistance often falls on the smallest customers which may not be able to pay for direct technical assistance. Western will make every effort to cost-share technical assistance activities to leverage costs so that many parties benefit.

Some customers requested that Western develop sample IRP formats for customers. Because of the great diversity of its customers, Western will not develop sample IRP formats. A customer can, however, obtain technical assistance from the appropriate Area Office to help it prepare an IRP. Additionally, a customer's Area Office may already have a collection of sample IRPs.

8. Submittal Timing

a. Background

Customers must submit their plans to the Area Manager of the area in which they are located within 12 months of the effective date of this rule for individual IRPs, within 12 months of the approval of a request for small customer status for small customer plans, and within 18 months of the approval of a request for IRP cooperative status for IRPs from IRP cooperatives. Additionally, EPAct requires updated IRPs and small customer plans to be submitted to Western for review every 5 years.

b. Comment and Discussion

A comment was received that suggested that Western stagger IRP submittals over 120 days, with small customer submittals processed first. Western will not take additional steps to stagger the approval of IRPs because the submittal time frame already is staged, and EPAct offers Western limited ability to depart from defined submittal time frames. Western expects that although many customers will submit IRPs and small customer plans when due, others will submit them before the plans are due. In addition, IRP cooperatives may submit IRPs 6 months after individual IRPs and small customer plans are due.

9. Irrigator Issues

a. Background

The IRP provisions apply to all customers, including irrigators, with the exception of those qualifying for small customer status. Irrigation districts and other irrigation entities may qualify for small customer status. Western shall consider water planning, water efficiency improvements, and water conservation in evaluating an IRP or small customer plan. Customers that provide water utility services and customers that service irrigation load as part of their overall load may include water conservation activities in the IRP.

b. Comments and Discussion

It was suggested that the irrigation provision language include entities which are not necessarily irrigation districts but which have irrigation loads. Language has been added to section 905.13, which has the effect of expanding the term "irrigation district" to include electrical districts, power and water conservation districts, and other comparable entities. Therefore, entities with similar functions are eligible for this provision.

It was also suggested that water efficiency should equate to electrical savings for all customers that manage water utilities, not just irrigators. Western agrees that customers with water utility responsibility face the same issues as irrigators. In recognition of the need for equity, new language has been added to section 905.13 to cover customers that provide both energy and water utility services and customers that serve irrigation load as part of their overall load. Western requests that all types of customers covered by this section convert their water savings to energy values to the extent practical.

10. Future Program Review

a. Background

EPAct requires that within 1 year after January 1, 1999, and at appropriate intervals thereafter, Western shall initiate a public process to review the Integrated Resource Planning provision established by this rule.

b. Comments and Discussion

A customer commented that 1999 is too late to revise the Program, given the increasingly competitive nature of the utility industry. 1999 is the date set forth by EPAct for review and revision, as appropriate, of these regulations, and the point at which, using a public process to review the program, Western has some ability to revise the criteria set forth in EPAct to reflect any changes in technology, needs, or other developments. However, IRPs may be amended or revised at any time, and updated IRPs are required every 5 years. This flexibility allows Western's customers to remain competitive.

11. Penalty

a. Background

As required by EPAct, penalties for noncompliance with these regulations shall be imposed for failure to submit or resubmit an IRP or small customer plan in accordance with these regulations and/or when Western finds that the customer's activities are not consistent with the applicable IRP or small customer plan unless a good faith effort has been made to comply with the approved IRP or small customer plan.

b. Comments and Discussion

The public commented that Western should not impose the same penalties for being late or not submitting an annual report as for not submitting an IRP; that the time frame between receiving a notice of noncompliance and the imposition of the penalty needs to be lengthened; and that the phrase "it is found that there are no mitigating circumstances which justify those reactions" should be removed. The noncompliance section of this rule, section 905.17, has been revised substantially in response to public comments. In recognition of the severity of the proposal, Western has dropped the provision for imposing penalties for failure to submit or for late submittal of annual progress reports. Section 905.17 also has been revised to provide that any penalties will be imposed beginning with the first full billing period following the notice of noncompliance, allowing customers 30 days to provide evidence of a good faith effort to comply. A customer must still show evidence of a good faith effort to comply which justifies its deficiency, but the term "mitigating circumstances" has been deleted.

Customers also commented that customers should be able to choose their own penalties (surcharge or allocation) and that penalties should apply directly to the MBA member and not to or through the MBA. Comment was also received that if a member of an MBA is not in compliance, notice should be sent to both the member and the MBA. Customers will not be allowed to choose the type of penalty that will be imposed for noncompliance. Western will determine which penalty is most appropriate for the situation in accordance with the criteria in section 905.17(d). Language has been added to clarify the imposition of penalties on MBAs and IRP cooperatives and their members. Members of MBAs and IRP cooperatives which are found to be in noncompliance will be directly penalized if they have a firm power contract with Western. For those members which do not, the penalty will be imposed upon the member's MBA or parent-type entity on a pro rata basis in proportion to that member's share of the total MBA's power received from Western. Assessment of penalties against MBAs is necessary in this situation to ensure that MBA members comply with the IRP requirements in this rule. The MBA or parent-type entity will be notified of a penalty assessment on a member.

A comment was received that stated that the administrative appeal process should allow a customer to appeal a decision about an IRP to the Department of Energy's Deputy Secretary to ensure customers and Western have an opportunity to seek an impartial ruling. A customer may request reconsideration of an initial noncompliance determination by filing a written appeal with the appropriate Area Manager. If the customer disagrees with the Area Manager's decision, an appeal may be filed with the Administrator. The Administrator's decision will be the final agency decision for purposes of judicial review. Western will use mutually agreeable alternative dispute resolution procedures, upon the customer's request, to attempt resolution of any appeal. No penalty will be imposed during the appeal, but if the dispute resolution is unsuccessful for the customer, Western will impose the penalty retroactively from the date the penalty would have been assessed without an appeal.

One customer commented that resource withdrawal penalties should not be imposed retroactively, as the impact on the annual ratchet clause in supplemental power supply contracts is overly burdensome. Western agrees that certain supplemental power supply contracts have ratchets that could magnify the burden of a retroactive resource penalty caused by an administrative appeal. However, Western will not amend the regulations to address this unlikely event. This situation would not arise under the final regulations until 12 months after the initial 10 percent surcharge had been imposed. The customer can avoid the impact of a ratchet by submitting an acceptable and timely IRP to Western.

Finally, a customer asked why, if IRPs are not required of nonfirm purchasers of Western energy, the penalty extends to nonfirm interruptible/diversity contracts with customers. A penalty will be assessed on the total charges for all power obtained by a customer from Western and will not be limited to firm power charges. If a customer has more than one long-term firm power contract with Western, the penalty will be imposed under each contract. Under EPAct, 42 U.S.C. 7276b(e), these penalties apply to "all power" purchased from Western by a customer which is in non-compliance; the penalty is not limited to firm power.

C. POWER MARKETING INITIATIVE

1. Applicability

a. Background

In the proposed Program, the Pick-Sloan Missouri Basin Program-Eastern Division and the Loveland Area Projects were proposed for initial coverage under the Power Marketing Initiative. Western proposed to defer making any decision about applying the PMI to the Central Valley Project, which is the subject of a project-specific marketing plan and associated EIS for the post-2004 time period. Western further proposed to evaluate application of the PMI to the Salt Lake City Area/Integrated Projects after its power marketing EIS is completed and the associated marketing criteria and contract changes are implemented. Finally, Western also proposed to evaluate application of the PMI to the Parker-Davis Project and the Boulder Canyon Project no sooner than 10 years before existing contracts expire.

b. Comments and Discussion

A comment was received concerning Western's statement that its customers have no equity position in Western's facilities, and that no right exists to power in the absence of a contract. The comment further states that this is not precisely true for the Boulder Canyon Project, where there is a statutory allocation of power and upratings funded by certain customers. The first of two other comments received on this subject suggests that Hoover should be excluded from PMI applicability in the final rule due to the statutory nature of the Hoover allocation. The second states that the customers do not understand Western's intentions on application of the Power Marketing Initiative to Hoover and that Western needs to conduct workshops and hearings before implementation takes place. Western has not proposed to apply the Power Marketing Initiative to the Boulder Canyon Project at the present time. The Boulder Canyon Project long-term firm sales contracts do not expire until 2014. Western cannot make sound decisions today about how this power might be marketed starting 20 years into the future. Western will evaluate the applicability of the PMI to the Boulder Canyon Project no sooner than the year 2004. No decision to apply the PMI will take place until an appropriate public process takes place. At that time, statutory interpretation issues can be addressed.

Comments were received suggesting that the Central Valley Project should recognize the Sacramento Municipal Utility District's right to 31 percent of CVP power through the year 2014 and that the first preference customers under the 1962 Flood Control Act should be exempt from any loss of allocation under the Power Marketing Initiative. Western does not intend to abrogate the statutory right of CVP first preference customers pursuant to the Flood Control

Act of 1962. Nor does the Power Marketing Initiative impact the contractual right of the Sacramento Municipal Utility District to receive a defined share of CVP resources between 2004 and 2014. Section 905.30(b) of the final rule accommodates these concerns by stating that the PMI will apply "if consistent with other contractual and legal rights." This broad statement of applicability protects the interests of the commenters.

Western received several comments that favored applying the PMI to the CVP. The comments had a common theme that the stability and certainty of the CVP resource is critically important and that Western should apply the PMI to the CVP now, and not wait until the 2004 marketing plan to make a decision on resource levels or contract term. Western was also asked if the application of the PMI to the CVP would take place with or without a public process. These comments also state that applying the PMI to the CVP will assure consistency across all of Western, and allow the 2004 process and the customers to focus on other issues. The commenters believe that a definite level of commitment and contract term, known now, is worth trading for larger percentage allocations and longer contract terms in a more uncertain future and that applying the PMI to the CVP will streamline the CVP EIS process, and integrate the planning process between the two programs. Western is impressed by the comments favoring an immediate but limited application of the PMI to the Central Valley Project, subject to the findings of the project-specific EIS currently underway. However, Western wants to protect the integrity of the ongoing project-specific marketing process. Application of the PMI to the CVP is best addressed in the separate public process.

One comment expressed appreciation for the decision not to propose application of the PMI to CVP and the SLCA/IP at this time, as large adjustments of marketable resources will be needed to meet environmental concerns for these projects. This comment expressed concern that the Program will create a precedent for these two projects. Western sees no reason to change its initial proposal to evaluate applicability of the PMI after the Salt Lake City Area/Integrated Projects Electric Power Marketing EIS is completed and the associated marketing criteria and contract changes are implemented. These steps are scheduled for completion in the near future. Western expects to start the evaluation process soon thereafter.

A comment was received questioning the decision to apply the Power Marketing Initiative to the LAP given that existing contracts do not expire for another 10 years. Other comment received supports application of the PMI to the Loveland Area Projects after the 1999 resource adjustments are complete. Western did not change its proposal regarding application of the Power Marketing Initiative to the Loveland Area Projects. No resource extension offer will take place until the analysis of potential LAP resource adjustments in 1999 has been completed. The analysis and implementation of any 1999 resource adjustments will take place no later than 1996. Given the time period that it takes to develop alternative resources to replace unextended LAP power, application of the PMI to LAP now is prudent. The resource certainty that results will assist Western's customers in developing effective integrated resource plans.

2. Contract Term

a. Background

In the proposed Program, an 18-year contract term was proposed, with the contract term to start from the date existing contracts expire.

b. Comments and Discussion

Western received many comments supporting extending the contract term from 18 to 20 or 25 years. The reasons customers overwhelmingly supported extending the contract term follow: a longer term would help short and long range planning; a longer term would add resource and rate stability; a longer term would benefit the environment by customers being more willing to make financial commitments to environmentally sound project enhancements; a 20 year term would be consistent with the IRP submittal cycle of 5 years; a longer term would be comparable to the amortization of long term investments in base load power plants and renewable resources; a longer term would correspond to existing all requirements contracts; an eighteen year term may jeopardize Western's obligations under an existing exchange arrangement; an eighteen year term would require existing customers that contracted for Federal power when it was not economical to give up too much of their existing benefits without equitable treatment; a longer term conforms to the Tennessee Valley Authority practices; and a longer term would allow customers to make commitments to demand side management programs and capital-intensive renewables. Western is persuaded by the comments supportive of a longer contract term. Section 905.31 of this final rule establishes a 20-year extension of resources.

In developing a proposal for the length of the resource extensions, Western has considerable discretion. One of the limits on that discretion is the prohibition, as set forth in the Reclamation Project Act of 1939, on power sales contracts with terms in excess of 40 years. Western may legally consider commitments of power up to, but not beyond, this 40-year maximum.

Western adopts a resource extension period of 20 years for several reasons. This time period is long enough to maintain a sufficient customer planning horizon. Long-term project financing, whether for supply-side, demand-side, or renewables, would be feasible with such an extension. Western agrees that financing of renewable resources is particularly sensitive to Federal hydropower resource uncertainty. Twenty years will maintain the resource and rate stability necessary for effective integrated resource planning. At the same time, 20 years is not so long that Western cannot reasonably guarantee the availability of the extended resource. The proposal of a graduated resource pool available to new customers gives Western the flexibility to allocate power equitably over the term of the contract.

Western's goal is to provide a sufficient incentive for new customer preparation of IRPs and to offer a contract term compatible with the time horizon for other resources evaluated in IRPs. Another goal is to reduce the amount of Western, customer, and public time and resources spent on marketing plan development. An extension of resource commitments for 20 years beyond the expiration date of contracts with existing customers would mean that new contracts would be in place until at least 2020. In other words, initial extensions would be about 25 years from the date that extension commitments are offered to customers of the Pick-Sloan Missouri Basin Program—Eastern Division; this time period approaches the average useful life of thermal generation.

Western agrees that a 20-year contract term is more comparable to those existing between the Tennessee Valley Authority and its customers. Western also agrees with the comments suggesting that a 20 to 25 year contract term is consistent with industry standards for firm sales. Recently issued RFPs have also entertained resource acquisition options on a long-term basis. Western also concurs with the comment

that a 20-year contract term fits better with the 5 year IRP preparation and approval cycle.

The selection of a 20-year extension contract term helps to answer the comment that the proposed Program asked existing customers to give up too much. The additional 2 years helps to provide an appropriate balance between existing customers, who in many cases chose to enter into hydropower contracts with the United States before the economic benefits of such a choice were clear, and other needs reflected in the Program.

Western believes that adoption of a relatively short contract term could impact the resource stability required to meet Western's obligations under the exchange arrangement with the Salt River Project. In particular, the pattern of power allocations over time could change the use of Colorado River Storage Project transmission, which could in turn impact the exchange arrangement. Twenty year contracts support the resource stability that in turn impacts usage of Western's transmission system.

A comment was received that stated eighteen year contracts are 3 years too long. According to this comment, most of the power contracts that Western has signed have been for 15-year terms, and a 15-year extension strikes the right balance between the customer's need for certainty and the Federal government's desire for flexibility so the changing needs of the West can be addressed. Western agrees that many of its historic contract terms have been 15 years in length. Currently effective contracts for the sale of power from the Pick-Sloan Missouri Basin Program—Eastern Division, the Loveland Area Projects and the Salt Lake City Area/Integrated Projects are all 15 years in length. However, a significant number of contracts have been in excess of this time period. Power sales contracts for the Parker-Davis Projects are 20 years in length, while the currently effective Boulder Canyon Project contracts are 30 years. Contracts for the sale of Central Valley Project power have variable terms, with the longest contracts approaching 40 years in length. The historic precedent for contract length is not confined to 15-year commitments, and is consistent with the 20-year term adopted in the final Program regulations.

