

Bonneville Power Administration
Overview of Proposed Revisions to Rules of Procedure
Draft - February 2, 2018

This document provides a high level overview and explanation regarding certain proposed revisions to Bonneville’s rules of procedure. The discussion below is intended to provide information to assist in the review and understanding of particular proposed revisions, but it does not address every proposed revision. In addition, statements that the rules “were” or “have been” revised are not intended to convey that Bonneville has made final decisions. Finally, Bonneville does not intend to include this document in the final rules, and the document has no legal or other effect in the process for revision of the rules or any future proceeding.

In general terms, the proposed revisions update and modernize the existing rules, address issues that the existing rules do not cover, expand the applicability of the rules to proceedings under Federal Power Act section 212 to establish or revise the terms and conditions for transmission service (section 212 proceedings), and incorporate procedures that previously were found in the hearing officer’s special rules or other orders.

The specific proposed revisions discussed below are organized according to the section of the rules in which they appear.

Section 1010.1 Applicability and Scope of Rules

- The proposed revisions specify that the procedural rules apply to wholesale power and transmission rate case proceedings and section 212 proceedings.
- A provision was added to clarify that the rules do not establish substantive standards for the Administrator’s final decisions.

Section 1010.2 Definitions

- Various definitions were added or revised in this section. The redline document shows specific revisions.

Section 1010.3 Hearing Officer

- A provision was added to clarify that parties should contact the hearing clerk with procedural questions rather than BPA counsel or rates staff.

Section 1010.5 Intervention

- The procedures for intervention were modified to provide prospective intervenors access to the secure website before filing a petition to intervene. Once access has been granted, a petition to intervene would be filed through the secure website.

Section 1010.9 Pleadings

- Provisions were added to specify the types of pleadings, establish format and content requirements, and clarify the rights and procedures for filing responsive pleadings.
- A provision was added to specify that motions for interlocutory appeal to the Administrator are disfavored and may be granted only in exceptional circumstances and at the Administrator's discretion.

Section 1010.10 *Ex Parte* Communications

- Proposed revisions more clearly prohibit *ex parte* communications with the hearing officer.
- A provision was added to clarify that communications between the hearing officer and the hearing clerk or other staff providing administrative support to the hearing officer are not *ex parte*.
- The procedures for addressing *ex parte* communications have been revised to provide that written *ex parte* communications and written summaries of oral *ex parte* communications will be posted on Bonneville's website rather than being made available in Bonneville's public involvement office.

Section 1010.11 Clarification Sessions and Data Requests

- The standards and procedures governing data requests have been revised significantly. A new provision calls for reasonableness in the number of data requests submitted and establishes procedures for seeking relief from an unreasonable number of requests. The proposed revisions incorporate a limitation found in the hearing officer's orders on data requests in previous rate cases providing that a litigant will not be required to respond to more than 100 data requests per day. Responses to requests in excess of the first 100 received are due the next business day.
- The scope of permissible data requests has been revised to incorporate the concept of "proportionality" found in Federal Rule of Civil Procedure 26(b), although the FRCP does not apply to Bonneville's proceedings under the rules. Data requests must be relevant to a party's prefiled testimony and exhibits and proportional to the needs of the case according to a variety of factors listed in the rule.
- The proposed revisions prohibit the hearing officer from ordering disclosure of documents that the responding party asserts are subject to attorney-client privilege, or contain attorney work product or commercially sensitive information. Withholding requested information on the basis of commercial sensitivity may affect the weight that the Administrator gives to evidence and arguments made in reliance upon such information.
- The proposed revisions allow the hearing officer to issue protective orders or arrange for private inspection of commercially sensitive information at the request of the party to which the data request was directed. This would allow a party to obtain a protective order to

voluntarily disclose commercially sensitive information without making it public or waiving claims of confidentiality. The rules do not include specific requirements or procedures for protective orders. Those issues would continue to be addressed on a case-by-case basis.

- Provisions have been added to govern the process for filing and responding to motions to compel. In deciding a motion to compel, the hearing officer will consider the potential impact of the decision on completing the proceeding according to the procedural schedule.
- Litigants continue to have no obligation to conduct new studies or run any analysis or computer program in response to a data request, but they may agree to perform such study or analysis without waiving any objections to the request.
- Multi-part data requests are not permitted.

Section 1010.12 Prefiled Testimony and Exhibits

- The proposed revisions establish format and content requirements for prefiled testimony and exhibits and specify that litigants will have the opportunity to rebut the direct testimony of other litigants. Many of these requirements were previously found in the special rules adopted by the hearing officer.
- The proposed revisions clarify that materials incorporated into prefiled testimony by reference or by providing a link to a website will not be considered part of the record even if the prefiled testimony is accepted into the record. Any materials that a litigant wants included in the record should be submitted as an exhibit and subsequently moved in to evidence.
- The proposed revisions specify that prefiled testimony and exhibits are not part of the record until they have been admitted into evidence by the hearing officer and provide procedures for moving those materials into the record.

Section 1010.13 Cross-Examination

- The proposed revisions specify the procedures for filing cross-examination statements and provide that witnesses generally will be cross-examined as a panel.
- The proposed revisions require the filing of cross-examination statements prior to cross-examination and reserve the rights of a litigant to ask follow-up cross-examination questions of witnesses even if the litigant did not initially file a cross-examination statement identifying those witnesses for cross. Failure to file or list witness panels in a cross-examination statement otherwise waives cross-examination.
- The proposed revisions clarify that witnesses are not required to perform calculations on the stand or answer questions about calculations that they did not perform.
- Friendly cross-examination is prohibited, except that counsel for a litigant with a position that is not adverse to the witnesses may seek leave from the hearing officer to ask limited

follow-up questions of a witness after any redirect testimony. Any follow-up questions are limited to the scope of the cross-examination.

- The proposed revisions broadly define cross-examination exhibits and require litigants to file all cross-examination exhibits for a witness two business days before the witness is scheduled to appear.
- Litigants must provide physical copies of cross-examination exhibits at the beginning of cross-examination.

Section 1010.16 Briefs

- The proposed revisions include a standard outline and format for briefs in order to help Bonneville identify parties' specific issues and recommendations and prepare the records of decision in a more orderly manner.
- The briefing provisions specify that Bonneville may file briefs in section 212 proceedings and that the Administrator may allow additional briefing opportunities in such proceedings.

Section 1010.17 Oral Argument

- Provisions have been added to specifically allow for oral argument and to establish procedures for providing notice of intent to present oral argument.

Section 1010.18 Filing and Service of Documents

- Provisions have been added to require that litigants file all documents through the secure website and provide that such filings will constitute service on all parties.

Section 1010.20 Hearing Officer's Recommended Decision

- A provision has been added to address the hearing officer's recommended decision in section 212 proceedings.

Section 1010.22 Expedited Proceedings

- Expedited proceedings are defined as extending 90-120 days from the date the Federal Register Notice is published.
- The proposed revisions eliminate the trade-off between having either oral argument or briefs on exceptions in expedited proceedings.