

## RTO WEST TARIFF DISPUTE RESOLUTION PROVISIONS

DRAFT ~~10-25~~11-2-02

(Based on 10-31-02 TWG Meeting)

~~[NOTE TO TWG DRAFT OF 9/27/01 – We need to talk and think through issues of coordinating between RTO West Tariff and the Tariff of any Canadian grid operating entity.]~~

“**Disputing Party(ies)**” shall mean any of the following entities which initiates RTO West Dispute Resolution Procedures pursuant to this section of the Tariff: (i) a Transmission Customer; (ii) RTO West; (iii) Bonneville, if and to the extent that, pursuant to Section 10.3.13.2, Bonneville is deemed a Transmission Customer for purposes of disputes arising out of service under a General Transfer Agreement **[QUESTION: Should this be applicable to all PTOs, not just BPA?]** [TOA Exh. P ¶ I.A.3.]; ~~and~~ (iv) any converting customer of a Participating Transmission Owner that disputes, prior to conversion, the catalogue of transmission rights established for that customer pursuant to Section ~~——~~; **[NOTE: preceding reference is to cataloguing and conversion section of Tariff that has yet to be developed]**; or (v) an Eligible Customer who wants to dispute whether they are entitled to become a Transmission Customer. [TOA Exh. P ¶ II] **[NOTE: May need to include reference to distribution service entity [and/or Scheduling Coordinator?] as party that may use ADR.]** **[NOTE: Paul Murphy has raised a concern about whether an entity desiring to go from bundled service under a PTO can use ADR to determine the nature and extent of the transmission rights, if any, they will receive before they make the irrevocable decision to go out on their own under voluntary, state approved direct access. A similar issue applies to customers under existing contracts who are considering conversion – can they use ADR before making the decision to convert? The issue here is essentially whether or to what extent the entity receives congestion hedges when it converts or goes out on its own in a retail access situation.]** **[NOTE: An entity wanting to convert an existing contract to FTOs can dispute the PTO’s determination of the FTOs using ADR and may, at its discretion, elect to take service under the conversion proposal pending ADR resolution. (Subject to confirmation!) See TOA Section 9.3.1 and 9.3.2]**

“Participant” means a person or entity with a commercial or other material interest in issues raised or the outcome of a proceeding under this Section 10 that has been allowed to intervene in that proceeding. **[DRAFT PROPOSAL BY EDITOR-NOT REVIEWED BY TWG]**

“**Party(ies)**” shall mean any Disputing Party, any Responding Party, and any entity that intervenes in an arbitration and secures Party status pursuant to Section 10.5.3;

“**Responding Party(ies)**” shall mean a Party named in a statement of claim submitted pursuant to Section 10.2.2 or that otherwise responds to a statement of claim pursuant to Sections 10.2.2 or 10.3.13.2; ~~[ERT NOTE – TOA EXH P ¶ I.A USES THE TERM “responding party,” and THE TWG DRAFT USES THE TERM “responding Party.” NEITHER DOCUMENT~~

~~DEFINES THE TERM OR USES IT AS A DEFINED TERM. IT WOULD BE HELPFUL TO HAVE THIS AS A DEFINED TERM.]~~

~~“Wholesale Access” means the need for and costs of upgrades, expansions and interconnection facilities and the estimates of the nature, extent, total cost, schedule and proposed allocations of costs associated with studies, including environmental analyses, proposed in response to a request for service in accordance with the terms and conditions provided in the applicable tariff; [Exhibit P]~~

## 10. Dispute Resolution

### 10.1 Applicability.

**10.1.1 General Applicability.** The provisions of this Section 10 (the “RTO West Dispute Resolution Provisions”) shall apply to all disputes that arise under the RTO West Tariff, including all disputes as to ~~A~~access and adequacy of service over ~~[F/F?]~~Electric System facilities that are not RTO West Controlled Transmission Facilities (in accordance with the special rules in Section 10.3.13) [TOA Exh. P, ¶ I.A.] NOTE: Look at the foregoing again after draft Tariff language is developed on the scope of use of facilities under Section 6.5 of TOA.], except:

- (i) ~~(i)~~ as limited by law (including the rights of any party entity to file a complaint with FERC under the relevant provisions of the FPA); and
- ~~(ii):~~
- (ii) (a) disputes between the parties to a Non-Converted Transmission Agreement that arise under ~~the that~~ Non-Converted Transmission Agreement, except (1) with respect to disputes over conversion of Non-Converted Transmission Agreements to Financial Transmission Options, (2), to the extent provided in Section 10.3.14, disputes over conversion of Non-Converted Transmission Agreements to Catalogued Transmission Rights or (3) as the ~~d~~Disputing ~~p~~Parties may otherwise agree;
- (b) disputes ~~as to~~ whether the rates, charges, terms, or conditions of the RTO West Tariff are just and reasonable under the FPA, which shall be presented directly to FERC for resolution, except as the ~~d~~Disputing ~~p~~Parties may otherwise agree; and
- (c) applications, petitions, or complaints seeking changes to the rates, charges, terms, or conditions of the RTO West Tariff or changes to any Service Agreement entered into under the RTO West Tariff, which shall be presented directly to FERC for resolution;

(d) disputes that the parties agree to resolve through means other than under the RTO West Dispute Resolution Provisions, including presenting the matter directly to FERC for resolution; ~~and,~~

~~(e) [ERT NOTE – PART IV, SEC. 3.5 OF TARIFF DRAFT DATED 10/16/02 ASKS WHETHER CUSTOMER CAN INITIATE SERVICE W/O EXECUTED SERVICE AGREEMENT. NEED TO (1) ADDRESS HERE WHETHER DISPUTES OVER SERV. AGREEMENT GO TO ADR OR FERC, (2) ADDRESS ELSEWHERE WHETHER CUSTOMER MUST TAKE SERVICE UNDER TERMS OF OFFER WHILE DISPUTE IS PENDING. – See SECTION 10.4.1.1 FOR ONE POSSIBLE SOLUTION TO ISSUE (2).]~~

**10.1.2** Injunctive Relief. Where a court so determines, resort to the RTO West Dispute Resolution Provisions shall not be a condition precedent to a court action for injunctive relief.