A comment received suggested rollover 18-year extensions every 5 years upon submittal of an updated IRP. A rolling extension of contracts on a long-term basis at the customer's option, upon submittal of future IRPs to Western, would cause hydropower resources to be extended too far into the future for Western to respond to changing circumstances over time.

Western has provided for resource adjustment capability as part of the PMI. Initial extensions would be based on the resource available at the time existing contracts expire. This allows Western to respond to changes in operations at Corps of Engineers (Corps) and Bureau of Reclamation (Reclamation) hydroelectric plants before the term of contract starts for extended resources. In addition, Western can make further adjustments in its marketable resources in response to changes in hydrology and operations upon 5 years' notice. Because of this capability, no need exists to extend resources for a minimal time period to protect fish and wildlife resources. The impact of the PMI can be summarized as an extension of existing commitments, with the recognition that adjustments to the marketable resource as a result of operational accommodations for fish and other wildlife resources can be accomplished within the extension framework.

Western realizes that the draft EIS predicted relatively greater environmental benefits for contract terms in excess of 20 years. Western's proposal balances environmental benefits associated with resource certainty against the need for flexibility to respond to changing circumstances over time.

Some of Western's customers suggest that since they have paid for projects in the past, they should have first call on resources in the future. Western agrees that the resource choices made by customers in the past have led to the construction or purchase of certain supplemental generating resources, as well as investment in transmission resources or negotiation of transmission service contracts. Western does not want to disrupt regional power supply and transmission arrangements at considerable economic and environmental cost to the area. At the same time, Western's existing customers have no equity position in Western's facilities, and they have no right to receive power from Western in the absence of a contract. Western believes the public interest is served by having the flexibility to meet a fair share of the needs of new customers from the publicly owned and financed hydroelectric facilities in the West.

Western agrees with a comment received that states the Program does not provide its customers with absolute resource certainty. Instead, the Program attempts to provide as much certainty as possible to facilitate the development of integrated resource plans, while retaining the flexibility to respond to changing conditions and evolving needs.

A comment received stated Western should consider a longer contract term, such as the 35-year term associated with FERC relicenses. This comment recognized how virtually all access to hydropower is controlled by Federal policy, either through FERC or the power marketing administrations, but the costs for that power differ. FERC licensees pay only for capital costs and O&M, while CVP customers must subsidize other project purposes such as those under the Central Valley Project Improvement Act. Differences in commitment lengths between FERC licensees and CVP power sales contracts only compound the inequity in a competitive and price-sensitive market. These comparability factors should be an additional basis for extending contracts for the longest possible term.

In response to these comments, Western notes that the holder of a FERC license typically plans, funds, and constructs the hydropower resource itself. A long-term license is appropriate in such a case, given the length of the construction debt service and the responsibilities of the licensee. With Western's resources, the planning, construction, financing, operation, and maintenance of the hydroelectric generation and high-voltage transmission is usually the responsibility of the United States. Since the two situations are not strictly comparable, Western feels that a proposal of a 20-year term of contract is appropriate.

Western agrees with the comment that the utility industry is increasingly dynamic, and that utilities must be flexible and forward-looking in order to be successful. The IRP requirement in this Program will provide Western's customers with the tools necessary to succeed in a changing utility climate.

Many comments were received from the public indicating that an extension of resources would assist IRP and not hinder future resource planning.

Western does not agree with the comment that long-term contracts will be a disincentive to improving energy efficiency. Short-term contracts cause customers to focus on the uncertainty surrounding the Western resource, rather than looking to implementation of cost-effective energy efficiency and DSM to meet future needs. Western only provides a portion of the resource needs of its customers, about 30 percent on average Western-wide. The cost of supplemental resources, whether supply-side or demand-side, is usually significantly higher than the cost of

Western's resources. Supplemental resource prices provide a significant incentive to implementation of cost-effective energy efficiency improvements.

Some customers indicated that their willingness to fund environmental improvements would be impacted by short-term contracts. Western agrees that short-term contracts could be a disincentive to the implementation of environmentally beneficial project improvements in support of the Clinton Administration's climate control action plan.

Several comments were received stating that Western power preserves the competitive balance in the utility industry. Western's hydropower commitments provide a yardstick that enhances competition in the utility industry within Western's marketing area. Twenty-year contracts help preserve the competitive balance in the regional utility industry.

3. Extension Percentage

a. Background

Western proposed to extend a major percentage of the power currently under contract with long-term firm power customers. The exact percentage to be extended would be determined on a project-specific basis, based on the amount of power needed to meet a fair share of the needs of potential new customers within the marketing area.

b. Comments and Discussion

Western received numerous comments that support a contract rate of delivery extension of 97 or 98 percent. One comment did not support a resource pool. Some comments were specific and suggested that current allocations should be the basis for application of the extension percentage or that the percentage withdrawal should be based on customer allocations existing in the year 2000 for Pick-Sloan Missouri Basin Program—Eastern Division customers and that withdrawals after that time should be based on the resource available to the customer at the time. One comment received stated that a 100 percent extension was preferred and another comment suggested that existing customers should receive maximum allocations.

The amount of unextended resource was determined on a project-specific basis by assessing the amount of power that must be reserved in order to meet a fair share of the needs of potential new customers. In deriving the size of the initial resource pool for each project, Western reviewed letters of interest from potential new allottees, potential new customer load information and analysis of any hydropower benefits currently being received by a potential new customer. Due to significant expressions of interest by Native Americans, Western has increased the size of the initial resource pool for those projects initially subject to the PMI. Subsequent resource pool increments have been reduced to compensate for the increase in the initial pool. Section 905.32 provides that for the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects, Western will reserve 4 percent of the marketable resource determined to be available at the beginning of future resource extensions. Subsequent increments of the resource pool have been reduced to no more than 1 percent.

The final rule recognizes that power reserved for new customers but not allocated and resources offered but not placed under contract may become available. Section 905.32 (e) provides that this power will be offered on a pro rata basis to existing customers that contributed to the resource pool through application of the extension formula. No firm power is expected to go unmarketed at any time.

The Program provides for the creation of two additional resource pool increments in the future for all of Western's projects covered by the PMI. At two intervals of 5 years after the effective date of the extension to existing customers, Western will create a project-specific resource pool increment of up to an additional 1 percent of the resource under contract at the time. The actual size of the additional resource pool increment will reflect the actual fair share needs of new customers and other purposes as determined by Western.

Western believes that the final Program provides an appropriate balance that recognizes the importance of certainty in customer planning efforts. An extension of Pick-Sloan Missouri Basin Program—Eastern Division and Loveland Area Project resources at a 96 percent level is substantial enough so existing customers will not have to build new generation or enter into large purchases of thermal generation. A lesser level of extension could cause customer pursuit of other resources, with potential associated economic and environmental impacts. The resource planning of auxiliary suppliers would be disrupted by the nonextension of a significant percentage of Federal power.

One comment stated that the percentage reduction should be applied to the allocation existing at the time, not the resource existing at the time of the contract extension. The current allocations to the customers will not be adopted as the basis for application of the resource percentage, as this approach could limit Western's short-term capability to adjust its marketable resources in response to changed operations and hydrology. Western believes a more flexible approach would be to apply the percentage to the marketable resource that is determined to be available at the beginning of future resource extensions. In this way, changes in operations or hydrology between today and the time existing contracts expire can be readily accommodated.

One of two comments received concerning the resource pool stated that given the great sacrifice of an initial 3 percent resource pool, the 1.5 percent additional increments should be based on the resource available at the time, while the other comment said there was no need for two additional resource pool increments. Another comment stated that they support a 2 percent resource pool. In the case of creation of resource pool increments subsequent to the initial pool, Western agrees with the comments that the percentage should be applied to the resource available at the time. The proposed Program, which suggested application of all percentages to the resource available at the time existing contracts expire, had some disadvantages. Application of the percentage to the resource available when existing contracts expire could create administrative confusion if the actual resource under contract was different. If the resource available several years into an extension contract was less than the marketable hydropower at the beginning of extension contracts, application of a percentage to the earlier, larger amount would create a higher effective percentage as applied to the existing resource. Western agrees with the comments recommending a change in the proposed approach. The final rule reflects this more simplified method.

One commenter points out that Western has not shown any reason for increasing the Pick-Sloan resource pool above 3 percent. The initial Pick-Sloan resource pool has been increased to 4 percent in the final rule, to assure that a fair share of the needs of Native Americans can be met. The rationale for creating two future resource pool increments of up to 1 percent each is to meet future needs that Western cannot currently identify. This flexibility is necessary to support a 20 year contract term.

Western understands the comment expressing concern about tying future allocations to a percentage of an amount to be determined, especially when Western may not know what it has to market from the Missouri River Basin generation until after the year 2000. Although Western appreciates the suggestion that a percentage of today's contractual amount be extended with an option to adjust the extended resource, others have expressed the concern that such an approach would create unwarranted power availability expectations on the part of firm power customers. Western believes that either adoption of this comment or retention of the approach of the proposed Program will lead to the same resource commitment. Western chooses to retain the approach of the proposed regulations.

One customer commented that a 97 percent initial extension level asks existing Pick-Sloan customers to give up too much, especially when coupled with the additional resource pool increments, exposure to adjustments due to changes in hydrology and operations, and withdrawals for project use. In contrast, another comment was received that the resource pool percentages should be increased to a 6 percent initial level, followed by two additional increments at 5 percent each. For the reasons stated earlier, Western believes the final rule strikes an appropriate balance among the relevant considerations.

Western recognizes that existing customers made an historic choice to pursue Federal hydropower and that some customers elected to purchase this resource before the economic advantages were clear. However, Western does not believe that the historic enjoyment of the benefits of Federal hydropower means that a customer has a perpetual right that cannot be diminished. Western's policy of promoting widespread use and the potential allocation of power to new preference customers must be balanced against the fact that existing customers have developed contractual relationships with supplemental suppliers, transmission arrangements with Western or third parties, and in some instances have constructed transmission facilities to receive Federal power. Western believes that this final rule provides for a proper balance among these policy considerations.

Comments concerning the marketable resources or the loss thereof for the Salt Lake City Area/Integrated Projects and the Central Valley Project were received that suggest that an additional 2 percent resource pool seems inappropriate for the Salt Lake City Area/Integrated Projects; that the resource pool for the Central Valley Project may be premature and too restrictive; that extensions for CVP resources should be in the 90–95 percent range and CVP unbundled services should be offered pro rata in 2004 in line with these percentages; that there is support for limiting the CVP resource pool to no more than 6 percent of the available resource which would minimize any disruption of customer planning efforts and avoids confusion between allocation issues and resource availability, yet allows Western to distribute the benefits of Federal power to new customer; that a 3–5 percent initial CVP resource pool is reasonable given the changes that are taking place within the industry; and that the initial CVP pool should not be larger than 2 percent given the two additional increments.

In the final rule, Western has not defined the size of the initial resource pool for the Central Valley Project and the Salt Lake City Area/Integrated Projects. The actual size of resource pools for these projects will be determined at a later date through project-specific public processes. Comments relating to these resource pools should be advanced at that time.

Western received a comment that stated that the Master Operating Manual process and the adverse impact of Corps of Engineers operations on wetlands, fish and wildlife and endangered species will likely affect electricity production on the Missouri River. Similar changes are possible on the Platte, Arkansas and Rio Grande rivers. Western's proposal will create an expectation that 94 percent of existing allocations will be reserved for existing customers. This will make it difficult to modify dam operations in the future. Evidence from the comments received on the draft EIS suggest that 6 percent is not enough to meet the needs of new customers and to respond to changing environmental concerns.

Western does not agree that the resource pools for the Eastern Division of Pick-Sloan and the Loveland Area Projects should be increased in size to enhance the ability to modify dam operations. Ample opportunity exists under the Program to adjust marketable resources in response to changes in reservoir operations. In the short-term, Western can accommodate such changes by applying the extension percentages to the marketable resource determined to be available at the beginning of future resource extensions. Operational decisions by the generating agencies in the shorter term will be reflected in the initial commitment to customers, as the extension percentage will be applied to the resource available at the time current contracts expire. Over the longer term, Western can adjust its commitments on 5 years' notice due to changes in operations and hydrology. Western is not creating a customer expectation that a percentage of existing allocations will be reserved for existing customers. Considerable flexibility exists in the final regulations to address the concerns raised in this comment.

No evidence has been produced to show that 6 percent is not enough to meet the needs of new customers. Environmental concerns will be addressed through the extension approach and withdrawal opportunities explained above, and not through use of the resource pools. Six percent should be more than is needed to meet a fair share of the needs of potential new customers. Western sees no reason to create a resource pool larger than that needed to meet a fair share of the needs of potential new customers.

4. Resource Pool Creation

a. Background

In the August 1994 Federal Register notice, Western proposed the creation of project-specific resources pools through a reservation of power not extended to existing customers. Existing customers with an allocation of one MW or less were not subject to the reservation. New customers receiving an allocation from an initial resource pool were not subject to withdrawal to form subsequent resource pool increments. The possibility of extending resources on a graduated scale, weighted towards some customer characteristic, was suggested early in the public process.

b. Comments and Discussion

Western received many comments on the issue of equity in the proposed creation of the resource pool. The majority of the comments on the issue objected to special treatment for customers with an allocation of one MW or less. Specific comments are that Western has provided no justification for exempting entities with a contract rate of delivery of one MW or less from resource pool creation, that the administrative burden of withdrawing power from entities with small allocations is not great; that it is inequitable to have an exemption from contributing to resource pools for customers with allocations of one MW or less; and that all resource reductions should be shared pro rata, with no exceptions for certain customers.

Western's rationale for exempting small entities from a contribution to the

resource pool was threefold. First, Western felt that the benefits associated with small allocations of hydropower would be diluted if all customers contributed to the resource pool. Second, the administrative issues of applying resource extension percentages to small allocations influenced Western's proposal. Third, there were not many entities with allocations of one MW or less, so the impact of the proposal on other customers was not large.

Upon further consideration, Western withdraws the proposal to exempt entities with allocations of one MW or less from contributing to the resource pool. For some small customers, an allocation of one MW represents a high percentage of their total load. Exempting an entity because of the size of their allocation is inequitable if that customer has a high percentage of its needs met by Western. The administrative issues underlying the original proposal are manageable. In fact, creating separate classes of customers leads to its own set of administrative issues. The fact that a small amount of power is involved is not dispositive, as the issue is more one of equity and fairness than one which hinges on the amount of power involved.

Western agrees that the proposed Program was not consistent in its treatment of customers with small allocations. For example, Western did not propose to insulate customers with small allocations from withdrawals for project use or from withdrawals of marketable resources due to changes in operations and hydrology. The final rule eliminates this inconsistency by treating all customers alike.

Several comments suggested that the one MW limit on withdrawals should apply even if the entity is a member of a member-based association or an IRP cooperative. With the elimination of the one MW exception, these comments are no longer relevant and need not be addressed.

Other comments were that withdrawals should apply to all customers with no exception for new customers; that allocations to new customers should be allowed to increase rather than automatically be reduced in their infancy through use of the extension formula; and that power reserved for project use should be used for new customers instead of taking it away from existing customers. This is another issue that received a number of equity-based comments—Western's proposal to exempt new customers receiving allocations out of the initial resource pool from withdrawals to create future resource pool increments. The rationale for this proposal was to avoid the dilution of recently-received hydropower benefits.

After considering these comments, Western has decided to abandon this aspect of its Program proposal. There is no strong policy reason to depart from equitable treatment for all customers. A new customer contribution to future resource pool increments would not be a large amount of power, so the benefits of the Western allocation out of the initial resource pool would not be diluted significantly. The administrative complications that arise from creating more than one class of firm power customer for withdrawal purposes are avoided by treating all customers the same.

