

May 30, 2018

Via Email (techforum@bpa.gov)

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

Re: TC-20 Comments of Avangrid Renewables, LLC, Avista Corporation, Idaho Power Company, PacifiCorp, Portland General Electric Company, and Puget Sound Energy, Inc. on BPA Proposed Section 9 Tariff Language

Avangrid Renewables, LLC, Avista Corporation, Idaho Power Company, PacifiCorp, Portland General Electric Company, and Puget Sound Energy, Inc. (together, the “Commenting Parties”) respectfully submit the following comments on the BPA proposed Section 9 (Regulatory Filings) tariff language (“BPA Proposed Section 9”), following up on BPA’s TC-20 Tariff Customer Workshop on April 23, 2018 (the “April 23 Workshop”).¹ Commenting Parties appreciate the opportunity to submit comments to BPA and look forward to working with BPA on these matters.

I. BPA PROPOSED SECTION 9 SHOULD NOT BE ADOPTED

A. BPA Proposed Section 9

At the April 23 Workshop, BPA presented the BPA Proposed Section 9,² which reads as follows:

Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the right of the Transmission Provider to unilaterally make changes in terms and conditions, classification of service, or Service Agreement after the Transmission Provider conducts a hearing under Section 212(i)(2)(A) of the Federal Power Act. The Transmission Provider may, subject to the provisions of the applicable

¹ The Commenting Parties understand that BPA is developing a new Tariff (the “New BPA Tariff”), for which BPA is proposing the BPA Proposed Section 9, for new transmission service requests. The New BPA Tariff (including the new section 9 that BPA is developing in this process) should not and cannot apply to transmission service under BPA’s existing Tariff (the “Existing BPA Tariff”).

² BPA Proposed Section 9 appears at page 13 of the BPA “Terms and Conditions TC-20 Tariff Proceeding Customer Workshop 4/23/18” presentation (the “BPA April 23 Presentation”), available at <https://www.bpa.gov/Finance/RateCases/BP-20/Meetings/Tariff-Proceeding/April%2023,%202018/Customer%20Workshop%20Presentation%20for%20April%2023%202018.pdf>.

Service Agreement under this Tariff, change the rates that apply to transmission service pursuant to applicable law.

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.

B. BPA Proposed Section 9 Fails to Provide Adequate Protection for Transmission Customers

The New BPA Tariff, and any changes thereto, should be durable, fair, and consistent with the terms and conditions of transmission service provided by FERC-jurisdictional transmission providers in the region. This is particularly true in light of BPA's role as a significant transmission provider in the region. BPA operates over 15,000 circuit miles of high voltage lines, representing about 75 percent of the high voltage grid in the Pacific Northwest. Transmission customers in the Pacific Northwest rely on BPA transmission to move power from resources to loads and make wholesale transactions. BPA's transmission customers need BPA to provide transmission service under terms and conditions 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 resource acquisition or development activities, are predicated, in part, on BPA providing transmission service under such terms and conditions. Section 9 should promote BPA transmission terms and conditions that are consistent with other transmission service in the region and that are durable and fair.

In sum, the shortcomings of the BPA Proposed Section 9 must be rectified to provide transmission customers assurance that an appropriate process will be followed before any changes to the New BPA Tariff are made. Such assurance will promote regional consistency and provide BPA's transmission customers the durable terms and conditions that they need to make long-term decisions, such as resources acquisition or development activities.

1. BPA Proposed Section 9 Is Overbroad and Would, For Example, Purport to Allow BPA to (i) Ignore Section 212 Hearing Determinations in Making Tariff Changes and (ii) Unilaterally Change a Service Agreement

BPA Proposed Section 9 is overbroad. BPA Proposed Section 9 requires BPA to conduct a hearing under Section 212(i)(2)(A) of the Federal Power Act³ (a "Section 212 Hearing") but fails to expressly require that any modification of the New BPA Tariff must be adopted pursuant to a determination made in that proceeding. Read literally, BPA Proposed Section 9 would arguably permit BPA—so long as it conducted a Section 212 Hearing—to adopt *any* revision to

³ Section 212(i)(2)(A) of the Federal Power Act, 16 U.S.C. § 824k(i)(2)(A).

the New BPA Tariff, even if the determination in the Section 212 Hearing was to do something different.

