

Supplemental Materials for the April 23, 2018 pre-TC-20 Workshop

Response to Customer Feedback on Section 9

Bonneville's organic statutes authorize the Administrator to enter into contracts and set general terms and conditions for transmission service on the Federal Columbia River Transmission System (FCRTS) pursuant to sections 2(b) and 2(f) of the Bonneville Project Act, section 6 of the Preference Act, sections 4 and 6 of the Transmission System Act; and sections 5(b), 9(a), and 9(i) of the Northwest Power Act. Section 212(i)(2)(A) of the Federal Power Act (Section 212) provides procedures the Administrator may use when proposing to establish generally applicable terms and conditions for transmission service over the FCRTS.

On January 10, 2018, Bonneville decided to use the Section 212 procedures to establish a new tariff providing the general terms and conditions for transmission service. See Letter to Region (01/10/18), *available at*:

<https://www.bpa.gov/transmission/Customervolvement/TariffEngagementDesign/Documents/212Announcement-Letter-Customers-01102018.pdf>.

During the April 23, 2018 pre-TC-20 workshop, Bonneville proposes a Section 9 for the new tariff that permits the transmission provider to modify the tariff after following the procedural requirements of Section 212. An overview of section 212 was provided in an October 27, 2017 Transmission Business Model/Pro Forma Gap Analysis workshop, *available at*

<https://www.bpa.gov/transmission/Customervolvement/TransmissionBusinessModel/Pages/Meetings.aspx>.

- Customers provided feedback on Section 9 during the [Transmission Engagement Design](#) process in 2017 and after the Pro Forma Gap Analysis workshops last summer.
- The general theme of customers' comments was that Section 9 and Bonneville's tariff should provide business certainty, durability, and stability.
 - Need for procedural protections
 - Need for a substantive standard
- During the April 23, 2018 workshop, Bonneville addressed these comments.

Comments Regarding Procedural Protections

1. Customer: Future tariff changes should follow the procedural requirements of Section 212.

Bonneville agrees. Consistent with the January 10, 2018 decision to use the Section 212 procedures to develop generally applicable terms and conditions for transmission service, Bonneville's proposal for Section 9 likewise requires use of Section 212 procedures to make tariff changes.

- Utilizes the familiar Northwest Power Act section 7(i) framework (Section 7(i)).
- Provides parties with substantial due process protections to:
 - Develop a full and complete record.

- Raise legal, factual, or policy issues for consideration by the Hearing Officer and the Administrator.
- Requires Administrator’s final decision to be based on the record. The decision cannot be arbitrary and capricious or otherwise inconsistent with applicable law.

2. Customer: Section 9 should require the Hearing Officer to be impartial.

Bonneville does not propose to add this requirement because it is unnecessary.

- Section 212 and the Section 7(i) procedures already require impartiality by the Hearing Officer

3. Customer: Section 9 should include ability for customers to request a Section 212 process and should require Bonneville to conduct the process concurrent with every rate case cycle.

Bonneville does not propose a timing requirement for the Section 212 process.

- Bonneville thinks a timing requirement is unnecessary and is concerned it may be overly restrictive.
 - Bonneville plans on conducting the Section 212 process concurrent with each rate case.
 - Customers may request additional Section 212 processes between rate cases.
- Conducting a Section 212 process requires significant Bonneville and customer resources and time. Bonneville prefers to discuss the appropriateness of conducting additional Section 212 processes with customers in public workshops, similar to the approach used for the rate cases.

Comments Regarding a Substantive Standard

Customer feedback reflects two ends of the spectrum:

1. Customer: Section 9 should include a substantive standard.

- One suggested standard used Federal Power Act statutory language, such as “just and reasonable and not unduly discriminatory or preferential.”
- Customers believe a substantive standard would provide business certainty.
- Customers want Bonneville to have the burden to prove that a tariff change met that standard.

2. Customer: Section 9 should not include a substantive standard.

- A substantive standard elevates one statutory standard over another.
- A substantive standard creates confusion by conflating statutory obligations with contractual rights.

Bonneville does not propose to add a substantive standard to Section 9.

- Bonneville shares an underlying interest in business certainty.