Customers also commented that Western should only create a resource pool if there are set time periods, restrictions as to amount, and defined customer demands; more consideration must be given to how resource pool power will be priced and marketed; and subsequent increments of the resource pool are inconsistent with Western's stated goal of resource stability. Western concurs with the comment that a resource pool should only be created if there are set time periods and restrictions as to amount. However, it is difficult to define precisely the demands of new customers prior to creation of the resource pool. That can only be done after a call for applications is published in the Federal Register, and applications are actually received. Western cannot precisely define the needs of new customers at this time. Instead, Western has promoted the widespread use of its hydropower resources through establishment of a resource pool based upon a fair share of estimated needs. If the pool size is too large, the unallocated power or power not placed under contract is returned to the customers who contributed power towards the initial resource pool on a pro rata basis.

Western intends to charge new customers the same rate for power as that charged to existing customers. Western will not purchase resources for new but not yet identified customers, as the appropriate level of Western's marketable resources should be determined through a project-specific analysis of hydrology, project use load, losses and reserves. Committing resources beyond this level would increase the risk of purchasing firming resources.

Comment was received that the proposed Program does not recognize that some customers get a high percentage of power from Western while others do not. On the whole, little support was received for the concept of extending resources on a graduated-scale basis. The issue here is whether extensions should be offered on a pro rata basis to all existing customers or if extensions should take place on some other basis, such as the percentage of the total customer load that is served by Western. Given the lack of significant public support for the graduated scale concept and the associated administrative complexities, Western has adopted a pro rata policy under which existing customers will receive the same treatment in the application of the extension.

Comment was received that the wide variation in percentage of customer load served from the Central Valley Project should be addressed through the PMI. While Western will not depart from the general policy of a pro rata extension of resources, Western's Sacramento Area Office reserves the right to achieve more parity among allocations to existing CVP customers. Allocations to existing customers may be made out of the CVP resource pool to assure that each customer has some minimum percentage of its needs met by Western. This will be considered during the public process on the CVP power marketing plan.

According to some commenters, the creation of subsequent increments of the resource pools are inconsistent with Western's stated goal of resource stability. To a limited extent, this comment is correct. The final Program strikes a balance between the need for resource stability and the need for flexibility to meet changing circumstances.

One customer commented that Western should use energy efficiency improvements rather than withdrawals from existing customers to create the initial resource pool, while another stated that savings opportunities recognized in Western's use of IRP principles can be used to develop resource pools, reducing the need to withdraw from existing customers. To the extent that cost-effective energy efficiency improvements can be captured, Western will take steps to make such improvements a reality. Potential for such improvements could be identified through the use of principles of integrated resource planning. Flexibility has been retained in the Program to allocate power available due to implementation of such efficiencies. If adopted on a project-specific basis, Western could use efficiency improvements to offset the need to form a resource pool through withdrawal of power from existing customers.

Some of Western's projects have reserved power for future project use loads, but have not marketed this resource as firm power on a withdrawable basis. As an example, this marketing approach is used by the SLCA/IP. If proposed and adopted on a project-specific basis, Western could use project use power, marketed on a withdrawable basis, to offset the need to form a resource pool through withdrawal of power from existing customers.

5. Resource Pool Uses

a. Background

In the proposed Program, Western advanced a concept to allocate power out of project-specific resource pools to new preference customers within the marketing area, and to meet other purposes as determined by Western. The specific terms and conditions associated with allocations out of each resource pool would be determined during future, project-specific public processes.

Western said it expected to make allocations to Native Americans for use on the reservation, and would consider making allocations to national parks, public mass transit agencies, in support of renewable resources and fish and wildlife habitat.

b. Comments and Discussion

Comment was received that new customers don't need resources and that they just want cheaper resources at the expense of those who made wise long-term decisions many years ago. Western does not necessarily agree that new customers don't need resources. Load growth could create such a need, as could expiration of a purchase power contract or the retirement of generation. One of Western's goals in the PMI is to achieve widespread use of Western's resources. Reservation of a modest percentage of resources to create a resource pool is consistent with a policy of encouraging widespread use of Federal hydroelectric power.

One customer commented that the resource pool should be first used to make adjustments in response to changes in operations/hydrology. Western does not agree. In response to public comments in favor of equity among all customers, Western has adopted in this final rule a policy of treating new customers and existing customers alike. Making the resource pool subject first to adjustments would discriminate against new customers when allocations are made from the pool before adjustments take place. Given the adoption of a separate resource adjustment mechanism in these regulations, there is no need to make the resource pool subject to resource adjustment.

It was suggested that all resources be marketed, and that resource pools should have a maximum ceiling, but should only be allocated to meet new loads that actually develop. Western agrees that all available resources should be marketed. The intent underlying the PMI is to market as much firm resource as would have been marketed in the absence of the PMI. Allocations out of each resource pool will be completed before the term of the extension contract begins. Power reserved in a resource pool but not allocated and resources offered but not placed under contract will be offered to existing customers that contributed to the resource pool, in accordance with the final rule. The comment which asks that resource pools have a maximum ceiling has been adopted in the final rule.

Comment was received that under the current proposal an existing customer will not be eligible to receive power out of a resource pool; an existing customer receiving power from only one Federal project would be precluded from applying for power from another project's resource pool; and that this is a clear departure from Reclamation Law. In the past, Western has allowed preference entities to receive power from more than one project when marketing areas overlap. Given the significant new customer load that exists in portions of Western's service territory, Western is not willing to continue this policy on a Western-wide basis. On this issue, Western will retain the flexibility set forth in the proposed Program. An existing customer will not be eligible to receive power from a resource pool unless Western provides otherwise on a project-specific basis. Comments on the eligibility of existing customers to receive resource pool power will be accepted as part of the project-specific public process.

Comment was received favoring use of the Central Valley Project resource pool to achieve a fairer distribution of power. Western reserves the right to use the CVP resource pool in this manner, subject to public input received during a project-specific public process.

Several comments advocated allocations of resource pool power to customers with renewable resources in their mix and customers that have documented efficiency improvements through IRP. Other comments suggest that new customers represent emerging markets for Western, or that allocations to the Federal government have national benefits. Since the specific criteria associated with allocations to new customers will be determined during future, project-specific public processes, these comments are more appropriately raised and addressed at that time.

Customers commented that sales from the pool should be on the same terms and conditions as with other contractors. Western also received comment that a definition of "fair share" is needed. Western agrees that sales from the pool should be on the same terms and conditions as with other contractors. No definition of "fair share" will be adopted as part of these regulations due to the difficulty of developing a meaningful definition on a Western-wide basis. A specific determination of "fair share" will be developed during the project-specific allocation processes, which will take place during a time period closer to the expiration date of existing contracts.

6. Resource Adjustment

a. Background

In the August 9 Federal Register notice, Western proposed to adjust its long-term firm resources only in response to changes in hydrology and river operations. Existing customers would receive at least 5 years' notice before adjustments are made.

b. Comments and Discussion

Comment was received that Western should change its marketable resource in response to changes in operations after the extension term begins only if such a change adversely impacts Western's ability to meet its contractual obligations. Under the PMI resource adjustment provision, section 905.34, however, Western retains the flexibility needed to react to either changes that are adverse or beneficial to Western's marketable resource. Western will not limit the exercise of this adjustment provision to circumstances that adversely impact our ability to meet contractual obligations.

A customer commented that any changes to marketable resources—not just significant changes—should be subject to a public process, and that adjustments in resources should be triggered only by changes in river hydrology or mandated operating adjustments such as new legislation and that if other factors affect determination of the allocated resource, Western should conduct public proceedings. Western agrees that any changes in our long-term marketable resource should be subject to a public process. Western also agrees to limit the exercise of this

resource adjustment provision to changes in hydrology and operations.

It was suggested that adjustments to contract rates of delivery be limited to no more than 5 percent. Some customers also commented that they support the 5 year window to make changes in resources based upon changes in operations/hydrology. A 5 percent limitation on contract rate of delivery adjustments would enhance the stability of Western's hydropower commitment, but would not give Western the flexibility it needs to react to changing circumstances such as generating agency adjustments to operations.

Western has experienced adjustments in operations that have impacted long-term firm power in excess of 5 percent in the past. Western needs the ability to react to these situations, even though they may be infrequent in nature.

Finally, comment was received concerning the withdrawal opportunities not likely being large enough to manage future environmental problems, encourage renewables, or meet the needs of new customers. Comment was also received that the added flexibility that Western has proposed on resource withdrawals is good. The more open-ended approach in the final rule should satisfy the concern that the withdrawal opportunities are not likely to be large enough to manage future environmental problems. Other provisions of the Program, or separate Western initiatives, will encourage renewables and meet the needs of new customers.

7. Notice

a. Background

Western has proposed the creation of an incremental resource pool that makes power available for potential new customers over time, without the disruptive influence of creating a large pool all at once, before the need exists. At two intervals of 5 years after the effective date of the extension to existing customers, Western proposed to create a project-specific resource pool increment of up to an additional 1.5 percent of the marketable resource. No provision for the timing of any advance notice was proposed.

b. Comments and Discussion

Comments were received that Western needs to better define the conditions and the notice provisions for future withdrawals of power, and that advance notice of incremental resource pool reductions should range from 2 to 5 years. Western agrees that customers need to have advance notice of the amount of future withdrawals of power. Five years' notice appears to be too long given the relatively low ceiling of 1 percent of the marketable resource available at the time, and the 5 year intervals between the initial resource pool and the two subsequent pool increments. Instead, Western has added a notice provision that gives customers at least a 2 year notice on withdrawals to create subsequent resource pool increments. The conditions for future withdrawals of power will be defined on a project-specific basis.

Comment was received that Western needs to clarify how it will notify customers about the availability of power due to penalty imposition. Other comment suggested that such power should be marketed in the same Area Office region first, and that Western needs to reconcile the reinstatement of power proposal with the notice to be given to those purchasing the penalty power. Western plans to provide notice to all long-term firm power customers within the project's marketing area. Of these customers, only those not currently being penalized for non-compliance with the IRP/small customer plan provision of these regulations may be offered an opportunity to place the penalty power under contract. The comment regarding the need to reconcile the reinstatement of power with the withdrawal notice timing is valid. The regulations have been changed to avoid any conflict.

8. Native American Issues

a. Background

In the proposed Program, Western expressed an expectation that resource pool power would be made available to Indians for use on the reservation. No utility status was required as a prerequisite to receipt of an allocation.

b. Comments and Discussion

Western has taken several steps toward assisting Native Americans in meeting their needs for cost-based hydroelectric power. In the past, the benefits of hydropower have been realized by Indians through allocations to cooperatives that serve tribal load. In the future, Western expects to make allocations directly to the tribes.

A number of comments were received on Native American utility status, ranging from strong objections to eliminating the utility responsibility requirement to strong support for eliminating it. Interested parties commented that the definition of preference customers should remain fixed, or otherwise the maximum will be taken from existing customers in later resource pool increments. Western has always considered tribes to be preference entities, but has not historically allocated power to Native Americans in the absence of utility status, eligible irrigation load or special legislation enacted by Congress. Western's change in policy, through removal of the utility status requirement, is in keeping with the spirit of DOE's Indian policy, and recognizes the special and unique relationship between the United States and tribal governments.

This limited and narrow policy change does not subvert the preference clause set forth in section 9(c) of the Reclamation Project Act of 1939. An overview of the range of preference customers Western currently serves helps put this issue in perspective. Western has marketed power historically both to preference utilities, such as municipal utilities and cooperatives, and non-utilities, such as irrigation districts, Federal installations, universities and prisons. Utility status is required for cities to be eligible to receive Western power under the preference clause. *Salt Lake City et al.* v. *Western Area Power Administration, et al.* 926 F.2d 974 (10th Cir. 1991). This precedent is not disturbed or overturned by these regulations. Western has discretion to determine the eligibility of Indian tribes and other entities entitled to preference in the allocation of Federal power. This policy change is limited in scope, in accordance with the policy underpinning described above, and is not a precedent for future erosion of the preference clause.

Comments were received favoring a 3 percent resource pool going to Native Americans if there is no disruption to the preference customer currently serving those loads. Comment was also received that new customers should be accommodated from new/expanded resources instead of taking power from existing customers that already have rates higher than the regional average; and expressing the view that it is not in the public's best interest to extend preference beyond the requirement of utility status.

No disruption to the preference customers currently serving tribal loads need occur. Proposals for providing allocations directly to the tribes will be developed on a project-by-project basis during the allocation of power from project-specific resource pools. Many of the more detailed comments Western has received on the issue of delivery of power to Native Americans cannot be answered at this time. However, some basic approaches have been set forth in this rule in section 905.35 and in

section IV of this supplementary information section. Western will consider arrangements for the delivery of the benefits of cost-based Federal power to non-utility Native American tribes, such as through credits on power bills.

Customers commented that preference and cost-based pricing must be observed and there should be no disruption to preference entities currently serving Native Americans. Customers and stakeholders commented that most Indian tribes already get 50 percent of their needs through coops; the arrangements should not result in financial hardship or additional responsibilities for the cooperative; the distribution cooperative should be kept as part of the transaction—possibly through the use of bill credits; the existing service territories of cooperatives must be protected; rural electric cooperation has been pledged to assure that delivery of power allocated to the tribes takes place and that a monthly billing credit approach is evolving in the Eastern Division of Pick-Sloan; and Western's allocations to tribal members should be based on usage within the servicing cooperative's territory. Western was also asked to put provisions in firm power contracts with cooperatives requiring distribution of power to the tribes at fair and reasonable costs.

Entities providing delivery services, such as rural electric cooperatives, should be fairly compensated for services provided. No additional responsibility will be required without appropriate financial compensation. Preference and cost-based pricing will be observed. Due to the decision to allocate power directly to tribes, without regard to utility status, there should not be any threat to the existing service territories of cooperatives because of these regulations. Western understands that some tribes are considering utility formation, but this action would not be required to receive a firm power allocation from Western.

It is true that many Indian tribes currently served by rural electric cooperatives already receive a portion of their needs from Western through the cooperative's blended rate. The amount varies from tribe to tribe. The magnitude of the benefit already received, among other factors, could influence Western's development of proposed criteria for future allocations of power from project-specific resource pools.

There was a question as to how tribes being served by investor-owned utilities will be handled. Western has not decided how tribes being served by investor-owned utilities might be handled. While Western's rural electric cooperative customers have been cooperative in working with Western and the tribes on workable delivery arrangements, investor-owned utilities serving reservation load have not been similarly involved to this point. A potential exists for the investor-owned utility community to resist comparable delivery arrangements based upon retail wheeling concerns. This issue will be addressed during Program implementation.

Diverse comments were received on the Pick-Sloan marketing area, with some comments favoring expansion; other comments favoring reduction; with most arguing for maintenance of the current Pick-Sloan marketing area. Western does not believe that equity or the public interest is served by adjusting the Pick-Sloan Missouri Basin Program-Eastern Division marketing area in the Power Marketing Initiative. Existing customers outside of the Missouri River Basin, principally in Minnesota and Iowa, have developed contractual arrangements with supplemental suppliers, have transmission arrangements with Western or third parties, or in some cases constructed transmission facilities to receive Federal power. Changing the marketing area to exclude these customers would create unnecessary disruption in regional power supply arrangements and lead to resource uncertainty that could hinder quality integrated resource planning. For these same reasons, Western will not require a larger withdrawal from customers located outside the Missouri River basin.

A comment was received that the Blackfeet Nation should be included in the marketing area for the Eastern Division of Pick-Sloan. The marketing area of the Pick-Sloan Missouri Basin Program-Eastern Division need not be expanded to include the reservation of the Blackfeet Nation. As the reservation is east of the Continental Divide in Montana, it is currently within the marketing area.

It was suggested that there is a potential for cooperation between a tribe and a rural electric cooperative on integrated resource planning. Western agrees that there is potential for cooperation between a tribe and a rural electric cooperative on an integrated resource plan. In addition to the benefits of joint planning and avoiding duplication, the tribe and the cooperative could apply for IRP cooperative status and receive an additional 6 months to submit an initial IRP.