More fundamentally, Section 9 should expressly limit the terms and conditions of service that may be modified through an appropriate process to the terms and conditions in the New BPA Tariff. Section 9 should not, for example, allow BPA to unilaterally change a transmission customer's service agreement. The service agreement sets forth in Exhibits the parameters of the service to be provided (e.g., transmission demand, term, Point(s) of Receipt, Point(s) of Delivery). BPA's transmission customers have an important interest in BPA not being able to unilaterally change a service agreement including the Exhibits that set forth the parameters of the service to be provided, and BPA has not demonstrated why it might need such a unilateral right.

2. BPA Proposed Section 9 Fails to Expressly Require a Determination by the Administrator that Changes to the New BPA Tariff to be Adopted Are (i) Consistent with the Statutory Standards in Federal Power Act Sections 211 and 211A, and (ii) Consistent with Applicable Law

BPA has indicated that it "has significant concerns with including a substantive standard based on statutory language." Specifically, BPA is concerned that a substantive standard creates a potential breach of contract claim, elevates one standard over other standards, and may not lead to the development of a full and complete record because it could limit the scope of a Section 212 Hearing.

By "substantive standard," it appears that BPA means a contractual requirement in section 9 of the New BPA Tariff that a change to that tariff satisfy the specified standard. However, any such concerns do not extend to specifying what the *determinations* made by the Administrator in changing the New BPA Tariff shall include (which is essentially a *procedural* standard). Section 9 in the New BPA Tariff can and should include a requirement, with regard to any change made by the Administrator in a Section 212 Hearing, that the Administrator make a determination that the tariff changes being adopted are consistent with the statutory standards under Federal Power Act sections 211 and 211A and consistent with applicable law.

The statutory standard under section 211 is terms and conditions that are just and reasonable and not unduly discriminatory or preferential and that would otherwise be in the public interest;⁴ the statutory standard under section 211A is terms and conditions that are comparable to those under which BPA provides transmission services to itself and that are not

⁴ This standard is applicable to BPA transmission terms and conditions ordered by FERC pursuant to section 211(a) of the Federal Power Act, 16 U.S.C. § 824j(a); these standards are set forth in 16 U.S.C. § 824j(a) or 16 U.S.C. § 824k(a).

unduly discriminatory or preferential.⁵ A provision in section 9 that the Administrator will make determinations in the Section 212 Hearing that tariff revisions that are adopted are consistent with these statutory standards and consistent with applicable law should help ensure (i) development of a record in the Section 212 Hearing that supports BPA's determinations in any subsequent proceedings before FERC under section 211 or 211A, (ii) the adoption of tariff revisions that protect the interests of BPA's transmission customers, and (iii) consistency of the tariff change with applicable law.

For example, if BPA has conducted a Section 212 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 extent that the Commission finds the Administrator's hearing record to be inadequate to support a decision by the Commission". If the Administrator fails to make a determination in the Section 212 Hearing that a tariff change is consistent with the section 211 standard, then it appears that the Administrator's hearing record will be inadequate before FERC in a section 211 proceeding. In this case, the benefit of FERC focus on a BPA record developed in the region is lost.

In short, in the absence of a section 9 requirement for a determination that a tariff change is consistent with the statutory standards of sections 211 and 211A and consistent with applicable law, a record could be developed that is inadequate to support a decision (a recommended decision by the Hearing Officer or a final decision by the Administrator). The Administrator's decision could then be found arbitrary and capricious and not in accordance with the law. Articulation of the above-described standard should allow for meaningful dialogue, for consideration of all of the statutory standards and BPA's various statutory obligations, and for the development of a complete record of the Administrator's determination.