**10.1.3.** Limitations on Availability of RTO West Dispute Resolution Procedures for Disputes as to Cataloguing and Conversion to Catalogued Transmission Rights. [NOTE: Look at this section again after drafting Tariff language on conversion] At the election of the customer, ~~D~~disputes between a Participating Transmission Owner and its converting customer as to the ~~e~~Catalogued ~~of~~ ~~t~~Transmission ~~r~~Rights [NOTE: This section needs to refer back to the substantive provision of the Tariff on conversion to CTRs once drafted] for that customer may, ~~at the election of that customer prior to conversion,~~ be submitted to RTO West Dispute Resolution Procedures prior to conversion, subject to the following limitations:

**10.1.3.1.** The right to invoke RTO West Dispute Resolution Procedures shall not be available for cataloguing of Open Access Transmission Tariff terms and conditions that may unilaterally be modified by the Participating Transmission Owner (subject to FERC approval) [TOA Exh. P ¶ II.B.2]; and

**10.1.3.2.** The issues subject to arbitration shall be limited to (i) amounts of demand and defined injection and withdrawal locations; (ii) limitations on amounts and directions of overall schedules; (iii) scheduling points of receipt and delivery (if off the RTO West Controlled Transmission System) and associated amounts of demand; (iv) scheduling flexibilities or limitations; (v) limitations on or curtailment of schedules; and (vi) load growth location and amount or formula. [ERT NOTE CONSEQUENCES OF ELECTION TO ARBITRATE (i.e. IRREVOCABLE) SHOULD BE ADDRESSED IN C&C PROVISIONS OF TARIFF]–[TOA Exh. P ¶ II.B.2]

## **10.2** Initiation of Arbitration

**10.2.1** Demand for Arbitration. ~~A~~Disputing Customer Party(ies) may initiate arbitration by serving ~~its~~ demand for arbitration on the ~~other disputing Parties~~ Responding Party(ies) [ERT NOTE REFERENCE TO “OTHER DISPUTING PARTIES” IS UNCLEAR] and the RTO West Arbitration Committee, which shall publish

notice of the demand on the RTO West Website and by any other method the RTO West Arbitration Committee specifies.

**10.2.2 Statement of Claim and Response.** Except as provided in Section 10.3.15, within 15 days after serving an arbitration demand under Section 10.2.1, the Disputing Party(ies) shall, ~~within 15 days after serving an arbitration demand under Section 10.2.1~~, serve a written statement of claim ~~to on~~ each other ~~disputing~~ Party and the RTO West Arbitration Committee. Service of the statement of claim ~~which~~ shall initiate the process specified in the RTO West Dispute Resolution Provisions. The Parties may agree to delay the commencement of arbitration to attempt ~~to resolve~~ resolution of their dispute through good-faith negotiations or mediation or for any other reason. The statement of claim shall set forth in reasonable detail (i) each claim, (ii) the relief sought (iii) a summary of the grounds for such relief and the basis for each claim, and (iv) the identity of all Parties to the dispute. Each Responding Party shall deliver its response (including identification of any additional necessary Parties) within 15 days following receipt of the initial statement of claim or such longer period as the Parties agree or the RTO West Arbitration Committee may permit following an application by the Responding Party. If any Responding Party wishes to submit a counterclaim with its response to the initial statement of claim, the Responding Party shall include the counterclaim in its response. Where a Responding Party includes a counterclaim the ~~initiating~~ Disputing Party may respond to that counterclaim within 15 days following receipt of the counterclaim. Any Party named in a statement of claim that does not respond to the claim within the period specified in this Section 10.2.2 shall be deemed to have denied each claim against it and shall thereafter be deemed to be a Responding Party. RTO West shall publish the statements of claim, responses, and any counterclaims on the RTO West Website and by any other method the RTO West Arbitration Committee specifies.

### **10.3 Arbitration Process.**

#### **10.3.1 Selection of Arbitrator.**

**10.3.1.1 Selection of a Single Arbitrator.** Except as provided in Section 10.3.15, within 10 days following submission of all ~~R~~ Responding Parties' responses and counterclaims, the Parties shall select an arbitrator familiar with and knowledgeable about electric utility matters, including electric transmission and bulk power issues and related regulatory requirements. If QUESTION: within days? the Parties cannot agree upon an arbitrator, or do not agree on a means of selecting an arbitrator that differs from that set forth in this Section 10.3.1, the Parties shall take turns striking names from a list of 10 qualified individuals supplied by the RTO West Arbitration Committee from its standing list, with a Party chosen by lot first striking a name. The last remaining name not stricken shall be designated as the arbitrator. If that individual is unable or unwilling to serve (or, if a Party objects to the arbitrator serving on the basis of a disclosure under-pursuant to Section 10.3.2.1 within five days of that disclosure), the individual last stricken from the list shall be designated and the process repeated until an individual is selected who is able and willing to serve. If a

Disputing Party or Responding Party does not participate in the selection of an arbitrator within the time period specified under this Section 10.3.1.1, the remaining Parties have the right to select the arbitrator without that Party.

