

**IDAHO POWER COMPANY’S COMMENTS ON THE
PROPOSED REVISION TO SECTION 9
OF BONNEVILLE POWER ADMINISTRATION’S
OPEN ACCESS TRANSMISSION TARIFF**

December 8, 2017

Idaho Power Company (“Idaho Power”) submits the following comments to the Bonneville Power Administration’s (“Bonneville” or “BPA”) October 27, 2017, revised approach to modifications of its Open Access Transmission Tariff (“OATT” or “Tariff”).

I. Summary of Idaho Power’s Comments.

While Bonneville’s proposal to grandfather existing transmission service agreements is an improvement over previous proposals, Idaho Power continues to express disagreement and concerns with Bonneville’s proposal to create a new Tariff that may be modified on a basis other than as set forth in Section 9 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) *pro forma* OATT. The Federal Power Act (“FPA”) Section 212(i) process Bonneville desires to utilize for the creation of a new Tariff provides no assurance that the portions of the *pro forma* OATT Bonneville intends to disregard will be replaced by provisions that are not unduly discriminatory or preferential. The Section 212(i) process therefore exposes customers under the new Tariff to potentially unjust terms and conditions of service.

II. Bonneville’s October 27, 2017, Proposal.

On October 27, 2017, Bonneville offered for customer comment a revised approach to modifications of its Tariff.¹ Bonneville proposed to grandfather transmission service agreements entered into under its current Tariff. But, a new Tariff established utilizing the procedural requirements of FPA Section 212(i)(2)(A)(ii) would be adopted for future transmission service agreements. Bonneville described the new Tariff as more closely aligning with (but continuing to vary from) the FERC *pro forma* OATT. For example, FERC approval would not be required for modifications of the new Tariff.

III. Grandfathering Existing Transmission Service Agreements Is an Improvement Over Bonneville’s Prior Proposal.

A. Section 9 of the Current Tariff Induced Idaho Power to Convert a Grandfathered Transmission Service Agreement to OATT Service.

Section 9 of Bonneville’s existing Tariff requires Commission review of future tariff changes under the “just and reasonable” standard. The provision is the product of transmission

¹ October 27, 2017, presentation at slide 24, available at: https://www.bpa.gov/transmission/CustomerInvolvement/TransmissionBusinessModel/Documents/Oct_27-customer-workshop-version_1.8.pdf. Bonneville’s prior proposal was presented on July 26, 2017, available at: <https://www.bpa.gov/transmission/CustomerInvolvement/TransmissionBusinessModel/Documents/Sec9LangHandout-PFGASummerWorkshop0726-Tariff.pdf>.

rate settlements² and induced Idaho Power to give up a grandfathered transmission service agreement and take service under Bonneville's OATT. Had Bonneville not adopted Section 9 of its OATT, Idaho Power would likely have chosen a different approach when it came to determining whether to relinquish the contractual protections of its grandfathered transmission service agreement.

B. Existing Transmission Service Agreements Cannot be Amended Without Customer Consent.

Bonneville lacks the authority to unilaterally amend a transmission service agreement. A proposed change to a contract's terms and conditions by one party is merely an offer that the counterparty is not required to accept.³ Only the Commission has the authority under the "public interest" application of the just and reasonable standard to amend an existing transmission service agreement.⁴

Therefore, grandfathering existing transmission service agreements is an improvement over Bonneville's prior proposal of unilaterally amending existing transmission service agreements. But, Idaho Power remains concerned with Bonneville's proposal to create a new Tariff utilizing Section 212(i) of the FPA and proposing that the new Tariff may be modified on a basis other than as set forth in Section 9 of the FERC *pro forma* OATT.

IV. Bonneville's Proposed New Tariff Exposes Transmission Customers to Potentially Unjust Terms and Conditions of Service.

A. Section 212(i) of the FPA Applies Once FERC Directs Transmission Service; It Does Not Provide Independent Authority for Bonneville to Modify Its Tariff.

Bonneville cannot act independently of FERC. Bonneville suggests that Section 212(i) of the FPA provides authority for it to adopt a tariff without prior Commission action. Idaho Power does not agree with this interpretation of Section 212(i) as providing such authority. Section 212(i) addresses FERC's authority to direct transmission service for the Federal

² Bonneville's 1996 and 2001 transmission rate settlements require that all future tariff changes be subject to Commission review under the "just and reasonable, and not unduly discriminatory or preferential" ("just and reasonable") standard. See *Bonneville Power Admin.*, "Bonneville Power Administration's Petition for Declaratory Order Regarding Transmission Terms and Conditions," Docket No. NJ97-3-000 at Attachment 2, Bonneville Power Administration Point-to-Point Transmission Service Tariff § 1.1, TC-96-FS-BPA-02 at 64 (Dec. 16, 1996); *Bonneville Power Admin.*, "Bonneville Power Administration's Petition for Declaratory Order Regarding Transmission Terms and Conditions," Docket No. NJ01-1-000, Attachment A at § 9 (Dec. 14, 2000).