The intent of the Program is for the benefits of hydropower allocations to go directly to individual tribal consumers. This is consistent with treatment of other Western customers. Tribal councils will be involved in the process of accomplishing this goal.

There were many comments concerning power allocations. Questions received were: (1) Will the tribes be able to act with complete independence in determining who receives the benefits? (2) What types of loads are appropriate targets for Western power? (3) Who will hold the allocation? (4) How will transmission compensation be handled? (5) How will the closed/open reservation issue be addressed? (6) Who must approve the agreement? (7) Who will be responsible for paying Western? Comments stated that a tribe should be required to demonstrate the existence of an agreement with a viable utility capable of delivering power and that the allocation should be made to the tribe and the utility that will transfer the resource; Western must be willing to reduce allocations to cooperatives that would otherwise benefit from allocations to tribes; the benefit of the allocation should be reflected on the power bills of the tribes; and allocations for tribes should be based on "usage by tribal members within the preference customer's service territory." Western sees no need to reduce allocations to cooperatives that would otherwise benefit from allocations to tribes. In the Eastern Division of Pick-Sloan, most of the discussion with tribes and customers regarding delivery of power has focused on the use of a bill crediting mechanism that could avoid this issue of undue benefits.

Concerns have been raised over Western providing power to tribes "for free." Western will not provide power to tribes free of charge. Native Americans will pay the same rate for power as any other customer.

Additional comments state that a resource pool of 25 percent is needed to meet the needs of tribes in the Missouri Basin today and into the future; the benefits of hydropower allocations must go directly to individual tribal consumers; tribes should get all new Pick-Sloan power resources due to changes in operations; the tribal councils should determine how the benefits of hydroelectric power are distributed to tribal members; Western should support a congressional super-preference for the tribes; and Western should serve all Native American existing load and meet all load growth with Federal power. Resale of Western's allocations should be allowed pending a need for the power. In response, Western maintains that the tribes should

receive their fair share of the marketable resources available. A power reservation for Native Americans of 25 percent of the current commitments from the Eastern Division of the Pick-Sloan Missouri Basin Program is far greater than that needed to meet a fair share of the power needs of the requesting tribes. A 25 percent resource pool would equal 500 MW of firm power, a resource far in excess of the loads of all potential new preference customers in the region. As documented in the EIS, there are increased environmental impacts associated with progressively larger resource pool sizes. Western believes that an extension of less than 90 percent of the resource to existing customers may lead to unnecessary power supply dislocations and potential development of new, but largely unneeded, supply-side resources, lessening the efficiency of the integrated system and defeating the purpose of the Program. Western sees no reason to allocate power to an entity in amounts greater than its loads, as this would deny a valuable renewable resource to existing customers. It is contrary to Western's policy and undermines Federal law to allow a customer to resell hydropower to third parties. Neither equity nor environmental quality is served by withdrawing power from existing customers to meet the load growth of new customers. Western intends to allocate power to Native Americans for use on the reservation out of project-specific resource pools, but will determine the size of the allocation based upon the need to meet an appropriate share of the load for eligible new customers.

Comment was received that the resource pool be enlarged to 4.5 percent to assure the pool is not so small that it limits a tribe's "fair share" or that the expectations of existing customers are not fixed too high. Over the last several months, Western has developed an estimate of the loads that exist on reservations within the marketing area of the Pick-Sloan Missouri Basin Program-Eastern Division. Information on the hydropower benefits currently being received by reservations has also been compiled. Based upon this information, and information from customers relating to Native American loads, a 3 percent initial resource pool was proposed. Comment was received that the proposed 3 percent initial reservation of Pick-Sloan Eastern Division power was not enough to meet a fair share of the needs of tribes, and should be increased to 4.5 percent. To assure that a fair share of the load of Native Americans is met, Western has increased the size of the initial resource pool to 4 percent.

Comments were received regarding the size of the resource pool. At present, Western supplies about 26 percent on average of the total load of firm power customers in the Eastern Division of Pick-Sloan. The size of the initial pool is large enough to meet a considerably higher percentage of tribal load than many existing customers enjoy.

Comments on the "fair share" concept were that Western has not addressed the tribal arguments in support of a greater than "fair share" allocation; Western's estimate that 45 MW of Pick-Sloan power is enough to meet a fair share of the needs of the tribes is flawed because it assumes a "fair share" would not exceed 70 percent and the load analysis was based on 1990 census data when the delivery of power would actually begin in the year 2000; and the term "fair share" should be discontinued because it is ambiguous and promotes misunderstanding and mistrust. Western regrets that tribes oppose the use of the term "fair share" due to its ambiguity. Western will not define "fair share" in this final rule, as this determination can be made better during the future project-specific allocation process for new customers within the Eastern Division marketing area.

During the comment period, it was suggested that tribes should receive all "new" power resources resulting from operational changes or upgrades. In contrast, another comment asked Western to accommodate new customer needs exclusively from new resources and not from a resource pool. According to this commenter, if needy groups need assistance, it should be in the form of subsidies borne by all taxpayers and not through actions that will increase power costs for rural America.

Equity is not served by dedicating future increases in resources, whether due to operational changes favorable to power production or upratings at existing powerplants, to one class of customers. The Power Marketing Initiative provides tribes with significant new benefits. Nor will Western limit new customer access to power to new power resources only. The creation of a resource pool serves the policy of promoting widespread use of hydropower. Limiting new customer allocations to potential new power resources would create additional uncertainty for new customers, as there is no assurance of the availability of such resources during any defined time period.

To date, Western has received full cooperation from Eastern Division cooperatives on the issue of delivery of hydropower benefits to reservations. Even if unanticipated obstacles to the delivery of hydropower benefits arise, Western retains the right to provide the economic benefits of its resources to Native Americans directly. Given this flexibility, Western sees no reason to include language that makes delivery of power/power benefits to tribes a condition of firm power sales contracts for cooperatives. Western, Native Americans and Western's Eastern Division customers will continue to work together to assure that the tribes receive the benefit of their allocation. Western has responded positively to requests for assistance in negotiations.

One comment suggested that Western evaluate tribal irrigation potential and integrate that irrigation into the Pick-Sloan similar to the Standing Rock Sioux and the Three Affiliated Tribes under the Water Resources Development Act of 1992. Another comment asked that more tribes receive compensation like that received by the Fort Berthoud, Standing Rock Sioux and Three Affiliated tribes. Special legislation would be required to accomplish these suggestions. Western will consider allocation of power to eligible irrigation districts in a future, project-specific resource pool allocation process.

Western has no authority to adjudicate Indian water rights and negotiate such rights with the states. This activity is outside the scope of Western's mission, and should be addressed through direct discussions with the responsible agencies.

Western will not adopt the comment that only short-term commitments of firm power should be made pending resolution of Missouri River Basin tribal issues. Significant resource uncertainty would continue for existing customers in the Eastern Division if this comment were adopted, as contracts currently in place expire in the year 2000. Instead, Western will continue to work with tribes in the upper Midwest in parallel with Program implementation.

Several comments were received advocating flexibility in the allocation of Western power to Indian tribes. Instead of limiting allocations to use on the reservation, these commenters asked that tribal members living adjacent to the reservation and within the servicing cooperative's service territory also be allowed to receive the benefits of cost-based Eastern Division power. Another comment asked how Western intended to address the closed/open reservation issue. In order to retain the flexibility to address these situations, this Federal Register notice states that Western

expects to make allocations to Native American tribes for use on the reservation and potentially off the reservation under certain circumstances as determined by Western. Western wants to reserve the flexibility to tailor the allocation of power from project-specific resource pools to meet regional circumstances.

Western was requested to advise whether the Mni Wiconi special allocation of 6 MW is part of the proposed 3 percent resource pool. The Mni Wiconi special allocation of 6 MW is statutory, and is not part of the Eastern Division proposed 3 percent initial resource pool.

An objection was raised regarding the distribution of power within the Department of Defense where the total military electrical load is being reduced, with comment being received that a higher Federal purpose would be served by reallocating the power to the tribes. Western does not have the contractual right to withdraw power from the Department of Defense to meet Native American needs. Under an existing contract that is effective through the year 2000, Western has agreed to allow the Department of Defense to shift its allocation among Air Force bases under circumstances such as a base closure. Western cannot allocate this power to tribes, as it is already contractually committed.

One comment stated that the tribes lost over 160,000 acres of land without just compensation when Oahe was constructed, and that the tribes have never received the power benefits from Pick-Sloan despite the loss of land. Just compensation for the taking of lands to construct the Pick-Sloan Program is not an issue that is appropriately addressed through an allocation of power by Western. When the taking of lands took place, compensation was given to tribes. If the compensation was inadequate, redress is available through the courts, through special legislation, or through the agencies that took the property.

It was suggested that a special tribal nation allocation be established from power revenues to provide just compensation. Western has no authority to use power revenues deposited in the Treasury to create a special tribal allocation to provide just compensation. Only Congress can direct the use of revenues in such a manner.

Western declines to create a special class of power exclusively for tribes. In the absence of direction from Congress to the contrary, Western believes it is inequitable to create administratively a special, preferential classification for Indians. Instead, Western intends to meet the needs of tribes through allocations from project-specific resource pools.

Nor will Western create a special IRP provision for Indians. Under section 114 of the Energy Policy Act of 1992, Western does not have the discretion to develop special provisions for tribes. However, Western intends to provide integrated resource planning technical assistance to Native American tribes upon tribal request. We are committed to assisting the tribes to successfully develop and implement IRPs.

Comment was received that the tribe must recapture capital ownership rights in RUS plant equipment based on the Consumer Price Index, and that Indians should be provided technical and financial assistance in developing a utility on a par with the rural electric cooperatives and investor-owned utilities. No authority exists for Western to adopt the comment that a tribe must recapture capital ownership rights in RUS plant equipment based on the Consumer Price Index. Nor does Western have any role with respect to disconnection of service policies. Western will remain neutral on the issue of tribal utility formation. Technical and financial assistance to a tribe or any other group in support of utility formation will not be provided, as this cost is the responsibility of the entity seeking utility status and should not be a project cost borne by all project ratepayers.

Western was asked whether it is implementing retail wheeling. Western is not imposing retail wheeling on its Eastern Division rural electric cooperative customers under the Power Marketing Initiative. The cooperatives have been supportive of the delivery of the benefits of power allocations to tribes, and are supportive of a bill crediting approach to accomplish Western's goals in a manner that avoids the need for a separate transmission service arrangement.

Comment was received asking why Western was expanding its resource allocations to tribes when the overall SLCA/IP resource was declining. No decision has been made on the size of the resource pool for potential new customers within the SLCA/IP marketing area. The size of this project-specific pool will be determined at a later date. Western is working with the Ute Mountain Utes to determine if project use power might be made available for certain irrigation pumping loads before existing firm power contracts expire in the year 2004.

Comments were received by customers and stakeholders that the efforts of Western to work with the tribes on implementing the Program is appreciated; that the United States should abandon the policy of decimating Indian water rights through court adjudication and negotiation with the states; the relationship between Western and Indian tribes is expected to be one of government to government; and Western must follow DOE's commitment to the trust responsibility reflected in DOE's Indian Policy and "redo" the Program to reflect tribes' unique relationships with the Federal government. Western supports the Department of Energy's American Indian policy which stresses the need for a government-to-government, trust-based relationship. The key theme throughout the Department's policy is consultation with tribal governments so that tribal rights and concerns are considered prior to action being taken. Western has met with Indian tribes and tribal representatives throughout the Program public process, and is currently meeting with tribes located in the Missouri River Basin on a monthly basis. To mitigate the economic conditions on reservations within Western's marketing area, Western has responded favorably to the comment that tribal utility status should not be required before a power sales contract can be offered, and has also adopted tribal comment by agreeing to enter into contracts with the tribe directly. These policy decisions show how Western has been responsive to the needs of tribal nations, and that the consultation has been meaningful and substantive.

9. Resource Acquisition by Western

a. Background

In the proposed Program, Western committed to the use of IRP principles in its resource acquisition and transmission planning principles. This commitment has been pursued through a separate public process, commencing with a Federal Register notice published on December 6, 1994, 59 FR 62724.

b. Comments and Discussion

The following are comments received which were addressed in the separate public process on the use of IRP principles by Western, or are more appropriately addressed in the project-specific implementation of the IRP principles: (1) Western should not develop non-hydro resources, as this would have a negative impact on our IRP. (2) Western's resource acquisitions should be limited to meeting contract rates of delivery. (3) Western should identify current and future transmission development in its IRP, as this information is critical to our IRP. (4)

How will Western acquire DSM? Western should not conserve its hydroelectric power, but should market all of the available resource. (5) Western should emphasize the purchase of energy efficiency and renewable energy from Western customers over other resources. (6) Western should purchase efficiency and renewables, because cost-based rates discourage the installation of energy efficiency measures. (7) We support IRP by Western. It would be appropriate for the Bureau of Reclamation to use IRP principles in its pump replacements, generator rewinds or other project enhancements and system improvements. (8) Any reduction in Western's costs will enhance our competitive position. (9) We do not support the concept of Western reducing customer demand through Western's adoption of IRP principles. (10) We are unclear whether Western could free up power resources by funding energy efficiency and demand-side management projects. (11) We are unsure if Western's commitment to IRP principles will apply to investments Western is considering in the very short term. (12) We are concerned about the timing of the adoption of IRP principles by Western—it should apply to Navajo transmission and Glen Canyon replacement power and to resources that have not yet been acquired as of January 1, 1995. (13) Western should use IRP principles immediately, without waiting for completion of the public process.

Several relevant comments will be addressed briefly here.

One customer commented that Western's use of IRP principles could impact customer resource planning, and that Western should implement its commitment before requiring its customers to complete their IRPs. Additionally, Western should be sensitive to the timing of customer IRPs and Western's use of IRP principles, especially if Western's actions impact the amount or the price of the Federal resource. Western agrees that its use of IRP principles could impact customer planning. Every attempt was made to conclude the parallel public process quickly, to provide customers with more certainty as they prepare their individual integrated resource plans. The implementation of Western's commitment to use principles of integrated resource planning is described in a Federal Register notice published on June 9, 1995 (60 FR 30533).

A customer commented that it supports future contracts that allow customers the flexibility to acquire firming resources, and urges Western to enter into contracts to purchase customer-owned renewable resources. Additionally, customers should be given the opportunity to refuse Western purchase of firming energy, and should be given a priority to purchase surpluses. Western concurs that customers be given the opportunity to refuse Western purchase of firming energy. For all projects receiving resource extensions under the PMI, Western will develop contractual language which would allow the customer to assume the responsibility of acquiring resources to firm up Western's hydroelectric commitments if the customer so chooses.

Another customer commented that adoption of IRP principles by Western should not mean abandonment of lowest possible cost consistent with sound business principles; and that Western's role is one of a marketer of power from Federal generation, and not acquiring non-Federal power through the use of power revenues. Adoption of IRP principles does not mean abandonment of lowest possible costs consistent with sound business principles. To the contrary, use of IRP principles will be a tool that will assist Western in keeping costs low.

10. Implementation

a. Background

Western proposed to offer extension contracts to existing Pick-Sloan Missouri Basin Program-Eastern Division and Loveland Area Project customers upon submittal of their IRPs to Western. Western also proposed to extend to existing customers a pro rata percentage of marketable resources available at the time current contracts expire.

b. Comments and Discussion

Comments were received stating that actual contract rate of delivery values need to be in the contracts extending resources because a percentage of a resource available at the end of the term of existing contracts does not offer customers the certainty needed to prepare a quality integrated resource plan; that it would be extremely beneficial to know the marketable capacity and the resources to be committed as soon as possible—when the Corps of Engineers operating procedures are known, the marketable capacity should be determined; that contract rate of delivery values must be specified in the contract; and that there should be minimum resource values set forth in the post-2000 contracts. While Western understands the concern that actual contract rate of delivery values need to be in contracts extending resources, or that some minimum resource values be established, there remains a need to retain the flexibility to respond to changing circumstances in the short term. The development and completion of the Missouri River Master Operating Manual EIS is one of those changing circumstances. Western will work with customers to determine the resources and marketable capacity to be committed as soon as possible after the Corps operating procedures are known. If no better information is available, for initial IRP planning purposes, Western will provide existing customers with estimated resource commitments (based upon application of the percentages set forth in this final rule to the resources currently under contract).

