

August 8, 2017

Via Email (techforum@bpa.gov)

U.S. Department of Energy
Bonneville Power Administration
Transmission Services

**Re: Comments of Avista Corporation, Portland General Electric Corporation,
and Puget Sound Energy, Inc. on BPA's Tariff Engagement**

Avista Corporation ("Avista"), Portland General Electric Corporation ("Portland General"), and Puget Sound Energy, Inc. ("PSE") hereby comment on BPA's Tariff Engagement, following up on the July 26, 2017, BPA Transmission Business Model Workshop on that topic.

At the July 26 workshop, BPA discussed BPA OATT section 9 ("section 9") and proposed revisions to the existing section 9¹ that read as follows:

Section 9 Tariff Changes

The Transmission Provider may, subject to the provisions of the applicable Service Agreement under this Tariff, change the rates [*sic*] that apply to transmission service under such Service Agreement pursuant to applicable law. The Transmission Provider may change the terms and conditions of this Tariff after conducting a public process in which Transmission Customers have an opportunity to review and comment on proposed changes.

Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and pursuant to the Commission's rules and regulations promulgated thereunder.

If and to the extent any revision to section 9 is made, BPA's proposed language should not be adopted. The current section 9 includes, and any replacement of the current section 9 should include, the following:

¹ Bonneville Power Administration Transmission Services, *Open Access Transmission Tariff*, section 9, available at https://www.bpa.gov/transmission/Doing%20Business/Tariff/Documents/bpa_oatt.pdf (effective date of February 2, 2016) (emphasis added).

- (i) a process pursuant to which a record is developed, with opportunity for input from customers and other stakeholders, that supports an amendment;
- (ii) a standard that provides assurance to BPA transmission customers that the BPA OATT amendments will be “just and reasonable, and not unduly discriminatory or preferential”;² and
- (iii) a meaningful FERC role with respect to amendment of section 9.³ Accordingly, if section 9 is revised, the revised section 9 should, at a minimum, require any changes to BPA’s OATT to be made in accordance with the process provided in Federal Power Act section 212(i)(2).

If and to the extent BPA revises section 9 of its OATT,⁴ it should be revised from the current language to read as follows (the “Commenting Parties Proposal”):

9 Regulatory Filings

Nothing contained in the Tariff shall be construed as affecting in any way the right of the Transmission Provider to unilaterally propose a change in rates, terms and conditions, charges or classification of service. The Transmission Provider may, subject to the provisions of the applicable Service Agreement under this Tariff, change the rates that apply to transmission service under such Service Agreement pursuant to applicable law. The Transmission Provider may, subject to the provisions of the applicable Service Agreement under this Tariff, change the terms and conditions of this Tariff upon, and only upon, a determination by the ~~Commission~~Administrator that ~~(i) such change is just and reasonable and not unduly discriminatory or preferential, or (ii) such change meets the non-public utility reciprocity requirements pursuant to a request for declaratory order under 18 CFR § 35.28(e).~~ Any such determination by the Administrator shall be made in a proceeding pursuant to the provisions of Federal Power Act section 212(i)(2), under which the Administrator shall conduct a hearing and make such determination based on the record developed in such proceeding.

Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and

² The standard for transmission terms and conditions required by FERC under Federal Power Act section 211 order to a utility such as BPA includes “just and reasonable, and not unduly discriminatory or preferential”. The standard for transmission terms and conditions required by FERC under Federal Power Act section 211A order to a utility such as BPA includes “not unduly discriminatory or preferential”.

³ The current section 9 provides for such a FERC role by providing for a FERC declaratory order on a request to approve a proposed amendment.

⁴ As discussed below, any revision of the current section 9 should only be made pursuant to the provisions of the current section 9.

pursuant to the Commission's rules and regulations promulgated thereunder.

1. **Any Revised Section 9 Should Require That (a) Any Amendments to BPA's OATT Must be Determined to be Just and Reasonable and Not Unduly Discriminatory or Preferential and (b) BPA Follow the Procedures Established in Section 212(i)(2) of the Federal Power Act With Respect to the Terms and Conditions of the BPA OATT⁵**
 - a. **Section 9 Should Require a Determination That Any Amendments to BPA's OATT Must be Determined to be Just and Reasonable and Not Unduly Discriminatory or Preferential**