³ See e.g., *Douglas v. Talk America*, 495 F.3d 1062 (9th Cir. 2007) ("[A] revised contract is merely an offer and does not bind the parties until it is accepted."); *Union Pac. RR v Chi., Milwaukee, St. Paul & Pac. RR*, 549 F.2d 114, 188 (9th Cir. 1976) ("One party cannot unilaterally modify a contract without the consent of the other party or without consideration.")

⁴ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the "Mobile-Sierra doctrine"), as clarified in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527 (2008), and refined in *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165, 174-75 (2010).

Columbia River Treaty System. However, Section 212(i)(2) provides authority for Bonneville to establish general terms and conditions of transmission service only in circumstances when FERC directs Bonneville to provide transmission service. This interpretation is confirmed by the legislative history of Section 212(i), which provides as follows:

BPA may establish rates of general applicability for FERC-ordered transmission service which, once approved by FERC, will not be subject to review in individual cases but will be periodically reviewed and, as appropriate, revised along with BPA's general wholesale power and transmission rates. *BPA may also establish, and FERC may approve, terms and conditions of general applicability and sufficient specificity for FERC-ordered transmission services.*

BPA's rates terms and conditions for transmission service ordered by the FERC may differ from those required by the FERC of other entities subject to this Act. However, the effect of any transmission services ordered by the FERC under section 211A cannot be materially more or less favorable for BPA than for other entities subject to the FERC's transmission service orders pursuant to this Act with respect to: (1) overall cost recovery by the transmitting utility, and (2) economic impact of the transmitting utility.

The FERC has the responsibility to implement this Act, including section 212(i), and to consider and apply BPA's other federal statutes.⁵ (Emphasis added).

Since FERC has not ordered Bonneville to provide transmission service under Section 212(i), Section 212(i) does not provide Bonneville with independent authority to adopt a new Tariff. Bonneville therefore cannot sidestep Section 9 of its existing Tariff by unilaterally freezing its applicability and adopting a new Tariff pursuant to Section 212(i).

B. Bonneville Must Offer Transmission Services on Terms and Conditions That Are Not Unduly Discriminatory or Preferential.

Section 211A of the FPA⁶ requires that Bonneville offer transmission services on terms and conditions that are not unduly discriminatory or preferential. The FERC *pro forma* OATT satisfies the Section 211A standard. While Bonneville states that it intends for its new Tariff to be "more closely aligned to FERC's *pro forma* OATT," Bonneville acknowledges that its current Tariff varies from the *pro forma* OATT, and acknowledges that it intends to adopt provisions that continue to vary from the *pro forma* OATT. The Section 212(i) process provides no assurance that the portions of the *pro forma* OATT Bonneville disregards will be replaced with provisions that are not unduly discriminatory or preferential. This concern is exacerbated by Bonneville's

⁵ H.R. 776, Energy Policy Act of 1992, Conference Report (Oct. 5, 1992), Joint Explanatory Statement, at 4464-65.

⁶ FPA § 211A, 16 U.S.C. § 824j-1(b) ("[T]he Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services-- (1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.")

desire that the new Tariff be modified utilizing a Section 212(i) process rather than through FERC. The Section 212(i) process therefore exposes customers under the new Tariff to potentially unjust terms and conditions of service without review by a neutral third party. It is important not to lose sight of the fact that a public utility is permitted to refuse open access transmission service to Bonneville in accordance with Order No. 888;⁷ however, such an approach would be a blunt instrument that utilities would prefer not to rely upon. It is in our collective best interest to avoid dynamics that encourage the consideration of such a remedy.

V. Conclusion.

Idaho Power appreciates the ability to submit comments on Bonneville's proposed modifications of its Tariff. While Bonneville's proposal to grandfather existing transmission agreements is an improvement over previous proposals, Idaho Power continues to express disagreement and concerns with Bonneville's proposal to create a new Tariff that may be modified on a basis other than as set forth in Section 9 of the FERC *pro forma* OATT. The Section 212(i) process Bonneville desires to utilize for the creation of a new Tariff provides no assurance that the portions of the *pro forma* OATT Bonneville intends to disregard will be replaced by provisions that are not unduly discriminatory or preferential. The Section 212(i) process therefore exposes customers under the new Tariff to potentially unjust terms and conditions of service.

Idaho Power reserves the right to submit additional comments on these topics and other topics in BPA's Tariff Engagement Design process.

⁷ *Pub. Serv. Co. of Colorado, et seq.*, 161 FERC 61,188 at P6 (Nov. 16, 2017) (“[T]he Commission permits a public utility transmission provider to refuse to offer open access transmission service to a non-public utility transmission provider, in accordance with Order No. 888.”)