⁵ This standard is applicable to BPA transmission terms and conditions ordered by FERC pursuant to section 211A of the Federal Power Act, 16 U.S.C. § 824j-1(b). Section 211A allows the Commission to order an unregulated transmitting utility, such as BPA, to provide transmission service on terms and conditions that are comparable to those under which the utility provides transmission services to itself and that are not unduly discriminatory or preferential. The Commission emphasized this point and applied it to BPA when it ordered BPA, under section 211A, to file tariff revisions regarding Bonneville's Environmental Redispatch Policy. (*Iberdrola Renewables, Inc. et seq.*, 137 FERC 61,185 at P64 (2011).) The Commission stated:

As we noted above, the Commission appreciates that Bonneville must reconcile the obligations set forth in its organic statutes with numerous rules and regulations, including those under the Endangered Species Act and the Clean Water Act. As directed in this order, *Bonneville also must reconcile the provisions of comparable service that is not unduly discriminatory or preferential with its organic statutes.*

Id. at P65 (emphasis added) (citation to footnote 101 of the order omitted).

II. BPA PROPOSED SECTION 9 SHOULD BE REVISED TO PROVIDE ADEQUATE PROTECTION FOR TRANSMISSION CUSTOMERS

BPA should revise the BPA Proposed Section 9⁶ to read as follows:

9 Changes to this Tariff

Nothing contained in this Tariff shall be construed as affecting in any way the Transmission Provider's ability to unilaterally make changes prospectively in terms and conditions of this Tariff; provided, that any change to this Tariff shall only be made pursuant to a determination by the Administrator made in a proceeding pursuant to the provisions of Federal Power Act section 212(i)(2), under which the Administrator conducts a hearing and makes a determination based on the record developed in such proceeding that such change provides terms and conditions that (i) are just and reasonable and not unduly discriminatory or preferential and would otherwise be in the public interest, (ii) are comparable to terms and conditions under which BPA provides transmission services to itself, and (iii) are consistent with applicable law.

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.

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.

The Commenting Parties Proposed Section 9⁷ rectifies shortcomings discussed above of the BPA Proposed Section 9 and should help ensure that the New BPA Tariff, including any changes thereto, is durable, fair, and consistent with statutory standards, applicable law, and the terms and conditions of transmission service provided by FERC-jurisdictional transmission providers in the region.

It should be noted that BPA must not adopt business practices or other procedures or policies that would circumvent section 9 of the New BPA Tariff or that would modify or be inconsistent with the New BPA Tariff. The process provided in section 9 of the New BPA Tariff provides the process for revising the New BPA Tariff. Business practices and other procedures

⁶ Indeed, the title of BPA Proposed Section 9 is "Regulatory Filings." This is a misnomer because BPA proposes to make *no* FERC filing to modify its New BPA Tariff.

⁷ This Commenting Parties' proposed Section 9 also clarifies that the New BPA Tariff is not to be changed retroactively.

and policies cannot and should not be used as a mechanism to effect changes to the New BPA Tariff.

III. BPA SHOULD FOLLOW THE PROCESS SET FORTH IN THE COMMENTING PARTIES PROPOSED SECTION 9 IN ADOPTING THE NEW BPA TARIFF

If BPA adopts a New BPA Tariff, it should do so pursuant to the process set forth in the Commenting Parties Proposed Section 9, which includes a Section 212 Hearing. In other words, BPA should follow the same procedures to adopt the New BPA Tariff as it should follow to change the New BPA Tariff.

IV. BPA SHOULD ADOPT THE COMMENTING PARTIES PROPOSED SECTION 9 AND ENGAGE TRANSMISSION CUSTOMERS TO ADDRESS ANY REMAINING CONCERNS

Particularly in light of the significant shortcomings of the BPA Proposed Section 9, BPA should not adopt the Proposed BPA Section 9. BPA should instead adopt the Commenting Parties' proposed Section 9. BPA should work with transmission customers and engage in further discussion regarding the appropriate requirements for section 9 of the New BPA Tariff to address any remaining concerns.

V. BPA SHOULD ISSUE A REASONED DECISION AND FOLLOW THE PROCEDURES OF THE EXISTING SECTION 9, IF BPA IS TO CHANGE THE EXISTING SECTION 9 OF THE EXISTING BPA TARIFF

If BPA is to change the existing section 9 of the Existing BPA Tariff, BPA may only do so by filing a petition for declaratory order with FERC. Further, BPA should explain in a reasoned decision why any such revision to section 9 is necessary.

By return e-mail, please confirm BPA's receipt of these comments.