The current section 9 provides important safeguards in ensuring that any change sought by BPA must be determined by FERC to be just and reasonable and not unduly discriminatory or preferential. Indeed, these standards are applicable to BPA transmission terms and conditions ordered by FERC pursuant to Federal Power Act § 211(a).⁶ The requirement in section 9 for a FERC determination that any changes to the terms and conditions of the BPA OATT meet this standard plays an important role in helping ensure that the terms and conditions of BPA's OATT are durable, fair, and consistent with the terms and conditions of transmission service provided by FERC jurisdictional transmission providers in the region.⁷

Any changes to the terms and conditions of the BPA OATT should be just and reasonable and not unduly discriminatory or preferential, particularly in light of BPA's role as an important transmission provider in the region. It is difficult to overstate the importance of BPA transmission to the electricity industry in the Pacific Northwest. BPA operates over 15,000 circuit miles of high voltage lines, representing about 75 percent of the high voltage grid in the Pacific Northwest.⁸ Transmission customers in the Pacific Northwest rely on BPA transmission to move power from resources to loads and need terms and conditions for BPA transmission service that are durable, fair, and consistent with the terms and conditions under which other transmission service is provided in the region. Long-term decisions, such as resources acquisition or development activities, are predicated, in part, on appropriate BPA terms

⁵ The Comments of Avista and PSE on BPA's Tariff Engagement Design, dated January 12, 2017, are available at: <https://www.bpa.gov/transmission/CustomerInvolvement/TariffEngagementDesign/Documents/2017-1-12-Comments-of-Avista-and-PSE-on-Tariff-Engagement.pdf>. As discussed in those comments, BPA need not seek to abandon the existing section 9 of its OATT based on a decision to no longer seek safe harbor reciprocity. If, however, the requirement for FERC approval of BPA OATT changes is removed from section 9 of BPA's OATT, BPA should follow the procedures established in section 212(i)(2) of the Federal Power Act, 16 U.S.C. § 824k(i)(2), with respect to the terms and conditions of the BPA OATT, as reflected in the Commenting Parties Proposal.

⁶ Federal Power Act § 212(a).

⁷ Indeed, FERC adopted the pro forma OATT through orders applying the just and reasonable or not unduly discriminatory or preferential standards. Application of these same standards to amendments to BPA's OATT should help ensure consistency with FERC's pro forma OATT requirements and the OATTs of jurisdictional transmission providers. In its letter to the region dated November 22, 2016, BPA stated that it "is committed to aligning its tariff with FERC's pro forma open access tariff as closely as possible."

⁸ Bonneville Power Administration, *BPA Transmission: Moving the Power of the Northwest*, available at <https://www.bpa.gov/news/pubs/FactSheets/fs-201306-BPA-transmission-moving-the-power-of-the-Northwest.pdf> (June 2013).

and conditions. For example, a unilateral ability of BPA to make changes that are not determined to be just and reasonable and not unduly discriminatory or preferential would create significant uncertainty and unpredictability regarding existing contracts for BPA transmission service.⁹ The application of a just and reasonable and not unduly discriminatory or preferential standard for changes in BPA's OATT promotes BPA transmission terms and conditions that are consistent with other transmission service in the region and that are durable and fair.

b. Section 9 Should Require that BPA Follow the Procedures Established in Section 212(i)(2) of the Federal Power Act With Respect to the Terms and Conditions of the BPA OATT

1. Section 212(i)(2) Provides a Procedure for Amending BPA's OATT

Section 212(i)(2) of the Federal Power Act establishes an "off-the-shelf" procedure for the determination of terms and conditions for transmission service on the Federal Columbia River Transmission System that focuses primarily on a record to be developed by BPA and that BPA could implement. Section 212(i)(2)(A) of the Federal Power Act includes provisions with respect to BPA's establishment of terms and conditions of general applicability for transmission service, pursuant to which the Administrator may provide an opportunity for a hearing, and in so doing is to

- (i) provide notice in the Federal Register and state in such notice the written explanation of the reasons why the specific terms and conditions for transmission services are not being offered or are being proposed;
- (ii) adhere to the procedural requirements of paragraphs (1) through (3) of section 7(i) of the Northwest Power Act, 16 U.S.C. § 839e(i), except that the hearing officer shall make a recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record; and
- (iii) make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer, based on the hearing record, consideration of the hearing officer's recommended decision, section 211 of the Federal Power Act, 16 U.S.C. § 824j.