**10.3.1.2 Party's Option to Obtain Three Arbitrator Panel.** As an alternative to selecting one arbitrator under Section 10.3.1.1, any Party may elect to constitute a three-member arbitration panel, and the other Party or Parties shall cooperate in the selection of the panel, subject to the following conditions:

- (a) Any Party or Parties so electing shall be responsible for five-sixths (5/6) of the costs of the arbitration (exclusive of each Party's individual costs and attorneys' fees), regardless of the outcome of the arbitration, unless the disputing Parties agree to an alternate method of allocating costs. The remaining one-six (1/6) of the costs shall be allocated to the Party (or allocated in equal parts among the Parties) that did not participate in the election to use a three arbitrator panel.
- (b) Each arbitrator shall be subject to the requirements of Section 10.3.2.
- (c) Unless otherwise agreed by the Parties, the three arbitrators shall be selected in the following manner:
  - (i) the RTO West Arbitration Committee shall provide to the Parties a list of 15 qualified individuals from its standing list;
  - (ii) the Parties shall take turns striking names from the list, with a Party chosen by lot first striking a name; ~~and~~
  - (iii) the three remaining names not stricken shall constitute the arbitration panel; and
  - (iv) in the event one or more of the arbitrators selected is unwilling to serve or disqualified from serving, the Parties shall use the same process described in Section 10.3.1.1 above to select a replacement.
- (d) The arbitration panel shall decide all matters by majority vote.
- (e) All other procedures, rights and obligations set out in the RTO West Dispute Resolution Provisions shall apply to the arbitration, and all references to the "arbitrator" also shall be deemed a reference to the three-member arbitration panel so chosen.

**10.3.1.3 Communication with Candidates Selected to Serve as Arbitrator.** No Party and no one acting on behalf of any Party shall communicate on any matter relating to the dispute, including selection of an arbitrator, with any potential arbitrator identified on the list provided by the RTO West Arbitration Committee, except that RTO West staff, under the direction of the RTO West

Arbitration Committee, may communicate with potential arbitrators concerning arrangements for an arbitration.

**10.3.1.4** Arbitrator's Jurisdiction. The arbitrator shall have the power to determine whether a dispute is subject to arbitration pursuant to the RTO West Dispute Resolution Provisions.

**10.3.2** Disclosures Required of Arbitrators.

**10.3.2.1** Initial Disclosure Obligation. The RTO-West Arbitration Committee shall require the selected ~~The selected~~ arbitrator ~~shall be required~~ to disclose to the Parties any direct financial or personal interest in the outcome of the arbitration and. ~~The arbitrator shall be required to disclose to the Parties~~ any additional interests, relationships, facts, or circumstances including:

- (a) any existing or past financial, business, or professional interest or employment;
- (b) any relationship the arbitrator has with any Party or its counsel, or with any individual whom the arbitrator has been told will be a witness; and
- (c) any family or personal relationship

if such interest or relationship is likely to affect the arbitrator's impartiality or might reasonably create an appearance of bias. All arbitrators shall be required to make a reasonable effort to inform themselves of any interests or relationships described above.

**10.3.2.2** Ongoing Disclosure Obligations. The obligation to make disclosure in accordance with Section 10.3.2.1 is a continuing duty. If, after initiation of an arbitration under the RTO West Dispute Resolution Provisions, the arbitrator must make a disclosure in accordance with Section 10.3.2.1, the arbitrator shall, at the time of disclosure, determine whether the information disclosed is grounds to disqualify the arbitrator from continuing with the arbitration. If the arbitrator determines that he or she is disqualified from continuing with the arbitration, the Parties shall select a new arbitrator in accordance with Section 10.3.1.

**10.3.3** Arbitration Procedures.

**10.3.3.1** Procedural Rules. The RTO West Arbitration Committee shall adopt Arbitration Procedural Rules consistent with the RTO West Dispute Resolution Provisions. The RTO West Arbitration Committee may modify the Arbitration Procedural Rules from time to time. In any case where there is a conflict between the Arbitration Procedural Rules and the RTO West Dispute Resolution Provisions, the RTO West Dispute Resolution Provisions shall govern. The arbitrator shall conduct the arbitration in accordance with the RTO West

Dispute Resolution Provisions and the Arbitration Procedural Rules, except as provided in Section 10.3.4.

**10.3.3.2** Communication with Arbitrator. Except by agreement of or in the presence of all Parties, no Party or Participant **[NOTE: Undefined term- See draft proposal under definitions]** and no one acting on behalf of any Party or Participant shall orally communicate with the arbitrator concerning the arbitration outside of scheduled proceedings. Unless the Parties agree otherwise or the arbitrator so directs, any written or electronic communication from any Party or Participant to the arbitrator shall also be sent to all other Parties and Participants and to the RTO West Arbitration Committee.

**10.3.4** Modification of Arbitration Procedures. The Parties may, by agreement of all the Parties, modify the application of the Arbitration Procedural Rules for purposes of their specific dispute. Except where the terms of the RTO West Dispute Resolution Provisions specifically provide otherwise, the Parties may not agree to modify any of the provisions set forth in the RTO West Dispute Resolution Provisions.

### **10.3.5** Rights Relating to Intervention

**10.3.5.1** Time for Intervention. Except as provided in Section 10.3.15, RTO West, any Canadian grid operating entity, or any Transmission Customer **[QUESTION: or Eligible Customer?]** not named as a Party in a statement of claim initiating an arbitration as provided in sSection 10.2.2 or in a counterclaim submitted in response thereto may apply to intervene in the arbitration as a Party or Participant within 30 days from publication of the statement of claim. Any Member of RTO West, as defined in the RTO West Bylaws, ~~[NTD: need to define RTO West Bylaws? Or Member of RTO West?]~~ that is not a Transmission Customer and is not named as a Party in a statement of claim initiating an arbitration as provided in section 10.2.2 or in a counterclaim submitted in response thereto may apply to intervene in the arbitration as a Participant within 30 days from publication of the statement of claim. Late intervention may be permitted in the arbitrator's discretion for good cause shown. Any intervening Party or Participant must:

- (i) accept the record as established prior to the intervention, including any procedural or substantive rulings or orders;
- (ii) proceed in accordance with any established schedule; and
- (iii) pay a share of the costs of arbitration as determined by the arbitrator taking into account, among other things, the differing procedural rights of Parties and Participants and the stage of the arbitration when intervention is sought. In addition, any late-intervening Party or Participant must not cause a conflict of interest for the arbitrator objectionable to any existing Party.