Customers commented that contracts should be offered upon publication of the final rule, as the added certainty would promote quality integrated resource planning; that customers are already required to prepare and implement IRPs under the Energy Policy Act and there is no need for a further incentive to encourage IRP; that contracts should be offered upon issuance of the EIS Record of Decision subject to the submission of the customer's initial IRP; that customers will find it difficult to develop IRPs without knowing Western's exact commitment; and that it may be necessary to delay the signing of Eastern Division contracts if appropriate delivery arrangements to Native Americans cannot be worked out. Western agrees with the comments that individual customer contract offers for those projects initially covered under the Power Marketing Initiative should be made before individual customers are required by Western to submit an IRP. By adopting this approach, the new penalty provisions under the extension contracts will be effective and available if an IRP or small customer plan is unsatisfactory. In 905.37 of this final rule, Western has adopted the approach that Pick-Sloan Missouri Basin Program-Eastern Division extension contracts may be offered 30 days after publication of this Federal Register notice. This approach provides more certainty to customers by advancing the date of the contract offer, but retains a powerful incentive for quality and timely integrated resource planning by making the penalties mandated by EPAct immediately applicable pursuant to the terms of the extension contract. Contracts for extensions of resources for the Loveland Area Projects will not be offered until the analysis of potential resource adjustments in 1999 has been

completed and any adjustments are implemented. Existing power sales contracts require that this analysis be completed by 1996.

It was also suggested that the Salt Lake City Area/Integrated Projects marketing plan, Glen Canyon EIS and replacement power study should be expedited, with contract extensions accomplished concurrent with the Record of Decision on the SLCA/IP marketing plan EIS. Western agrees that customer resource certainty is promoted by expediting the Salt Lake City Area/ Integrated Projects marketing plan, the Glen Canyon EIS and the replacement power study. Western is making every effort to complete the processes we are managing, and is working with the Bureau of Reclamation to help complete the Glen Canyon EIS as well. Western will evaluate application of the PMI to the SLCA/IP after its electric power marketing EIS is completed and the associated marketing criteria and contract changes are implemented.

11. Other Marketing Issues

a. Background

Historically, Western has marketed firm power at a level defined in project-specific marketing criteria. During periods of drought, Western has purchased firming power to meet the obligations defined in the marketing criteria. When water conditions are good, surplus energy (and occasionally surplus capacity) may be available for sale on a short-term basis. Typically, these surpluses are sold to regional utilities. These regional utilities may or may not be long-term firm power customers; these sales are often made to both preference entities and investor owned utilities.

Historically, Western's project-specific marketing approach has been based upon public comment and policy decisions made during the development of specific marketing criteria. Some resources are marketed on a resource pattern basis, while others are based on the load pattern of the customer.

Western proposed to extend a major percentage of the power currently committed to existing customers beyond the expiration date of existing contracts. Western is not proposing to acquire new resources to meet customer load growth.

b. Comments and Discussion

A number of commenters supported the current definition of Pick-Sloan Missouri Basin Program-Eastern Division marketable resources and the marketing criteria. Any change should take place under a separate public process after consultation with customers. Several commenters suggested that existing preference entities should have a right of first refusal to all non-firm power at the price of production and transmission and that non-firm energy should be sold to customers that demonstrate feasibility of purchase in their IRP, and when that customer can firm the hydroelectric energy. They also suggested that resources made available as a result of penalty impositions should be marketed to customers of the same Area Office.

There were numerous comments on how to establish the marketable capacity. Some suggested that a separate approach may help maximize the capacity Western has available to market. Several of Western's customers are power suppliers that have energy flexibility with their own resources. If that flexibility can be utilized by Western to minimize their risk in high or low water years, the Western capacity could be based on something other than a lower decile water year such as a higher percentage of average hydrology. This would be a departure from the load pattern type resource. In bad water years, the deliveries would be lower, and the deliveries would be higher in good water years. This would minimize the purchase and sale of firming energy. Marketable capacity might be based on average water conditions if the customers could handle some of the swings.

Changes to Western's project-specific marketing policies are not appropriate in a Western-wide initiative such as the Energy Planning and Management Program. Adjustments in Western's current marketing approach for a specific project can be appropriately addressed in a separate project-specific proceeding at a later date. The extension formula provides for a pro rata commitment to existing customers, based upon the resource available at the end of the term of existing contracts. Changes in marketing approaches are best addressed at that time on a project-specific basis and not during the Western-wide development of the PMI. Marketing issues that might be appropriate for discussion at that time include policies for sale of non-firm energy, departure from a load pattern resource and adjusting the firm power risk level to a different percentage.

Several comments were received on the proposal to restrict transfers of Pick-Sloan Missouri Basin Program—Eastern Division allocations held by the State of South Dakota and the Department of Defense. Under existing contracts, these two customers have enjoyed the flexibility to transfer Western's hydropower and concentrate allocations in specific locations with the goal of maximizing the benefits of Federal hydropower. This contractual right exposes supplemental power suppliers to load variations, undermining the resource stability which promotes quality integrated resource planning. By proposing some restrictions in the final rule on this flexibility in the contracts extending resources, Western intends to create a more stable resource commitment to customers that would benefit regional planning, and make future firm power customer contracts more consistent and equitable.

Contrary to the comments of the Air Force, the final rule does not require that an entire allocation be lost upon base closure after 2000. Movements of allocations are allowed when the contract rate of delivery exceeds the load at a particular site; this would be the case when a base closes.

The final rule does not impose unfair or unusual constraints on government customers. If anything, the regulations treat Federal and state government the same as other Eastern Division customers by removing an advantage other customers do not enjoy. While this provision may impact power costs for the Air Force and the state of South Dakota, broader regional advantages are also realized from the increase in power supply stability.

The seasonal proportional share concept does not violate least-cost principles. This same approach has been used in allocations to new customers in many historic project-specific marketing plans.

Several commenters recommended that Western maximize the stability of the planning environment, and do everything possible to control costs and identify the costs of other agencies that adversely impact the cost of power. They also suggested that Western recognize the potential structural changes in the electric utility industry by beginning a meaningful dialogue on unbundling of services and must avoid new subsidies or perpetuating old ones. A further suggestion was that Western should further unbundle services to expand Western's customer base and those receiving project benefits.

Western is committed to enhancing resource stability through control of costs. Many positive steps have been taken to reduce Western's expenses, and more are planned for the future. Western intends to be responsive to customer needs and utility industry changes. This responsiveness includes a willingness to enter into a meaningful dialogue on unbundling of services. Most recently, a dialogue on this subject has taken place among Western and

Central Valley Project customers. Western agrees with the comment that new subsidies must be avoided and old subsidies must be eliminated. Western will take advantage of consultation opportunities with customers to maximize communication.

One commenter was concerned that in the responses to comments that were part of the proposed rule, Western makes the statement that it has no general legal obligation to acquire additional resources to meet the load growth of its customers. They felt that this statement is unnecessary and constrains the considerable authority given to Western by the Tenth Circuit Court of Appeals.

Western does not intend the publication of the proposed Program or this final rule to limit Western's legal authorities recognized by the Tenth Circuit Court of Appeals in *Salt Lake City et al* v. *Western Area Power Administration, et al.*, 926 F.2nd 974 (10th Cir. 1991). However, Western does not have the legal authority to acquire resources to meet customer load growth.

Several commenters supported efficiency improvements to existing project facilities, and asked that customers have a right of first refusal to participate. Any increases in capacity/energy should be made available to the financing customer, or as a substitute for other firming resources. Western should commence a process along the lines of NCPA's 1992 proposal to the House Interior Committee.

On the issue of customer financing of improvements to project facilities, Western has decided to retain its flexibility to address unique opportunities in a tailored manner as opposed to establishing a Western-wide policy. In the past, Western has made increases in capacity/energy available to the financing customer. Western continues to believe this concept makes sense, and will likely apply it in the future under most circumstances.

Commenters applauded Western's decision to continue to provide transmission access for renewables and endorsed Western marketing a variety of products out of the Central Valley Project. Western appreciates this supportive feedback.

One commenter remarked that access to Western hydropower should be based on customer adoption of a mix of conventional, renewable, and demand-side resources. This commenter believes that contract renewals should be a reward for DSM implementation. Western declines to allocate power based on customer adoption of a mix of conventional, renewable and demand-side resources. Nor will contract renewals be a reward for DSM implementation. Resource extensions should be the foundation for customer IRP, and not a carrot to induce the selection of some preconceived resource ideal. Integrated resource planning should lead to the selection of resources based on their individual merits as determined through the IRP process. Western addressed at length the issue of incentives in the responses to comments that were part of the Federal Register notice of August 9, 1994. That discussion is still valid and is incorporated as a response to these comments.

Allocations from project-specific resource pools will be completed before contracts with existing customers expire. Power that is reserved for new customers but not allocated and resources offered but not placed under contract will be offered to existing customers that contributed to the resource pool. Western expects that all firm power will be marketed. Withdrawal mechanisms will exist for purposes described in the final regulations.

D. Other Issues

1. Support of Renewables

a. Background

In the proposed rule, Western stated that consideration would be given to the allocation of power from project-specific resource pools to firm up renewable resources.

b. Comments and Discussion

Western received several comments that strongly support the concept of making power available to preference entities to firm up renewable resources. Those comments stated that firming renewables would expand that marketplace for renewables and facilitate the further development and commercialization of this technology; that the initial pools for the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects be increased to 6 percent of the available resource, with half of the increased pool being dedicated to help firm up renewables; and that the increased experience and economies of scale would make renewables more attractive and cost-effective and renewable investments would help utilities diversify against future fuel price and environmental risks. However, one commenter stated that funding renewable or nontraditional power supply may be a worthy social objective, but this is not Western's role and incentives to encourage non-traditional resources should be developed at the community level through the customer IRP process.

Western has a strong desire to support the development of renewables. Western has in the past and plans in the future to assure the continued progress of renewable resources as an important national resource. The following examples demonstrate Western's commitment.

In the Eastern Division of the Pick-Sloan Missouri Basin Program, the Mid-Continent Area Power Pool (MAPP) has in place a means to accredit capacity for renewable resources based on historical performance. Accreditation relieves the renewable resource owner from the cost of purchasing power reserves due to the intermittent nature of power production by this type of resource. If a Western customer is not a MAPP member, Western may act as an agent for the customer to gain MAPP accreditation of capacity for the renewable resource.

Recently, Western has committed to undertake a market assessment of the potential for solar power in the southwestern United States as part of the Solar Enterprise Zone (SEZ) initiative. Western has offered its marketing, transmission and power system operations expertise to the SEZ.

Western has been active in promoting renewable energy in partnership with Native American Indians. Western, in coordination with the Navajo Nation, the Department of Energy and Sandia National Laboratory, has supplied forty photovoltaic units to the Navajo Tribal Utility Authority for installation at remote homes on the Navajo reservation. As extensions of distribution lines to these remote locations would be prohibitively expensive, installation of photovoltaic technology is a commercially viable alternative. Western has contributed to an assessment of the wood fuel supply on the White Mountain Apache tribe reservation to determine the quantity of this fuel available for power cogeneration. To promote Indian health, Western is contributing to the Navajo Rootfuel Promotion project, which will evaluate the feasibility of growing and harvesting rootfuels to replace coal as a fuel in Indian homes. Another example of a partnership between Western and Native Americans is an assessment of the feasibility of producing biogas fuel from solid wastes to meet the needs of remote Navajo villages and cluster homes.

In addition to sponsoring many workshops and publishing numerous publications on IRP, Western has created the Resource Planning Guide, a technical assistance tool that will help customers to prepare integrated resource

plans as required by section 114 of the Energy Policy Act of 1992. The RPG is a personal computer-based piece of software that will allow customers to evaluate renewable resources as a future resource.

Western's Sacramento Area Office has provided technical assistance for a feasibility analysis of using wind-generated energy at Lawrence Livermore National Laboratory. If the analysis is favorable, Western will work with the laboratory to develop the use of wind energy. Western has also made its transmission system available to wheel power from wind generation to load.

Most recently, Western has taken steps to implement its commitment to use principles of integrated resource planning for its resource acquisition and transmission planning activities. Demand-side and renewable resource options will be considered side-by-side with thermal generation purchase opportunities. The implementation of the commitment to use principles of integrated resource planning is described in a Federal Register notice published on June 9, 1995 (60 FR 30533). Although strongly supportive of renewable resources, Western believes that the concept of setting aside a portion of Western's purchase power appropriations exclusively to acquire renewables is best addressed through project-specific implementation of IRP principles.

While Western wants the ability to support renewable resources through allocations from project-specific resource pools, it is premature to designate a portion of the pool exclusively for the support of renewable resources. Western's resource pool reservations are for use beginning in the year 2000 for the Eastern Division of Pick-Sloan. Western does not want to commit a block of power today for the benefit of renewable technologies, when the targeting of resource pool power can take place more effectively nearer the date that existing contracts expire and regional needs are better known. Devotion of a block of power today to a single use, such as fostering renewables, could work to the disadvantage of other pool uses, such as allocation of power to American Indians. Western reserves the right to allocate resource pool power in support of renewables, but will not now exercise that right.

2. Project Use

a. Background

Project use power is that power reserved to meet project needs pursuant to law, such as pumping irrigation water. Power in excess of that needed for project use is available to Western for allocation. Western made no proposal to change the definition of project use power in the proposed Program.

b. Comments and Discussion

One comment stated that Western should maintain the current definition of project use and that an allocation of Pick-Sloan power to the Garrison Diversion Conservancy District is important to them under present operations and absolutely essential for future requirements. Given the Garrison Diversion Unit reformulation legislation passed by Congress in 1986, the commenter thought consideration should be given to a specific power allocation on reserve in their name for operation of facilities authorized in the 1986 legislation. Any change in the suballocation of costs should take into account the interests of the irrigation districts. This commenter also stated that all long-term contracts should have provisions for withdrawal to meet the pumping power needs of the Garrison Diversion Unit, as farmers need reasonably priced electricity for use on the farm.

Project use power is not allocated but is reserved pursuant to the authorizing legislation for each project. Since Western does not allocate project use power for water pumping, this type of power is not a part of the PMI. Western's firm power contracts for the Eastern Division presently contain withdrawal provisions to meet project use load as it develops. Future contracts will contain similar withdrawal language for project use.

Since these regulations do not address any changes in the definition or scope of project use power for pumping purposes, the suballocation of costs is similarly not a part of the PMI.

III. Summary of Changes From the Proposed Program

Western has made several revisions to the proposed Program in response to public comments on the Federal Register notice of August 9, 1994. All references to Program "procedures" have been deleted, and replaced with "final rule" or "regulations" to better reflect section 114 of the EPAct and the fact that the final rule will be published in the Code of Federal Regulations. The final rule clearly separates the Program's provisions from the explanatory text which has been shifted to the supplemental explanation section. To eliminate confusion, the definition and use of the word "purchaser" was eliminated and replaced with "customer."