- The Strategic Plan and Transmission Business Model articulate Bonneville’s strategy and policy to align with the *pro forma* tariff to the extent possible.
- To operate as a sound business, Bonneville needs a durable tariff. Bonneville must remain mindful of statutory requirements based on Bonneville’s organic statutes and the statutes that provide jurisdiction to FERC.
- Under Bonneville’s proposal, all applicable statutory requirements continue to apply even though they are not specifically referenced.
 - The statutes include (and are not limited to) the Bonneville Project Act; Pacific Northwest Power Preference Act; Transmission System Act; the Northwest Power Act; and the Federal Power Act.
- Bonneville’s proposal does not, and cannot, change the law’s applicability.

3. Customer: Can Bonneville clarify its concerns with including a substantive standard?

Bonneville has significant concerns with including a substantive standard based on statutory language.

- Creates a potential breach of contract claim that is broader than the underlying statutory claim and contractually elevates one standard over other applicable statutory standards. For example:
 - In Federal Power Act section 210 or 211 statutory claims, FERC must consider whether Bonneville’s terms and conditions are “just and reasonable and not unduly discriminatory” in addition to considering Bonneville’s other statutory requirements.
 - In a Ninth Circuit challenge, the court must review, among other things, whether Bonneville’s final decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
 - Congress has not chosen to elevate one statutory standard over another. Bonneville does not think it is wise for the Administrator to do so in Bonneville’s contracts.
- The contractual elevation of one standard over other standards could create confusion and result in conflicting legal interpretations and application of the Federal Power Act and Bonneville’s organic statutes.
 - The contractual standard could hold more weight over other applicable law in the Hearing Officer’s recommended decision. It is possible that the Hearing Officer’s recommendation could be consistent with the contractual standard, but otherwise inconsistent with applicable law. Bonneville is concerned that this result would be confusing and undermine the integrity of the Hearing Officer’s recommendation.
 - It is appropriate and necessary for the Hearing Officer’s recommended decision and the Administrator’s final decision to interpret and consider the breadth of evidence in the record and all applicable law, not just the contractual standard.
 - When the Bonneville tariff weights one standard over others, in a Federal Power Act proceeding addressing a parties’ complaint against Bonneville, it is possible that FERC could reach a different conclusion than the Hearing Officer and Administrator about the

application of the Federal Power Act (including preservation of other applicable law) to the terms and conditions.

- May not lead to the development of a full and complete record because it could limit the scope of the Section 212 process.
 - A substantive standard could impede parties' procedural protections by narrowing the scope of legal, factual, or policy issues the parties may raise and which the Hearing Officer must address in the recommended decision.
 - Bonneville is also concerned that it could prevent Administrator from adopting terms and conditions that significantly benefit the region and which consider Bonneville's other statutory requirements.

4. Is Bonneville confident that the new tariff will satisfy applicable statutory standards?

Bonneville is confident that the tariff will satisfy all applicable statutory standards because Bonneville's terms and conditions will either be the same as FERC's pro forma tariff, consistent with approved deviations to the pro forma tariff, or consistent with industry standards.

- Pursuant to section 6 of the Transmission System Act, Bonneville is already required to offer excess transmission capacity (after federal needs) on a fair and nondiscriminatory basis.
- When Bonneville's terms and conditions are the same as FERC's *pro forma* tariff or consistent with approved deviations to the *pro forma* tariff and Bonneville takes service under its tariff, we think there could be a presumption that Bonneville's tariff satisfies the Federal Power Act § § 210, 211, 211A, and 212 standards.
 - The proposed differences to the *pro forma* are consistent with applicable law and do not alter the non-discrimination protections available in the *pro forma* tariff:
 - § 17.5, Response to a Completed Application
 - § 19.1, Notice of Need for System Impact Study
 - § 31.5, Changes in Service Requests
 - § 32.1, Notice of Need for System Impact Study
 - § 33.5, Allocation of Curtailments
 - Additional tariff proposals in future workshops will align with the *pro forma* tariff to the extent possible and contain the *pro forma* non-discrimination obligations, include:
 - § 13.6, Curtailments of Firm Transmission Service
 - § 14.7, Curtailment or Interruption of Service
 - § 18.4, Determination of Available Transfer Capability
 - § 30.5, Network Customer Redispatch Obligation
- By following the due process requirements of the Section 212 process, Bonneville believes the Administrator's final determination of terms and conditions will be consistent with applicable law.