**10.3.5.2** Application and Order. Except as provided in Section 10.3.15, an application to intervene shall be served on ~~the~~ all Parties and the RTO West Arbitration Committee. Any such application shall state whether intervention is sought as a Party or a Participant and shall demonstrate the applicant's satisfaction of the criteria stated in Section 10.3.5.4 below. Any objection by a Party to the intervention request must be filed with the arbitrator, if an arbitrator has been selected, and served upon the applicant, the Parties and the RTO West Arbitration Committee, within 10 days of service of the application. Promptly upon selection of the arbitrator pursuant to Section 10.3.1, the arbitrator will issue an order determining whether, based upon the criteria established by Section 10.3.5.4 below, any applicant that has timely filed an application pursuant to Section 10.3.5.1 may intervene in the arbitration.

**10.3.5.3** Intervenor Status and Rights of an Intervening Party. The arbitrator, in an order responding to an application to intervene, ~~shall~~, upon the requisite showing as established by Section 10.3.5.4 below, shall grant Party status to RTO West, a Canadian grid operating entity, or a Transmission Customer with full rights and responsibilities in relation to all other Parties, provided that the arbitrator may condition Party status as necessary to assure that the rights of other Parties are not unduly prejudiced or that the arbitration is not unduly delayed. Alternatively, the arbitrator's order responding to an application to intervene may grant Participant status to RTO West, a Canadian grid operating entity, a Transmission Customer, or a Member upon the requisite showing as established by Section 10.3.5.4 below. If intervention is granted to an applicant as a Participant only, the arbitrator's order shall contain any limitations on participation additional to those stated in Section 10.3.5.5 below. The arbitrator shall deny all other applications for intervention.

**10.3.5.4 Requisite Showing**. Subject to the provisions of Sections 10.3.5.1 and 10.3.5.3,

(A) RTO West, a Canadian grid operating entity, or an Transmission Customer shall be permitted to intervene as a Party upon a showing that:

- (i) the applicant has an interest relating to the property or the transaction that is the subject of the arbitration,
- (ii) the applicant is so situated that the disposition of the matter subject to arbitration may as a practical matter impair or impede the applicant's ability to protect that interest, and
- (iii) no existing Party adequately represents the applicant's interest; and

(B) any person or entity eligible to apply for Party status that does not satisfy the requirements of subsection (A) above or any Member [QUESTION: or Eligible Customer?] that is not a Transmission

Customer shall be permitted to intervene as a Participant upon a showing that it has a commercial or other material interest in the issues raised or outcome of the proceeding.

**10.3.5.5** Participants' Rights. Subject to further limitations imposed by the arbitrator as may be required to assure that the rights of Parties or other Participants are not unduly prejudiced or that the arbitration is not unduly delayed, and except as provided in Section 10.3.5.6 below, Participants' rights to participate in the arbitration shall be only as specified in this Section 10.3.5.5. Participants:

- (a) must be timely served by the Parties with copies of all pleadings;
- (b) have the right to file written post-hearing comments; and
- (c) may attend hearings conducted by the arbitrator, but shall not otherwise participate in the hearings except as provided in Section 10.3.5.6 below. Participants must serve their comments upon each Party and Participant according to a procedural schedule to be established by the arbitrator, which shall include a reasonable opportunity for Parties to respond to comments filed by Participants. Participants' comments may be considered by the arbitrator in reaching decision on any issue; provided, however, that comments shall not constitute evidence in the proceeding except to the extent they contain information that, in the arbitrator's opinion, is within the scope of judicial notice.

**10.3.5.6** Additional Participants' Rights. For good cause shown, the arbitrator may allow one or more of the Participants, or designated groups of Participants with common interests to: (i) file expert testimony on one or more specifically-identified discrete issues, (ii) cross examine one or more witnesses on such issue(s); (iii) submit briefs on such issue(s); and (iv) participate in oral argument on such issue(s). Any such expert testimony or testimony obtained by cross-examination shall be treated as evidence on the same basis as the Parties' testimony. As used in this Section 10.3.5.6, "good cause" means that

- (a) the Participant(s) has made a showing that its interests are likely to be adversely affected by the resolution of an issue in a manner advocated by a Party;
- (b) no Party's interest is reasonably aligned with the Participant(s) interest;
- (c) the Participant(s) will present evidence or argument helpful to the determination of an issue;
- (d) the Participant(s) agrees to pay an increased share of the arbitration costs as mutually agreed by the Participant(s) and Parties or as determined by the arbitrator at the conclusion of the arbitration; and

(e) the Participant(s)' additional participation will not expand the scope of or unduly delay the proceedings.

**10.3.6 Timetable.** Except as provided in Section 10.3.15, -the arbitrator shall, promptly after his or her appointment, set a date for the issuance of the arbitration decision, which shall be no later than six months (or such later date as the Parties and the arbitrator may agree) from the date of the appointment of the arbitrator, with other dates, including the dates for an evidentiary hearing or other final submissions of evidence, set in light of this date. The Parties ~~may~~, by agreement, may modify any dates set by the arbitrator (other than the maximum time allowed for issuance of the arbitration decision). The arbitrator shall not change the date for the evidentiary hearing or other final submissions of evidence absent extraordinary circumstances. The arbitrator shall have the power to impose sanctions, including imposition of costs and dismissal of the proceeding, for dilatory tactics or undue delay in completing the arbitration proceedings.