In the IRP subpart (subpart B), Western broadened language relating to member-based associations in recognition of our wide variety of customers. Determination of the small customer threshold of 25 gigawatthours (GWh) was changed to a 5 year average, instead of the proposed annual measurement. A customer's competitive situation was added as a factor in the determination of the reasonableness of an IRP. Provisions relating to irrigation districts were extended to other customers that serve water pumps and comparable equipment as part of their load. The section dealing with the use of IRP principles by Western was deleted, in recognition of the completion of a separate public process (60 FR 30533 (June 9, 1995)) on this subject. Finally, clarifying changes were made in a variety of areas, including penalties, IRP action plans and progress reports, public participation and small customer plans.

With regard to the Power Marketing Initiative (PMI) provision (subpart C), the term of contract has been extended from 18 to 20 years. For any project initially covered by the PMI, offers of extension contracts will take place upon no sooner than the effective date of the final rule. For the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects, the initial resource pool was increased to 4 percent, while the two subsequent pool increments were reduced to 1 percent each. Application of the percentage extension for subsequent resource pool increments was changed to the resource that is under contract at the time. The proposal to exempt customers with contract rates of delivery of one MW or less from contributions to the resource pool was deleted, as was the proposed new customer exemption from withdrawals to form later resource pool increments. Delivery of the benefits of cost-based Federal power to Indian tribes is now directly allowed. Various clarifying changes were also made in the PMI.

IV. Supplemental Explanation of the Rule

This section includes an explanation of certain IRP provisions, and it also sets forth Western's policy regarding the future application of the Power Marketing Initiative. Section 905.11(b)(3) addresses the concept of cost-effectiveness. Cost-effectiveness is basic to a resource evaluation and therefore must be pursued. Western recognizes the criteria for determination of least-cost options in each IRP will

vary among Western's customers because of differences in their size, type, resource needs, geographic area and competitive situation. For Western's smaller customers, Western may approve an IRP that is a generalized analysis which describes the cost comparison processes utilized and economic assumptions used. These may be limited to, for example, the total resource cost test for demand-side resources and may involve use of simplified methods and procedures to analyze important variations in supply-side characteristics such as service lives, construction periods, and price inflation influences. However, Western would expect its larger customers to prepare a more in-depth evaluation of demand and supply resource cost effectiveness, on a comparable basis. This may include evaluation of demand-side resources under some combination of the total resource cost, participant, rate impact measure, utility, or societal tests; life-cycle screening and screening curve analyses for the supply-side resources; production costing analysis; rate impact analysis; risk analysis; and impacts to the power supply chain as applicable.

Full public participation is the subject of section 905.11(b)(5). Western will not require a customer to take any action inconsistent with existing sunshine laws and other open meeting requirements. Given the wide diversity of customers that Western serves and the variety of resource planning circumstances that they face, Western will not mandate that customers hold a specific number of public meetings.

Section 905.12 describes how customers may be allowed to form an IRP cooperative. Western believes the benefits of joint integrated resource planning can be significant and encourages customer consideration of this approach when an appropriate resource planning "decision block" exists. Examples of such a "decision block" are when all the entities covered by an IRP are contained within a power supply chain or regional entities plan for joint supply-side, demand-side, and/or renewable resources above and beyond the Western resource, so long as individual member responsibilities and participation levels are identified.

Examples of entities likely to receive Western's approval include (1) existing first-level MBAs which were formed to meet the load growth of their members through supply-side resources, such as G&T cooperatives; (2) existing second-level MBAs, such as organizations with G&T cooperative members, which may be granted IRP cooperative status due to the magnitude and effort involved in development of such comprehensive IRPs; and (3) new associations where potential members have not previously evaluated supply-side and demand-side resources on a joint basis.

The criteria that will be used in evaluating IRPs are set forth in section 905.11(b). Customers will make their own choices regarding resource type, quantity, and timing in accordance with their IRP. Western will not dictate resource choices.

Section 905.13(d) contains special irrigation district and water planning provisions. Irrigation and water utility customers may use information available from an extension service or a university to judge the merits of a demand-side resource opportunity; there is no requirement to hire a consultant to independently verify this kind of information. The customer's knowledge and experience should be central in the integrated resource planning resource evaluation and selection process.

Small customer plan requirements are set forth in section 905.14. Western does not expect small customers to expend a significant amount of time and money to acquire expertise and data to prepare these plans. Western will be available to assist customers in developing an appropriate strategy for preparing the plans.

Section 905.30 deals with the applicability of the Power Marketing Initiative. It limits the initial application of the PMI to the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects. Western's Program establishes an overall framework for the marketing of power, while recognizing that future determinations must be made on a project-specific basis. Many project-specific determinations are necessary before any final decisions can be made on marketing power. Such important issues as the resource available for marketing in the future, the size of a resource pool, any adjustments to the size of this pool, and allocation criteria for new customers must be decided on a project-specific basis, with public input and appropriate environmental documentation.

Application of the PMI to the Central Valley Project, Washoe Project and Salt Lake City Area/Integrated Projects shall not take place in the absence of a future, project-specific evaluation and decision.

For Central Valley Project and Washoe Project resources, all power contracts between Western and its long-term firm power customers expire in 2004, as do the Western-Pacific Gas & Electric Company contracts. Western is presently preparing an environmental impact statement (EIS) for the Sacramento Area Office (SAO) 2004 marketing plan. Western will not make any decision at this time about application of the PMI to SAO resources for the post-2004 time period. The provisions of the PMI will be within the range of alternatives in the SAO marketing plan EIS for purposes of impact assessment. As a result of further analysis in the 2004 power marketing plan process, Western may at a later date propose through the public process adoption of the PMI for SAO resources in the post-2004 time period. If the PMI provision is implemented, Western estimates that an initial extension level percentage would be similar to those of the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects. The additional resource pool increments described in section 905.32 would also be applicable.

Application of the PMI to the Salt Lake City Area/Integrated Projects (SLCA/IP) resources will be evaluated after its electric power marketing EIS is completed and the associated marketing criteria and contract changes are implemented. Western's ongoing project-specific EIS for the SLCA/IP analyzes power marketing between now and the year 2004. If the PMI provision is implemented, Western estimates that an initial extension level percentage would be similar to those of the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects. The additional resource pool increments described in section 905.32 would also be applicable.

The resource pool size for SAO and SLCA/IP resources will be determined during a project-specific public process to reflect the actual fair share needs of eligible new customers and other purposes, as determined by Western.

Western will evaluate application of this PMI to other Western firm power contracts that expire after January 1, 2005—principally the Parker-Davis and Boulder Canyon Projects. This evaluation will be published after a separate public process and will take place no more than 10 years before termination of these contracts.

Any adjustment shall only take place after an appropriate public process. Withdrawals to serve project use and other purposes provided for by contract shall continue to take place based on existing contract/marketing criteria principles.

Section 905.32 addresses both resource extensions and resource pool size. Western's policy on these subjects is as follows. For the projects initially covered under this PMI, the project-specific resource pools (including both the initial pool and future increments)

could be as large as 6 percent over the term of the contracts. These percentages are based on Western's judgment of the hydropower needed to meet a fair share of the projected power needs of potential new customers in the applicable marketing area at the time existing contracts expire.

Western will establish incremental resource pools that make power available for potential new customers over time, without the disruptive influence of creating a large pool all at once, before the need exists. Another purpose of incremental resource pools is to provide Western with the flexibility to meet new needs that is necessary when long-term contracts are offered to customers. The following table illustrates the timing and size of the resource pool creation, as applied to the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects.

Year	P–SMBP–ED	LAP
2001	4%.	
2004		4%.
2006	Up to 1%.	
2009		Up to 1%.
2011	Up to 1%.	
2014		Up to 1%.

For the Pick-Sloan Missouri Basin Program—Eastern Division, both the State of South Dakota (State) and the Department of Defense (Defense) have been allowed to transfer Western power from one location to another. After existing contracts expire, Western will require that power commitments to specific State and Defense sites not be changed unless the contract rate of delivery exceeds the total load at that site. If the contract rate of delivery exceeds the total load at a State or Defense site, only the excess power at that site may be transferred to other State or Defense sites. Transfers are subject to negotiation of transmission service contracts for the delivery of transferred power. To be consistent with requirements for other firm power deliveries, Western will require the delivery of a proportional share of firm Pick-Sloan Missouri Basin Program—Eastern Division power at each State or Defense site in both the summer and winter seasons. If a Defense installation or facility is closed after the year 2000, the allocation may be affected by the report required in section 2929 of the 1993 National Defense Authorization Act, Pub. L. No. 103–160. Section 2929 requires the Secretary of Energy, in consultation with the Secretary of Defense, to submit a report to Congress that must contain recommendations regarding the disposition of hydroelectric power allocations to military installations closed or approved for closure outside of the marketing area of the Central Valley Project.

In section 905.33, the PMI extension formula is described. If no better information is available for initial IRP planning purposes, Western will provide existing customers with estimated resource commitments (based on application of the percentages set forth in these procedures to the resources currently under contract). Actual resource commitment numbers will be developed and included in contracts as soon as practicable.

New customer eligibility is addressed in section 905.35. Western's policy on allocation of power to new customers in the future is as follows. In order to increase widespread distribution of hydropower resources, Western will allocate a fair share of power to eligible new preference entities who do not have a contract with Western or are not a member of a parent entity that has a contract with Western.

The specific terms and conditions associated with allocations to new customers will be determined during future, project-specific public processes. All new applicants for power will be considered and be given an opportunity to receive an allocation in accordance with Reclamation law. For example, Western expects to make allocations to Native American tribes (as that term is defined in the Indian Self Determination Act of 1975, 25 U.S.C. 450b) for use on the reservation and potentially off the reservation under certain circumstances as determined by Western. Utility status will not be a prerequisite for an allocation to Native American tribes. Western will also consider making allocations to national parks and public mass transit agencies. Western will consider making power available to preference entities in support of fish and wildlife (such as power to pump water to increase or improve wildlife habitat) and to firm up renewable resources.

Proposals for providing allocations directly to Native American tribes will be developed on a project-by-project basis, during the allocation of project-specific resource pools.

Western will consider arrangements for the delivery of the benefits of cost-based Federal power to Native American tribes without utility status.

All potential new customers, both utilities and nonutilities, will be required to apply for power in a project-specific marketing plan by a date to be determined in the project-specific process. All potential new customers, except Native American tribes, must be ready, willing, and able to receive and distribute or use power from Western. Ready, willing, and able means that (1) the potential customer has the facilities needed for the receipt of power or has made the necessary arrangements for transmission and/or distribution service, (2) the potential customer's power supply contracts with third parties permit the delivery of Western's power, and (3) metering, scheduling, and billing arrangements are in place. Limits on the power received by any customer, as well as minimum load requirements, may be adopted. If required in project-specific marketing criteria, a potential new customer is responsible for transmission arrangements beyond Western's system/points of delivery necessary to receive power from Western.

An existing customer will not be eligible to receive power from a resource pool unless Western provides otherwise on a project-specific basis. A new customer receiving power from a project-specific resource pool will not be eligible to receive additional power from a subsequently available resource pool increment unless Western provides otherwise on a project-specific basis.

Existing power marketing criteria, which will remain in effect unless amended by the PMI, may be amended in the future if necessary. Section 905.36 addresses the relationship between existing marketing criteria and the PMI. Any necessary amendments to existing power marketing criteria could be pursued at the time Western determines the amount of resource available after existing contracts expire. For the Central Valley Project, Western plans to develop future marketing criteria during the 2004 Marketing Plan process.

The process of implementing the PMI is addressed in section 905.37. Modified contractual language will be required to place resource extensions under contract. For all projects receiving resource extensions under the PMI Western will develop alternative contractual language which would allow the customer to assume the responsibility of acquiring resources to firm up Western's hydroelectric commitments to a customer if the customer so chooses. The timing of any offers of power to existing Salt Lake City Area/Integrated Projects customers for the time period after 2004 may be affected by the replacement power process relating to loss of capacity due to changes in operations at Glen Canyon Dam. For the SLCA/IP, existing contracts provide for potential resource adjustments in 1999. No contracts will

be offered to existing customers for post-2004 SLCA/IP resources until the analysis of potential resources in 1999 has been completed and any adjustments are implemented. Existing power sales contracts require that this analysis be completed by 1996.

Western is committed to providing IRP technical assistance to customers. In section 905.40, Western will establish a program to assist customers with technical questions or concerns relating to the development and implementation of an IRP or small customer plan. Technical assistance, which may include publications, workshops, conferences, individual assistance, equipment loans, technology and resource assessment studies, marketing studies, and other mechanisms to transfer information on energy efficiency and renewable energy options and programs to customers, will be provided under Western's energy services functions. Customers will be kept informed of the technical assistance available to them in support of their development and implementation of IRPs through Western's energy services publications and other communications efforts.

V. Regulatory Review

Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget (OMB) is required.

VI. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires federal agencies to perform a regulatory flexibility analysis if a proposed regulation is likely to have a significant economic impact on a substantial number of small entities. In the notice proposing the Program, Western's Administrator certified that this Program, if promulgated, would not have a significant adverse economic impact on a substantial number of small entities. Western did not receive any comments that addressed the certification.

VII. Review Under the Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. 3501–3520, Western has received approval from OMB for the collection of customer information in this rule, under control number 1910–1200.

VIII. Review Under the National Environmental Policy Act

Western has completed an environmental impact statement on the Program, pursuant to the National Environmental Policy Act of 1969. The Record of Decision was published in the Federal Register on October 12, 1995 (60 FR 53181).

IX. Review Under Executive Order 12612

Executive Order 12612 requires review of regulations or rules for any substantial direct effects on States, on the relationship between National Government and the States, or on the distribution of power and responsibilities among various levels of Government. This rule carries out the requirements of EPAct in a manner that reflects comity between the States and the United States Government. Western has assessed this rule in light of the criteria in Sections 2 through 5 of Executive Order 12612. Western has determined that the rule is consistent with those criteria, and that the rule will not impose significant costs or burdens on States or affect the States' ability to discharge traditional State functions.

X. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in section 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that regulations define key terms and are clear on such matters as exhaustion of administrative remedies and preemption. The Department certifies that today's regulatory action meets the requirements of section 2(a) and (b)(2) of Executive Order 12778.

XI. List of Subjects in 10 CFR Part 905

Electric Power, Electric Utilities, Energy, Energy Conservation, Hydroelectric Power and Utilities.

Issued in Golden, Colorado, September 21, 1995.

J.M. Shafer,

Administrator.

For the reasons set forth in the preamble, Title 10 of the Code of Federal Regulations is amended by adding a new part 905 to read as set forth below.

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Authority: 42 U.S.C. §§ 7152 and 7191; 32 Stat. 388, as amended; and 42 U.S.C. §§ 7275–7276c.

PART 905—ENERGY PLANNING AND MANAGEMENT PROGRAM

Subpart A—General Provisions

§ 905.1 Purpose.

The purposes of the Energy Planning and Management Program (Program) are to implement section 114 of the Energy Policy Act of 1992 (EPAct) and to extend the Western Area Power Administration's (Western) long-term firm power resource commitments in support of customer integrated resource planning.

§ 905.2 Definitions.

Administrator means the Administrator of Western.

Applicable integrated resource plan or *applicable IRP*, when used with reference to a customer, means the integrated resource plan (IRP) approved by Western under these regulations for that customer.

Customer means any entity that purchases firm capacity, with or without energy, from Western under a long-term firm power contract. The term includes a member-based association (MBA) and its distribution or user members that receive direct benefit from Western's power.

Integrated resource planning means a planning process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, in order to provide adequate and reliable service to a customer's electric consumers at the customer's or member's lowest system cost. The process shall take into account necessary features for system operation, such as diversity, reliability, dispatchability, and other factors of risk; shall take into account the ability to verify energy savings achieved through energy efficiency and the projected durability of such savings measured over time; and shall treat demand and supply resources on a consistent and integrated basis.