Importantly, if BPA has conducted such a section 212(i)(2) hearing to determine transmission terms and conditions of general applicability, the record developed by BPA in that proceeding plays a central role in FERC action on a request under Federal Power Act section 211 for different terms and conditions. In other words, section 212(i)(2)(B) generally requires FERC to consider the record developed by BPA and afford an "opportunity for a hearing if and to the

⁹ In its letter to the region dated November 22, 2016, BPA stated that it "understands and appreciates the value to [its] customers of certainty and predictability for Bonneville's transmission service terms and conditions."

extent that the Commission finds the Administrator’s hearing record to be inadequate to support a decision by the Commission”. If BPA has not conducted a section 212(i)(2) hearing to determine transmission terms and conditions of general applicability, FERC is to determine whether to issue an order for transmission service in accordance with section 211, including providing the opportunity for a hearing. In this case, the benefit of FERC focus on a BPA record developed in the region is lost.

Each of the procedures set forth in section 212(i)(2) of the Federal Power Act provides important safeguards to both BPA and its transmission customers and is a process that could be implemented without the need to create a different regional public process for the consideration of proposed changes to the terms and conditions of the BPA OATT, which different public process would not have the benefit of requiring FERC to focus on a record developed by BPA in the region.

The procedures established in section 212(i)(2) of the Federal Power Act are closely akin to those established in Northwest Power Act (“NWPA”) section 7(i) for rate proceedings before BPA.¹⁰ BPA has long had a process for expedited 7(i) rate proceedings.¹¹ Similarly, BPA could establish procedures, under section 212(i)(2) of the Federal Power Act, for expedited proceedings under section 212(i)(2). In this sense, the procedures established in section 212(i)(2) of the Federal Power Act could fit within the “scalable” model described in the Design Presentation.

In short, the section 212(i)(2) procedures should facilitate a “regional” focus with respect to BPA OATT changes through development of a record before BPA. BPA has indicated that BPA will “[r]espect existing avenues available to customers to seek third party oversight (Federal Power Act 210, 211, 211A, 212, 9th Circuit).”¹² Section 212(i)(2) procedures help ensure the development of a record in the region that should be the focus of FERC consideration of BPA OATT changes.

2. Section 9 Should Provide that BPA Will Follow the Procedures Established in Section 212(i)(2)

Section 212(i)(2) procedures must be expressly required by section 9 itself, in order to give BPA customers assurance that an appropriate process will be followed in amending BPA’s OATT. As discussed above, long-term decisions, such as resources acquisition or development activities, are predicated, in part, on appropriate BPA terms and conditions. The application pursuant to section 9 of such procedures that apply a just and reasonable and not unduly discriminatory or preferential standard for changes in BPA’s OATT promotes BPA transmission

¹⁰ BPA should adopt rules of procedure for the conduct of a proceeding under section 212(i)(2). Such rules of procedure should address (i) topics akin to those addressed in BPA’s rules of procedure for BPA rate cases conducted under NWPA section 7(i) and, in addition (ii) should address the role of the hearing officer, under which the hearing officer selected would be independent of BPA and prohibited from receiving *ex parte* contacts.

¹¹ See Bonneville Power Administration, United States Department of Energy, Rules of Procedure Governing Rate Proceedings, § 1010.10, available at https://www.bpa.gov/power/psp/rates/ratecases/7_i_rules.pdf.

¹² See Comments of Avista and PSE on BPA’s Tariff Engagement Design, dated January 12, 2017, at page 1.

terms and conditions that are consistent with other transmission service in the region and that are durable and fair.

2. Adoption of the Commenting Parties Proposal May Well Ameliorate Concerns Regarding the Absence of a FERC Role in the BPA OATT Amendment Process

As indicated above, the current section 9 provides for a FERC role by providing for a FERC declaratory order on a request to approve a proposed amendment. It appears that BPA contemplates that FERC would not have a role in the amendment process. In the absence of such a FERC role in the process for amending BPA's OATT, it may well be more likely that issues will unavoidably be framed in a petition to FERC under Federal Power Act section 211 or 211A. The absence of a FERC role in the process of amending BPA's OATT is a concern, but the adoption of the Commenting Parties Proposal should provide some procedural safeguards and an appropriate standard for adoption of amendments that may well ameliorate that concern.

3. BPA Should Issue a Reasoned Decision and Follow the Procedures of the Existing Section 9, if BPA Is to Change the Existing Section 9

If BPA is to change the existing section 9, BPA may only do so by filing a petition for declaratory order with FERC. Further, BPA should explain in a reasoned decision why section 9 should be revised.

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Avista, Portland General, and PSE appreciate BPA's review of these comments and consideration of the recommendations contained herein. By return e-mail, please confirm BPA's receipt of these comments.