**10.3.7 Discovery Procedures.** The Arbitration Procedural Rules shall include adequate provision for the discovery of relevant facts, including the taking of testimony under oath, production of documents and other things, the presentation of evidence, the taking of samples, conducting of tests, and inspection of land and tangible items. The nature and extent of such discovery shall take into account (i) the complexity of the dispute, (ii) the extent to which facts are disputed, (iii) the extent to which the credibility of witnesses is relevant to a resolution, (iv) the need to provide fair access to information by all Parties where information has been obtained under statutory right by one or more Parties from another Party or Parties outside the discovery process, and (v) the amount in controversy. The forms and methods for taking such discovery shall be as described in the Federal Rules of Civil Procedure, except as modified by agreement of the Parties.

**10.3.8 Confidentiality.** The Arbitration Procedural Rules shall provide a means for protecting confidential information disclosed in the course of an arbitration under the RTO West Dispute Resolution Provisions. Any information determined to be confidential in the course of an arbitration shall not be included in any published or publicly available summary or copy of the arbitration award.

**10.3.9 Summary Disposition.** The Arbitration Procedural Rules shall provide a means for summary disposition of an arbitration proceeding under the RTO West Dispute Resolution Provisions. The arbitrator may grant summary disposition of the proceeding, in whole or in part, if there is no genuine issue of fact material to the decision. Any uncontroverted fact established through summary disposition shall be deemed established for the remainder of the proceeding. Any grant of summary disposition under this Section 10.3.9 is subject to appeal pursuant to Section 10.5 after the final award in the proceeding has been issued.

**10.3.10 Evidentiary Hearing.** The Arbitration Procedural Rules shall provide for an evidentiary hearing with respect to matters not resolved through summary disposition under Section 10.3.9 above, unless all Parties consent to the resolution of the

matter on the basis of a written record. Hearing rules shall include provision for the cross-examination of witnesses.

**10.3.11 Evidence.** The Arbitration Procedural Rules shall include provisions addressing submission and admissibility of evidence. The arbitrator shall compile and certify a complete evidentiary record of the arbitration, which, upon completion, shall be available to any Party at that Party's request.

~~10.3.12 Burden of Proof.~~ ~~The Disputing Party shall have the burden of proof on all elements of a claim. [ERT NOTE SHOULD 10.3.13 AND 10.3.14 BE MOVED ELSEWHERE (PERHAPS BETWEEN AWARD AND REMEDY)?]~~

**10.3.12 Special Arbitration Rules for Disputes as to Access to and Adequacy of Service over Facilities that are Not RTO West Controlled Transmission Facilities.** For the purpose of this Section 10.3.12, "Wholesale Access" means, with regard to Electric System Facilities that are not RTO-West controlled, the need for and costs of upgrades, expansions and interconnection facilities and the estimates of the nature, extent, total cost, schedule and proposed allocations of costs associated with studies, including environmental analyses, proposed in response to a request for service in accordance with the terms and conditions provided in the applicable tariff; [Exhibit P]. -The following provisions shall govern, and shall apply only to, disputes between a customer of a Participating Transmission Owner and a Participating Transmission Owner concerning ~~w~~Wholesale ~~a~~Access to, or the adequacy of wholesale service over, ~~F/A~~facilities of a Participating Transmission Owner that are not RTO West Controlled Transmission Facilities:

**10.3.12.1. Responding Parties.** The Participating Transmission Owner shall be a Responding Party. RTO West also shall be a Responding Party. [TOA Exh. P ¶ 1.A.]

**10.3.12.2. Bonneville Status.** Bonneville shall be deemed a Transmission Customer with respect to any disputes arising out of service under a General Transfer Agreement to which a Participating Transmission Owner is a party, whether or not the Transmission Facilities or Certain Distribution Facilities ~~[OF THE PTO???~~of the Participating Transmission Owner are used to provide such service, so long as Bonneville has agreed (i) that the provisions of this Section 10 shall apply to any dispute arising out of service under any General Transfer Agreements under which Bonneville contracts with any other Participating Transmission Owner for Bonneville to provide delivered energy on behalf of the Participating Transmission Owner, and (ii) that for purposes of this Section 10, the Participating Transmission Owner shall be deemed to be a Transmission Customer. [TOA Exh. P ¶ 1.A.3.]

**10.3.12.3. General Standards.** The arbitrator's award shall be limited to a determination of whether Wholesale Access or the adequacy of service conform with (i) this Tariff, including the standards described below in this Section 10.3.12.4; (ii) any other applicable agreement or tariff; (iii) the Federal

Power Act, as applicable; (iv) FERC's then-applicable standards and policies; and (v) other applicable law. [TOA Exh. P ¶ I.A.4]

**10.3.1312.4. Adequacy of Service Standards.**

(i) If ~~(a)~~ a dispute concerning adequacy of service ~~(a)~~ relates to Non-Converted Transmission Service, and (b) the terms of the Catalogued Transmission Rights pursuant to which RTO West provides such Non-Converted Transmission Service specify how adequacy of service is to be measured, then the arbitrator shall make his or her determination of the adequacy of Non-Converted Transmission Service by reference to whether the terms of the Catalogued Transmission Rights have been fulfilled.

(ii) If a dispute concerning adequacy of service relates either to: (a) Non-Converted Transmission Service for which the applicable Catalogued Transmission Rights do not specify how adequacy of service is to be measured; or (b) RTO West Transmission Services other than Non-Converted Transmission Service, then the arbitrator shall make his or her determination of the adequacy of service by reference to whether the service is comparable to the service the Participating Transmission Owner provides to its similarly situated retail loads served over the same facilities (for service provided over the Participating Transmission Owner's Electric System facilities that are not RTO West Controlled Transmission Facilities), or whether the service is comparable to the Participating Transmission Owner's use of its own system (for service provided over Transmission Facilities that are not RTO West Controlled Transmission Facilities) [TOA EXH P, ¶ I.A.2].