Least-cost option means an option for providing reliable electric services to electric consumers which will, to the extent practicable, minimize life-cycle system costs, including adverse environmental effects, of providing such service. To the extent practicable, energy efficiency and renewable resources may be given priority in any least-cost option.

Long-term firm power contract means any contract with Western for the sale of firm capacity, with or without energy, which is to be delivered over a period of more than 1 year. This term includes contracts for the long-term sale of power from the Boulder Canyon Project.

Member-Based Association or *MBA* means:

(1) an entity composed of utilities or user members; or

(2) an entity which acts as an agent for, or subcontracts with, but does not assume power supply responsibility for its principals or subcontractors, who are its members.

Small customer means a customer with total annual sales or usage of 25 GWh or less, as averaged over the previous 5 years, which is not a member of a joint action agency or a generation and transmission (G&T) cooperative with power supply responsibility, and that Western finds has limited economic, managerial, and resource capability to conduct integrated resource planning.

Western means the Western Area Power Administration.

Subpart B—Integrated Resource Planning

§ 905.10 Applicability.

(a) Each customer of Western must address its power resource needs in an IRP prepared and submitted to Western as provided herein, except for:

(1) Those meeting the criteria for a small customer as detailed in § 905.14 this part; and

(2) State-regulated, investor-owned utilities.

(b) Nothing in these regulations shall require a customer to take any action inconsistent with a requirement imposed by the Rural Utilities Service or a state utility commission which receives IRP filings from that customer.

§ 905.11 Integrated resource plan contents.

(a) An integrated resource plan should support customer-developed goals and schedules. The plan should evaluate the full range of practicable alternatives for energy resources, and include:

(1) an assessment of resources on an equitable basis, where supply-side, demand-side, and renewable resources are compared on a fair and accurate basis to determine an appropriate low-cost resource portfolio, and

(2) an integration of all options in a comprehensive manner.

(b) IRPs must consider electrical energy resource needs and may consider, at the customer's option, water, natural gas, and other energy resources. Each IRP submitted to Western must satisfy the following requirements of section 114 of EPAct:

(1) Identification and Comparison of All Practicable Energy Efficiency and Energy Supply Resource Options. This is an assessment and comparison of existing and future supply- and demand-side resource options available to a customer based upon its size, type, resource needs, geographic area, and competitive situation. Identification of resource options evaluated by the specific customer, or members in the case of IRP cooperatives or MBAs, must be provided. The options evaluated should relate to the resource situation unique to each Western customer as determined by profile data (such as service area, geographical characteristics, customer mix, historical loads, projected growth, existing system data, rates, and financial information) and load forecasts.

(i) Supply-side options include, but are not limited to, purchased power contracts, conventional or renewable generation options.

(ii) Demand-side options alter the customer's use pattern in a manner that provides for an improved combination of energy services at least cost to the customer and the ultimate consumer.

(iii) Considerations that may be used to develop the potential options include cost, market potential, consumer preferences, environmental impacts, demand or energy impacts, implementation issues, revenue impacts, and commercial availability.

(iv) The IRP discussion comparing resource options must include:

(A) the method or rationale used to select the options to be compared,

(B) the options evaluated,

(C) the assumptions and costs related to the options, and

(D) the evaluation methods, including any quantitative and qualitative methods used to compare the resource options.

(2) An IRP must include an action plan covering a minimum period of 5 years describing specific actions the customer will take to implement its IRP. This plan must outline both short-term (2 years) and long-term (5 years) actions proposed for implementation during the period covered by the plan. The action plan must summarize the load profile data and address the results of the resource evaluation. Where a customer is implementing integrated resource planning in response to State, Federal, and other initiatives, Western will accept action plans of other than 2 and 5 years if they substantially comply with EPAct. For those customers not experiencing or anticipating load growth, the action plan requirement for the IRP may be satisfied by a discussion of current actions and procedures in place to reevaluate periodically the possible future need for new resources. The action plan must include the following four items:

(i) Actions the customer expects to take in accomplishing the goals identified in the IRP;

(ii) Milestones to be used to evaluate accomplishment of those actions during implementation;

(iii) Quantified estimated energy and capacity benefits for each action planned; and

(iv) Estimated or proposed costs for implementing each action.

(3) An IRP must designate least-cost options to be utilized by the customer. This requires a comparative evaluation of supply- and demand-side resources using a consistent economic evaluation method. This evaluation should identify the most cost-effective energy services to the consumer, taking into account reliability, economics, price, adverse environmental effects, risk, and all other factors influencing the quality of energy services. The analysis should consider impacts on suppliers, distribution entities, and end-use consumers, as applicable. The resource selection process and criteria must be explicit and identify the rationale for selection. An IRP may strike a reasonable balance

among the applicable evaluation factors, as opposed to a plan which seeks to optimize any single criterion. Exceptions to least-cost-based decisions may be made if the customer explains the basis for the decision and can show in the IRP that decisions were based on a reasonable analysis of resource options and environmental effects, were based on response to public input, or were required by Federal or State mandates.

(4) To the extent practicable, the customer shall minimize adverse environmental effects of new resource acquisitions and document these efforts in the IRP. Customers are neither precluded from nor required to include a quantitative analysis of environmental externalities as a part of their integrated resource planning process. Customers are required to include a qualitative analysis of environmental effects.

(5) In the preparation and development of an IRP (or any revision or amendment of an IRP), ample opportunity for full public participation shall be provided. The IRP shall describe how the customer: gathered information from the public, identified public concerns, shared information with the public, and responded to public comments.

(i) Member-based associations and their members must demonstrate public participation in the preparation and development, revision, or amendment of the IRP. No specific number of meetings is required.

(ii) As part of the public participation process, the governing body of an MBA and each MBA member (such as a board of directors or city council) must approve the IRP, confirming that all requirements have been met. MBA and member approvals must be indicated by signature of a responsible official in the IRP submitted to Western or by documentation of passage of an approval resolution by the appropriate governing body included or referred to in the IRP submitted to Western.

(iii) For Western customers that do not purchase for resale, such as Federal and State government agencies, the public participation requirement is satisfied if there is review and concurrence by a top management official with resource acquisition responsibility, and the concurrence is noted in the IRP submitted to Western.

(6) An IRP must include load forecasting. Load forecasting should include data which reflects the size, type, resource conditions, and demographic nature of the customer using an accepted load forecasting methodology, including but not limited to the time series, end-use, and econometric methods.

(7) Customers must provide methods of validating predicted performance in order to determine whether objectives in the IRP are being met. These validation methods must include identification of the baseline from which a customer will measure the benefits of its IRP implementation. Baseline data that is unavailable should be identified. A reasonable balance must be struck between the cost of data collection and the benefits resulting from obtaining exact information.

§ 905.12 Submittal procedures.

(a) An IRP submitted to Western for approval must have sufficient detail for Western to confirm it meets the requirements of these regulations. Only one IRP is required per customer, regardless of the number of long-term firm power contracts between the customer and Western.

(b) Customers may submit IRPs to Western under one of the following options:

(1) Customers may submit IRPs individually.

(2) MBAs may submit individual IRPs for each of their members or submit one IRP on behalf of all or some of their members, that specifies the responsibilities and participation levels of individual members and the MBA. Such IRP or IRPs shall constitute the MBA's IRP where the MBA subcontracts or acts as an agent but does not assume power supply responsibility. Any member of an MBA may submit an individual IRP to Western in lieu of inclusion in an MBA IRP.

(3) Integrated resource planning cooperatives approved by Western pursuant to paragraph (d) of this section must submit an IRP for its members.

(4) Customers that Western determines to be small customers pursuant to section 905.14 may submit a small customer plan in lieu of an IRP.

(c) Schedules.

(1) Except as provided in paragraph (c)(2) of this section, customers must submit their initial IRP to the appropriate Area Manager no later than 1 year after the effective date of this rule, or after becoming a customer, whichever is later. Approved IRP cooperatives shall be allowed 18 months from Western's approval of the IRP cooperative request to submit an initial IRP.

(2) Every customer must provide written notification to Western if it intends to seek approval for IRP cooperative or small customer status. This notification must be provided by the customer to the Western Area Manager of the Area in which the customer is located by December 19, 1995, or within 30 days from the time it becomes a customer, whichever is later.

(3) If an IRP submittal is found to be insufficient after Western review, a notice of deficiencies will be provided to the entity that submitted the IRP. Western, working together with the customer, will determine the time allowable for resubmitting the IRP. However, the time allowed for resubmittal will not be greater than 9 months after the date of the disapproval, unless otherwise provided by contract language in effect as of the effective date of these regulations.

(4) Updated IRPs must be submitted to the appropriate Area Manager every 5 years after Western's approval of the initial IRP.

(5) Amendments and revisions to IRPs may be submitted at any time.

(d) Western shall respond to IRP cooperative status requests within 30 days of receipt. If a request for IRP cooperative status is disapproved, the requesting customers must submit their initial IRPs no later than 1 year after the date of the letter of disapproval. Any subsequent requests by customers for IRP cooperative status will be responded to by Western within 30 days of receipt of the request. Western's approval of IRP cooperative status will not be based on any potential member's contractual status with Western.

§ 905.13 Approval criteria.

(a) IRP or small customer plan approval will be based upon:

(1) whether the IRP or small customer plan satisfactorily addresses the criteria in these regulations; and

(2) the reasonableness of the IRP or small customer plan given the size, type, resource needs, geographic area, and competitive situation of the customer.

(b) Western will review resource choices in accordance with section 114 of EPAct and these regulations. Western will disapprove IRPs if resource choices do not meet the reasonableness test set forth in (a)(2) of this section and the provisions of section 114 of EPAct.

(c) Where a customer or group of customers implements integrated resource planning under a program responding to other Federal, State, or other initiatives, Western shall accept and approve such a plan as long as the IRP substantially complies with the requirements of these regulations.

(d) In evaluating an IRP or small customer plan, Western shall consider water planning, efficiency improvements, and conservation in the

same manner it considers energy planning and efficiencies. Customers that provide water utility services and customers that service irrigation load as part of their overall load may include water conservation activities in the IRP. To the extent practical, customers should convert their water savings to energy values.

§ 905.14 Small customer plan.

(a) Small customers may submit a request to prepare a small customer plan in lieu of an IRP. Requests for small customer status must include data on total annual energy sales and usage for the 5 years prior to the request. This data will be averaged to determine overall annual energy sales and usage so that uncontrollable events, such as extreme weather, do not distort levelized energy sales and usage. Documentation of limited economic, managerial and resource capability must also be included in a request.

(b) Western shall respond to small customer status requests within 30 days of receipt of the request. If a request for small customer status is disapproved, the requesting customer must submit its initial IRP no later than 1 year after the date of the letter of disapproval. Any subsequent requests by customers for small customer status will be responded to by Western within 30 days of receipt of the request.

(c) Small Customer Plan Contents.

Small customer plans shall:

(1) consider all reasonable opportunities to meet future energy service requirements using demand-side management techniques, new renewable resources, and other programs that will provide retail consumers with electricity at the lowest possible cost;

(2) minimize, to the extent practicable, adverse environmental effects; and

(3) present in summary form the following information:

(i) customer name, address, phone number, and contact person;

(ii) type of customer;

(iii) current energy and demand profiles and data on total annual energy sales and usage for the previous 5 years;

(iv) future energy services projections;

(v) the manner in which paragraphs (c) (1) and (2) of this section were considered; and

(vi) actions to be implemented over the next 5 years.

(d) The first small customer plan must be submitted to the appropriate Western Area Manager within 1 year after Western's approval of the request for small customer status. Small customers must submit in writing a small customer plan every 5 years.

(e) Maintenance of Small Customer Status.

(1) Every year on the anniversary of submittal of the plan, small customers must submit a letter to Western verifying that their annual energy sales or usage is 25 GWh or less averaged over the previous 5 years, and identifying their achievements against their targeted action plans. The letter will be used for overall program evaluation and comparison with the customer's plan, and for verification of continued small customer status.

(2) A customer ceases to be a small customer if it:

(i) exceeds total annual energy sales or usage of 25 GWh, as averaged over the previous 5 years,

(ii) becomes a member of a joint action agency or G&T cooperative with power supply responsibility, or

(iii) no longer has a limited economic, managerial, and resource capability. Western will work with a customer who loses small customer status to develop an appropriate schedule, no longer than 1 year, for submittal of an IRP.

(3) Membership in or contracting with an MBA that does not have power supply responsibility shall not affect a customer's status as a small customer. A small customer plan or annual letter may be submitted by or through an MBA that does not have power supply responsibility.

§ 905.15 Processing of IRPs and small customer plans.

Western shall review all IRP and small customer plan submittals and notify the submitting entity of the plan's acceptability within 120 days after receipt.

§ 905.16 Annual IRP progress reports.

IRP progress reports must be submitted each year within 30 days of the anniversary date of the approval of the currently applicable IRP in such form and containing such information as to describe the customer's accomplishments achieved pursuant to the action plan, including projected goals, implementation schedules, and resource expenditures, and energy and capacity benefits and renewable energy developments achieved as compared to those anticipated. Measured values are preferred, but reasonable estimates are acceptable if measurement is infeasible or not cost-effective. In lieu of a separate progress report, all information from the progress report may be combined with any other report that the customer submits to Western, at the customer's discretion, if that report is submitted within 30 days of the approval anniversary date of the currently applicable IRP.

§ 905.17 Noncompliance.

(a) The penalty set forth in this section shall be imposed for failure to submit or resubmit an IRP or small customer plan in accordance with these regulations. The penalty also will be imposed when Western finds that the customer's activities are not consistent with the applicable IRP or small customer plan unless Western finds that a good faith effort has been made to comply with the approved IRP or small customer plan.

(b) If it appears that a customer's activities may be inconsistent with the applicable IRP or small customer plan, Western will so notify the customer and offer the customer 30 days in which to provide evidence of its good faith effort to comply. If the customer does not correct the specified deficiency or submit such evidence, or if Western finds, after receipt of information from the customer, that a good faith effort has not been made, a penalty shall be imposed.

(c) Western shall provide written notice of the imposition of a penalty to the customer, and to the MBA or IRP cooperative where applicable. The notice must specify the reasons for imposition of the penalty.

(d) Imposition of Penalty.

(1) Beginning with the first full billing period following the notice specified in paragraph (c) of this section a surcharge of 10 percent of the monthly power charges will be imposed until the deficiency specified in the notice is cured, or until 12 months pass, provided that no such penalty shall be immediately imposed if the customer or its MBA or IRP cooperative has requested reconsideration by filing a written appeal with the appropriate Area Manager, pursuant to 905.18.

(2) The surcharge imposed shall increase to 20 percent for the second 12 months and to 30 percent per year thereafter until the deficiency is cured.

(3) After the first 12 months of imposition of the surcharge and in lieu of imposition of any further surcharge, Western may impose a penalty which would reduce the resource delivered under a customer's long-term firm power contract(s) by 10 percent. The resource reduction may be imposed either

(i) when it appears to Western to be more effective to assure customer compliance, or

(ii) when such reduction may be more cost-effective for Western.

(4) The penalty provisions in existing contracts will continue to be in effect

and shall be administered and enforced in accordance with such contract provisions.

(e) The surcharge will be assessed on the total charges for all power obtained by a customer from Western and will not be limited to firm power charges. When a customer resolves the deficiencies, the imposed surcharge or power withdrawal will cease, beginning with the first full billing period after compliance is achieved.

(f) In situations involving an IRP submitted by a member-based association on behalf of its members where a single member does not comply, a penalty or withdrawal shall be imposed upon the MBA on a pro rata basis in proportion to that member's share of the total MBA's power received from Western. In situations involving noncompliance by a member of an IRP cooperative, any applicable penalty shall be imposed directly upon that member if it has a firm power contract with Western. If the IRP cooperative member does not have a firm power contract with Western then a penalty or withdrawal shall be imposed upon the member's MBA or parent-type entity on a pro rata basis in proportion to that member's share of the total MBA's power received from Western.