~~10.3.13.5.10.3.12.5~~ **Application of Other RTO West Dispute Resolution Procedures.** Except as specifically provided in this Section 10.3.1312~~[ANY OTHER SECTIONS?]~~, the RTO West Dispute Resolution Procedures shall govern disputes described in this Section 10.3.1312. [TOA Exh. P ¶ II.B.6.]

~~10.3.13.6.10.3.12.6~~ **Special Exclusions.** This Section 10.3.1312 shall not apply to disputes as to whether any part of a Participating Transmission Owner's System has incorrectly been included with or excluded from (i) the Transmission Facilities listed in Exhibit \_\_\_\_, (ii) the RTO West Controlled Transmission Facilities or (iii) the Certain Distribution Facilities listed in Exhibit \_\_\_\_ [TOA Exh. P, ¶ I.A.5.]

**10.3.1413. Special Arbitration Rules for ~~Certain~~ Disputes as to Conversion to ~~Cataloguing~~ Catalogued Transmission Rights.** The following provisions shall govern, and shall apply only to, disputes between a Participating Transmission Owner and a converting customer of a Participating Transmission Owner, when such disputes (i) arise prior to Conversion of Pre-Existing Transmission Agreements And Obligations for Catalogued Transmission Rights, and (ii) relate to the

Catalogued Transmission Rights for such customer ~~[ERT NOTE BETTER WAY TO PHRASE THIS?]~~

**10.3.1413.1** Appointment of a Master. Immediately after it establishes the date by which the Participating Transmission Owner must offer to suspend and convert Pre-Existing Transmission Agreements And Obligations, RTO West shall appoint a special procedural master who shall have the authority and responsibility, to the extent practicable, to consolidate separate disputes concerning conversion of Pre-Existing Transmission Agreements And Obligations for Catalogued Transmission Rights on the basis that the proceedings present similar issues or relate to similar Pre-Existing Transmission Agreements. No Participating Transmission Owner shall be obligated to participate in such consolidated procedures unless the disputed contract language of that Participating Transmission Owner's Pre-existing Transmission Agreement is identical to the relevant contract language of the Pre-Existing Transmission Agreements of all other Participating Transmission Owners that are Parties to the consolidated proceedings. In carrying out his or her duties, the special procedural master shall seek to promote efficiency and consistency regarding awards related to conversion for Catalogued Transmission Rights. RTO West shall post on its ~~W~~ website notice of the initiation of any arbitration related to suspension and conversion of Pre-Existing Transmission Agreements for Catalogued Transmission Rights and a summary of the issues in dispute. The parties to Pre-Existing Transmission Agreements that are subject to dispute concerning conversion shall then select an arbitrator resolve the substantive issues in each proceeding. Only parties that have elected to suspend and convert at least one Pre-Existing Transmission Agreement may intervene in an arbitration related to conversion, and only parties with rights under similar Pre-Existing Transmission Agreements may raise contract interpretation or conversion methodology issues in each proceeding. Awards in a proceeding shall be precedential only with respect to similar issues that arise in (i) interpretation of the same type of Pre-Existing Transmission Agreement held by a party that intervenes in the proceeding and (ii) suspension and conversion of the same type of Pre-Existing Transmission Agreement for Catalogued Transmission Rights.

~~10.3.14.2. *Burden of Proof*. The Participating Transmission Owner has the burden of proof. [FERC Stage 2 Order ¶ 104.]~~

**10.3.1413.3** Conversion Methodologies. The Arbitrator's decision regarding methodologies of ~~C~~ cataloguing and ~~C~~ conversion shall be applied consistently to similar contracts.

**10.3.1413.4** Conversion to Financial Transmission Options. To the extent that a Participating Transmission Owner's customer elects to suspend and convert rights under a Pre-Existing Transmission Agreement for Financial Transmission Options rather than Catalogued Transmission Rights, the RTO West Dispute Resolution Procedures other than this Section 10.3.14-13 shall apply to any dispute arising in connection with that process [TOA Ex. P ¶ II.C.]

**10.3.1413.5. Application of Other RTO West Dispute Resolution Procedures.** Except as specifically provided in this Section 10.3.14-13 ~~[ANY OTHER SECTIONS?]~~, all RTO West Dispute Resolution ~~p~~Procedures shall govern disputes described in this Section 10.3.1413. [TOA Exh. P ¶ II.B.6.]

**[ERT-NOTE: -TOA EXH. P ¶¶ IIA, IIB3, 7, 9 & 10 SHOULD GO IN TARIFF SECTION ON C&C???]**

**10.3.1514 Expedited Procedures for Generator Interconnection Disputes.**  
~~In addition,~~ ¶ The arbitrator may, for good cause shown, order that the Parties engage in expedited arbitration for disputes arising under Sections ~~[insert G.I. Sections when available]~~ as provided in this Section 10.3.1514, in lieu of certain other RTO West Dispute Resolution Procedures. **[NTDNOTE: This Section should be reviewed after FERC issues its final rules on Generator Interconnection]**

**10.3.1514.1 Procedures for Expedited Dispute Resolution.** The following procedures shall apply to expedited Dispute Resolution: (i) the time limits relating to delivery of responses and counterclaims, contained in Section 10.2.2, shall not apply; (ii) the Disputing Party and the Responding Party shall each, within ten (10) calendar days of the selection of the arbitrator, but not less than seven (7) days in advance of the date fixed for the hearing, submit to the arbitrator its proposed resolution of the issues in dispute; (iii) the time limits relating to applications for intervention, contained in Section ~~\_\_\_\_\_~~, 10.3.5.1 shall not apply, and applications for intervention must instead be received within fifteen (15) days from publication of the statement of claim; and (4) the six- (6-) month time limit contained in Section 10.3.5-16 shall not apply, and the arbitrator shall issue an award within thirty (30) days of receiving both parties' submissions of the proposed resolution. [TOA § 20.7] **[ERT-NOTE: -NEED FURTHER DEVELOPMENT OF RELATIONSHIP BETWEEN THIS SECTION AND OTHER PROCEDURES].**

**10.3.1514.2 Remedies for Disputed Interconnection Agreements.** When the subject of the expedited Dispute Resolution is an interconnection agreement, the Disputing Party and the Participating Transmission owner shall each, within ten (10) calendar days of the selection of the arbitrator, but not less than seven (7) days in advance of the date fixed for the hearing, submit to the arbitrator its proposed contract language concerning the issues in dispute. The following limits on the arbitrator's remedial powers apply: The arbitrator shall be instructed to accept the Participating Transmission Owner's proposed terms for interconnection if such terms (1) are reasonable, (2) are not contrary to applicable regulatory requirements, (3) do not conflict with the terms of any Generation Integration Agreement or Load Integration Agreement the requesting party will be expected to execute, (4) do not conflict with interconnection standards adopted by RTO West and (5) are not unreasonably discriminatory or preferential with respect to the Participating Transmission Owner's other comparable interconnection agreements. The arbitrator shall be further instructed that there is no requirement for the interconnection agreement terms of the various

Participating Transmission Owners to be uniform among the various Participating Transmission Owners, so long as the proposed interconnection agreement terms meet the above standards. [NOTE: May need to add RTO- West to this section]

**10.3.14.3 Arbitrator's Authority To Decide Agreement Terms.**

When the arbitrator cannot, consistent with the provisions of Section 10.3.14.2 above, accept the Participating Transmission Owner's proposed terms for interconnection, or if the Participating Transmission Owner has failed to offer proposed terms for interconnection pursuant to Section ~~10.3.14.2~~, 10.3.14.2, the arbitrator shall have authority to decide the terms of an interconnection agreement that, in the arbitrator's opinion, it is reasonable that the parties should reach, giving due regard to: (1) the terms of any applicable tariff, (2) applicable laws and regulations and (3) what the arbitrator finds is fair and reasonable in all the circumstances.

**10.4 Awards, Remedies, and Enforcement.**

**10.4.1 Award.**

**10.4.1.2 Award Based on Arbitrator's Decision.** Except as provided below with respect to "baseball" style arbitration, the arbitrator shall issue written reasons for the award, including findings of fact and conclusions of law. Except as provided in Sections 10.3.12.3 and ~~10.3.14.3~~ 10.3.13.3 and ~~OTHER PROVISIONS~~, the arbitration award shall be based on (i) the evidence in the record, (ii) the terms of the RTO West Tariff, (iii) applicable United States federal law, regulations, treaties, and agreements, and any relevant FERC decisions or then-applicable FERC standards or policies, (iv) other applicable law, and (v) consideration of relevant awards in previous arbitration proceedings. The arbitrator may, but need not, treat previous awards under this Section 10.4.1.1 as determinative. The arbitrator's award shall be published and maintained, in searchable form, on the RTO West ~~W~~website and by any other method the RTO West Arbitration Committee specifies. The RTO West Office of General Counsel shall maintain a copy of the complete award and written explanation.

**10.4.1.3 Award Based on "Baseball" Style Arbitration.** In arbitration conducted "baseball" style, the arbitrator shall issue written reasons for adopting one of the awards proposed by the Parties. The arbitrator's choice among the proposed awards shall be based on (i) the evidence in the record, (ii) the terms of the RTO West Tariff, (iii) applicable United States federal law, regulations, treaties, and agreements and any relevant FERC decisions or then-applicable FERC standards and policies, (iv) other applicable law, and (v) consideration of relevant awards in previous arbitration proceedings. If the arbitrator concludes that none of the proposed awards are consistent with the factors enumerated in (i) through (v) above, or address all of the issues in dispute, the arbitrator shall specify how each proposed award is deficient and direct that the Parties submit new proposed awards that cure the identified deficiencies. A summary of the disputed matter and the arbitrator's award shall be published on

the RTO West Website and by any other method the RTO West Arbitration Committee specifies. An award under this Section 10.4.1.2 shall not be considered and may not be cited in any other proceeding.

~~[ERT NOTE REDUNDANT OF § 10.3.1.2(d)]~~

#### 10.4.2          Remedies.

~~\*\*[NOTE: TO TWG DRAFT OF 9/27/01] – We need to think through how to retain a “level playing field” as much as possible – for example, if some remedies that could be imposed on nongovernmental parties might not apply, because of statutory provisions, to governmental parties]~~ two kinds of problems – (1) limitations that can be waived; and (2) laws about which the affected party does not have the ability to choose – ~~we think maybe an approach that could~~ might result in ~~be a fair balance~~ would be for: (a) parties to agree, as a condition of service, to waive any limitations they have authority to waive and (b) to require the arbitrator to limit awards to only those they could be awarded against any Party to the arbitration]

**10.4.2.1          Arbitrator’s Discretion.** The arbitrator shall have discretion to grant the relief sought by a Party, or determine such other remedy as is appropriate, unless the Parties agree to conduct the arbitration “baseball” style. ~~[Except as limited by law]~~~~\*\*\*~~, the arbitrator shall have the authority to award any remedy or relief available from FERC or any court of competent jurisdiction. Where the RTO West Tariff leaves any matter to be agreed between the Parties at some future time and provides that in the absences of agreement the matter shall be resolved in accordance with the RTO West Dispute Resolution Provisions, the arbitrator shall have authority to decide upon the terms of the agreement that, in the arbitrator’s opinion, it is reasonable that the Parties should reach, having regard to the other terms of the RTO West Tariff and the arbitrator’s opinion as to what is fair and reasonable in all the circumstances.