§ 905.18 Administrative appeal process.

(a) If a customer disagrees with Western's determination of the acceptability of its IRP submittal, its compliance with an approved IRP, or any other compliance issue, the customer may request reconsideration by filing a written appeal with the appropriate Area Manager. Appeals may be submitted any time such disagreements occur and should be specific as to the nature of the issue, the reasons for the disagreement, and any other pertinent facts which the customer believes should be brought to Western's attention. The Area Manager will respond within 45 days of receipt of the appeal. If resolution is not achieved at the Area Office level, a further appeal may then be made to the Administrator who will respond within 30 days of receipt.

(b) Upon request, Western will agree to use mutually agreeable alternative dispute resolution procedures, to the extent allowed by law, to resolve issues or disputes relating to compliance with IRP requirements.

(c) Western shall not impose a penalty while an appeal process is pending. However, if the appeal is unsuccessful for the customer, Western shall impose the penalty retroactively from the date the penalty would have been assessed if an appeal had not been filed.

(d) A written appeal or use of alternative dispute resolution procedures does not suspend other reporting and compliance requirements under these regulations.

§ 905.19 Periodic review by Western.

(a) Western will periodically review customer actions to determine whether they are consistent with the approved IRP. Small customer plans are not subject to this periodic review.

(b) Beginning 3 years after the effective date of these regulations, Western shall periodically review selected, representative IRPs and the customer's implementation of the applicable IRP. These reviews are in addition to, and separate and apart from, the review of initial IRP submittals and updated IRPs made under §§ 905.11 and 905.13 of these regulations.

(c) Western will review a representative sample of IRPs from each of its marketing areas. The representative samples will consist of IRPs that reflect the diverse characteristics and circumstances of the customers that purchase power from Western. At a minimum, Western will review a sample of IRPs from the following:

(1) IRPs indicating a need to acquire resources in the IRP study period;

(2) IRPs prepared by individual customers, IRP cooperatives, and member-based associations; and

(3) IRPs that do not show plans to implement DSM programs in the IRP study period.

(d) Periodic reviews may consist of any combination of review of the customer's annual IRP progress reports, telephone interviews, or on-site visits. Western will document these periodic reviews and shall report on the results of the reviews in Western's annual report.

§ 905.20 Freedom of Information Act.

IRPs and associated data submitted to Western will be made available to the public unless Western has determined, pursuant to 10 CFR Part 1004, that particular information is exempt from public access under the Freedom of Information Act (FOIA). Customers may request confidential treatment of all or part of a submitted document under FOIA's exemption for confidential business information. Materials so designated and which Western determines to meet the exemption criteria in the FOIA will be treated as confidential and will not be disclosed to the public.

§ 905.21 Program review.

Before January 1, 2000, and at appropriate intervals thereafter, Western shall initiate a public process to review these IRP regulations in order to determine whether the criteria for approval of IRPs should be revised to reflect changes in technology, needs, or other developments.

Subpart C—Power Marketing Initiative

§ 905.30 Purpose and applicability.

(a) The Power Marketing Initiative (PMI) provides a framework for marketing Western's long-term firm hydroelectric resources. For covered projects, Western will make a major portion of the resources currently under contract available to existing long-term firm power customers for a period of time beyond the expiration date of their current contracts.

(b) The Western projects covered by this subpart are the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects (LAP). The PMI applies to covered projects to the extent it is consistent with other contractual and legal rights, and subject to any applicable project-specific environmental requirements.

§ 905.31 Term.

Western will extend resource commitments for 20 years from the date existing contracts expire to existing customers with long-term firm power contracts from projects identified in section 905.30(b).

§ 905.32 Resource extensions and resource pool size.

(a) Western will extend a project-specific percentage of the marketable resource, determined to be available at the time future resource extensions begin, to existing customers with long-term firm power contracts. The remaining unextended power will be used to establish project-specific resource pools. An initial level of 96 percent of the marketable resource will be extended for the Pick-Sloan Missouri Basin Program—Eastern Division and the Loveland Area Projects.

(b) At two 5-year intervals after the effective date of the extension to existing customers, Western shall create a project-specific resource pool increment of up to an additional 1 percent of the long-term marketable resource under contract at the time. The size of the additional resource pool increment shall be determined by Western based on consideration of the actual fair-share needs of eligible new customers and other appropriate purposes.

(c) The initial pool percentages shall be applied to the marketable resource determined to be available at the time future resource extensions begin. Subsequent percentages shall be applied to the resource under contract at the time.

(d) The additional resource pool increments shall be established by pro rata withdrawals, on 2 years' notice, from then-existing customers. Withdrawals could be mitigated or delayed if good water conditions exist.

(e) Once the extensions for existing customers and allocations to new customers from the resource pool have been made, additional power resources may become available for various reasons. Any additional available resources will be used as follows:

(1) If power is reserved for new customers but not allocated, or resources are offered but not placed under contract, this power will be offered on a pro rata basis to customers that contributed to the resource pool through application of the extension formula in § 905.33.

(2) If power resources become available as a result of the enhancement of existing generation, project-use load efficiency upgrades, the development of new resources, or resources turned back to Western, Western may elect to use this power to reduce the need to acquire firming resources, retain the power for operational flexibility, sell these resources on a short-term basis, or allocate the power.

(3) If resources become available due to imposition of penalties pursuant to § 905.17, Western may make such resources available within the marketing area to existing customers that are in compliance with Subpart B, subject to withdrawal.

§ 905.33 Extension formula.

(a) The amount of power to be extended to an existing customer shall be determined according to this formula:

Customer Contract Rate of Delivery (CROD) today/total project CROD under contract today x project-specific percentage x marketable resource determined to be available at the time future resource extensions begin = CROD extended.

(b) Where contract rates of delivery vary by season, the formula shall be used on a seasonal basis to determine the extended power resource. A similar pro rata approach shall be used for energy extensions.

(c) Determination of the amount of resource available after existing contracts expire, if significantly different from existing resource commitments, shall take place only after an appropriate public process.

(d) The formula set forth in paragraph (a) of this section also should be used to determine the amounts of firm power subject to withdrawal at 5-year intervals after the effective date of the extension to existing customers, except that the percentage used would be up to 1 percent for each of the two withdrawal opportunities, and the formula would use the customer CROD, project CROD and the resource under contract at the time.

§ 905.34 Adjustment provisions.

Western reserves the right to adjust marketable resources committed to all customers with long-term firm power contracts only as required to respond to changes in hydrology and river operations, except as otherwise expressly provided in these regulations. Under contracts that extend resources under this PMI, existing customers shall be given at least 5 years' notice before adjustments are made. New customers may receive less notice. The earliest that any notice under this section shall become effective is the date that existing contractual commitments expire. Any adjustment shall only take place after an appropriate public process. Withdrawals to serve project use and other purposes provided for by contract shall continue to take place based on existing contract/marketing criteria principles.

§ 905.35 New customer eligibility.

(a) Allocations to new customers from the project-specific resource pools established under § 905.32 shall be determined through separate public processes in each project's marketing area. New customers receiving an allocation must execute a long-term firm power contract to receive the allocated power and are required to comply with the IRP requirements in this part. Contracts with new customers shall expire on the same date as firm power contracts with all other customers of a project.

(b) To be eligible for an allocation, a potential new customer must be a preference entity, as defined in Reclamation law, within the currently established marketing area for a project.

(c) Entities that desire to purchase power from Western for resale to consumers, including municipalities, cooperatives, public utility districts and public power districts, must have utility status. Native American tribes are not subject to this requirement. Utility status means that the entity has responsibility to meet load growth, has a distribution system, and is ready, willing, and able to purchase power from Western on a wholesale basis for resale to retail consumers. To be eligible to apply for power available from a project's initial resource pool, those entities that desire to purchase Western power for resale to consumers must have attained utility status by December 31, 1996, for the Pick-Sloan Missouri Basin Program—Eastern Division, and by September 30, 2000, for the Loveland Area Projects. To be eligible to apply for power from subsequent resource pool increments, these entities must have attained utility status no later than 3 years prior to availability of the incremental addition to the resource pool. Deadlines for attaining utility status for other projects will be established at a later date.

§ 905.36 Marketing criteria.

Western shall retain applicable provisions of existing marketing criteria for projects where resource commitments are extended beyond the current expiration date of long-term firm power sales contracts. Western must retain important marketing plan provisions such as classes of service, marketing area, and points of delivery, to the extent that these provisions are consistent with the PMI. The PMI, eligibility and allocation criteria for potential new customers, retained or amended provisions of existing marketing criteria, the project-specific resource definition, and the size of a project-specific resource pool shall constitute the future marketing plan for each project.

§ 905.37 Process.

Modified contractual language shall be required to place resource extensions under contract. Resource extensions and allocations to new customers from the initial resource pool will take effect when existing contracts expire. These dates are December 31, 2000, for the Pick-Sloan Missouri Basin Program—Eastern Division and September 30, 2004, for the Loveland Area Projects. For the Pick-Sloan Missouri Basin Program—Eastern Division, Western will offer contracts to existing customers for resource extensions no sooner than the effective date of the final regulations. For the Loveland Area Projects, existing contracts provide for potential adjustments to marketable resources in 1999. No contracts will be offered to existing customers for post-2004 Loveland Area Projects resources until the analysis of potential resource adjustments in 1999 has been completed and any adjustments are implemented. Existing power sales contracts require that this analysis be completed by 1996.

Subpart D—Energy Services

§ 905.40 Technical assistance.

Western shall establish a program that provides technical assistance to customers to conduct integrated resource planning, implement applicable IRPs and small customer plans, and otherwise comply with the requirements of these regulations.

[FR Doc. 95–25829 Filed 10–19–95; 8:45 am]
BILLING CODE 6450–01–P

FEDERAL TRADE COMMISSION

16 CFR Part 429

Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations

AGENCY: Federal Trade Commission.

ACTION: Final non-substantive amendments to the rule.

SUMMARY: The Federal Trade Commission ("the Commission") announces that it has concluded a review of its Trade Regulation Rule on Cooling-Off Period for Door-to-Door Sales ("Cooling-Off Rule" or "Rule"), and determined there is a continuing need for the Rule. This review was conducted as part of the Commission's ongoing program to review all of its rules and guides periodically. The Commission has also determined to issue non-substantive amendments to several Rule provisions. Specifically, the Commission is amending the Rule by renaming it so that it more clearly identifies the kinds of sales it covers and by inserting two notes, formerly at the end of the Rule, into the Rule itself. Moreover, the Commission is amending the Rule by adding a new section containing two exemptions to the Rule that the Commission granted, in November 1988, to certain sellers of arts and crafts and of automobiles. The Commission is also expanding the exemption for automobiles to include vans, trucks and other motor vehicles sold at temporary places of business by dealers having permanent places of business. Further, the Commission is amending the Rule by adding a parenthetical statement to the Rule's definition of the term "Door-to-Door Sale." This new statement gives examples of kinds of sales locations covered by the Rule. The Commission is also amending the Rule's definition of "Business Day" to reflect changes in federal holidays. Finally, the Commission is amending the Rule to make the typeface used in the sample "Notice of Cancellation" more readable and to substitute the gender neutral words "the buyer" or "the buyer's" for the pronouns "he," "his," and "him."

EFFECTIVE DATE: December 19, 1995.

FOR FURTHER INFORMATION CONTACT: Lemuel W. Dowdy, Attorney, (202) 326–2981, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Cooling-Off Rule was promulgated by the Commission on October 26, 1972,[1] and subsequently amended on November 1, 1973,[2] November 19, 1973,[3], and November 10, 1988.[4] The Rule, as amended, declares it to be an unfair and deceptive act or practice for any seller in a door-to-door sale of consumer goods or services, with a purchase price of $25 or more, to fail to furnish the buyer with certain oral and written disclosures regarding the right of the buyer to cancel the contract within three business days from the date of the sales transaction. The Rule also requires a seller, within 10 business days after receipt of a valid cancellation notice from a buyer, to honor the buyer's cancellation by refunding all payments made under the contract, by returning any traded-in property, by cancelling and returning any security interests created in the transaction, and by notifying the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods.

The Rule requires the seller in a door-to-door sale to furnish the buyer with a completed receipt, or a copy of the sales contract, containing a summary notice informing the buyer of the right to cancel the transaction. The Rule also requires a seller to furnish the buyer with a completed cancellation form, in duplicate, captioned either "Notice of Right to Cancel" or "Notice of Cancellation," one copy of which can be returned by the buyer to the seller to effect cancellation.

In issuing the Rule, the Commission adopted a broad definition of "Door-to-Door Sale" to include any sale "made at a place other than the place of business of the seller." In doing this, the Commission indicated that the Rule covers more than just at-home sales.[5] The Commission has on several occasions reiterated this position. For example, in a 1978 Advisory Opinion, the Commission stated:

In the opinion of the Commission, firms which temporarily or sporadically rent hotel rooms, motel rooms, public halls or other facilities and invite members of the general public to attend a presentation therein, the purpose of which is to sell them courses of training, are subject to the provisions of the Trade Regulation Rule concerning a Cooling-Off Period for Door-To-Door Sales (16 CFR 429).[6]

Moreover, pursuant to Section 18(g)(2) of the FTC Act,[7] the Commission on November 10, 1988, granted exemptions to the Rule to certain sellers of automobiles and of arts and crafts at temporary business locations.[8] In granting these exemptions, the Commission noted that, when it had issued the Rule in 1972, it was concerned not only with sales made at consumers' homes, but also with sales by "itinerant salesmen who sell at restaurants, shops and other places."[9]

II. Background

In 1983, the Commission began a review of the Cooling-Off Rule pursuant to the Regulatory Flexibility Act, 5 U.S.C. 603, and published a notice in the Federal Register soliciting comment on whether the Rule had a significant impact on small businesses and, if so, whether the Rule needed amendment to minimize its impact on small

[1] 37 FR 22933 (Oct. 26, 1972). The effective date of the Rule was later set as June 7, 1974. 38 FR 33766 (Dec. 7, 1973).

[2] 38 FR 30105 (Nov. 1, 1973). This amendment revised the fourth paragraph of the sample "Notice of Cancellation" set forth in section 429.1(b) of the Rule, 16 CFR 429.1(b), to make clearer what are the buyer's responsibilities for goods delivered under a contract the buyer has cancelled.

[3] 38 FR 31828 (Nov. 19, 1973). This amendment corrected a misstatement in the November 1, 1973, amendment concerning the amendment's effective date.

[4] 53 FR 45455 (Nov. 10, 1988). This amendment allowed alternative wording in certain parts of the Rule's required "Notice of Cancellation." At the same time, the Federal Register notice announced the two exemptions the Commission was granting to sellers of arts and crafts and of automobiles sold at temporary places of business.

[5] 37 FR 22947 (Oct. 26, 1972).

[6] Advisory Opinion, dated July 14, 1978, in FTC File No. D.H. 70016.

[7] 15 U.S.C. 57a(g)(2). This section of the FTC Act provides that the Commission may, on its own or on the basis of a petition, exempt persons from a rule's application if their inclusion is not necessary to prevent a practice to which the rule relates. Exemptions are considered through notice and comment rulemaking.

[8] 53 FR 45455 (Nov. 10, 1988). The first exemption was for sellers of automobiles at auctions, tent sales and other temporary places of business, provided the seller has a permanent place of business elsewhere. The second exemption was for sellers of arts and crafts at fairs and other, similar locations. The Commission, when granting these exemptions, determined that, at least with regard to these transactions, the record indicated an absence of the kinds of problems (such as the high pressure sales tactics, the nuisance aspects, the equivalent of deceptive door-openers, or the misrepresentations as to the quality, price or characteristics of the product or services offered for sale) that are often generally associated with sales made in the home.

[9] *Id.* at 45458.