**10.4.2.2          “Baseball” Arbitration.** If the Parties agree to conduct the arbitration “baseball” style, the Parties shall submit to the arbitrator and exchange with each other their last best offers in the form of the award they consider the arbitrator should make, not less than seven days in advance of the date fixed for the hearing, or such other date as the arbitrator may decide. If a Party fails to submit its last best offer in accordance with this Section 10.4.2.2, that Party shall be deemed to have accepted the offer proposed by the other Party. The arbitrator shall be limited to awarding only one of the proposed offers and may not determine an alternative or compromise remedy.

**10.4.2.3          Consistency with Other Provisions.** The arbitrator shall have no authority to render an award that is inconsistent with (i) the terms of the Bylaws, (ii) the terms of the Transmission Operating Agreement [TOA EXH. P. ¶ I.A.5].

**10.4.3          Costs.** Except as otherwise provided in Section 10.3.1.2, the costs of the time, expenses, and other charges of the arbitrator shall be borne by the Parties to

the dispute, with each Party on an arbitrated issue bearing its pro-rata share of such costs, and each Party to an arbitration proceeding bearing its own costs and fees. If the arbitrator determines that a demand for arbitration or response to a demand for arbitration was made in bad faith ~~[Note to 9/27/01 TWG Draft—consider whether bad faith is too limited a basis for cost shifting?]~~, the arbitrator shall have discretion to award the costs of the time, expenses, and other charges of the arbitrator to the prevailing Party. Participants' obligations to share in costs of any arbitration under the RTO West Dispute Resolution Provisions shall be as determined by the arbitrator in accordance with Sections 10.3.5.1 and 10.3.5.6.

**10.4.4 Compliance.** Unless the arbitrator's decision is appealed under Section 10.5, the disputing Parties shall, upon receipt of the decision, immediately take whatever action is required to comply with the award to the extent the award does not require regulatory action. An award that is not appealed shall be deemed to have the same force and effect as an order entered by FERC or any court of competent jurisdiction.

**10.4.5 Enforcement.** Following the expiration of the time for appeal of an award pursuant to Section 10.5.3, any Party may apply to FERC or any court of competent jurisdiction for entry and enforcement of judgment based on the award.

## **10.5 Appeal of Award.**

**10.5.1 Basis for Appeal.** A Party may apply to FERC to hear an appeal of an arbitration award upon the grounds that: (i) the arbitrator's decision is contrary to applicable law or regulation (including the FPA or FERC's then-applicable standards or policies); (ii) the arbitrator's decision is arbitrary and capricious; (iii) the arbitrator failed to afford one or more Parties to the dispute an opportunity for a fair and meaningful hearing; (iv) the arbitrator engaged in material misconduct in connection with the arbitration; (v) the arbitrator exceeded the authority conferred upon him or her under the RTO West Dispute Resolution Provisions or as otherwise established by agreement of all the Parties, including without limitation whether the dispute is subject to arbitration; or (vi) the arbitrator's decision is contrary to the provisions of Section 10.4.1. Where there is concurrent jurisdiction between a court of competent jurisdiction and FERC, the Party shall appeal to FERC. Where FERC does not have jurisdiction, a Party may appeal to a court of competent jurisdiction on any grounds provided bylaw. A Participant may appeal the arbitrator's findings with respect to issues on which the Participant was allowed to present evidence pursuant to Section 10.3.5.6.

**10.5.2 Appellate Record.** The arbitration process set forth in the RTO West Dispute Resolution Provisions contemplates that FERC or the court of competent jurisdiction should afford substantial deference to the factual findings of the arbitrator. No Party shall seek to expand the record before FERC or the court of competent jurisdiction beyond that assembled by the arbitrator, except (i) by making reference to legal authority that did not exist at the time of the arbitrator's decision, or (ii) if such Party contends the decision was based upon or affect by fraud, collusion, corruption, misconduct or misrepresentation.

**10.5.3** \_\_\_\_\_ **Procedures for Appeals.** Appeals shall, unless otherwise ordered by FERC or the court of competent jurisdiction, conform to the procedural limitations set forth in this Section 10.5.3.

**10.5.3.1** \_\_\_\_\_ **Notice.** If a Party or Participant to an arbitration desires to appeal an award, it shall provide notice of appeal to the RTO West Board of Directors, all Parties and Participants, and the arbitrator within 14 days following the date of the award. The appealing Party or Participant must likewise provide notice to the RTO West Arbitration Committee, which shall publish notice of the appeal on the RTO West Website and by other method the RTO West Arbitration Committee specifies. Within 10 days of the filing of the notice of appeal, the appealing Party or Participant must file an appropriate application, petition or motion with FERC to trigger review under the FPA or with a court of competent jurisdiction. Such filing shall state that the subject matter has been the subject of an arbitration under the RTO West Dispute Resolution Provisions.

**10.5.3.2** \_\_\_\_\_ **Evidentiary Record.** Within 30 days of filing the notice of appeal (or such period as FERC or the court of competent jurisdiction may specify) the appellant shall file the complete evidentiary record of the arbitration and a copy of the award with FERC or with the court of competent jurisdiction. The appellant shall serve copies of a description of all materials included in the submitted evidentiary record. *[Note to 9/27/01 TWG Draft-Need to address Connie's issue here – certified evidentiary record]*

**10.5.4** \_\_\_\_\_ **Award Implementation.** Implementation of the award shall be deemed stayed pending an appeal unless and until, at the request of a Party, FERC or the court of competent jurisdiction to which an appeal has been filed issues an order dissolving, shortening, or extending such stay. RTO West shall publish a summary of each appeal on the RTO West ~~W~~website and by other method the RTO West Arbitration Committee specifies.

**10.5.5** \_\_\_\_\_ **Judicial Review of FERC Orders.** FERC orders resulting from appeals shall be subject to judicial review pursuant to the FPA.