ICNU Error Correction Comments

The Industrial Customers of Northwest Utilities ("ICNU") appreciates the opportunity to submit comments on Snohomish PUD's Error Correction Proposal (the "Proposal"), and Bonneville Power Administration ("BPA") Staff's Response to the Proposal (the "Response"). In short, ICNU does not support the prescriptive action contemplated in either the Proposal or the Response. Any practice of adjusting future rates to offset prior rate case errors, supported by official agency guidelines, could undermine BPA's fundamental policy interest in rate finality and potentially cause considerable harm to customers and end-use consumers making planning decisions in reliance upon past agency rate actions.

A. Effect of Correction

As ICNU understands them, both the Proposal and Response contemplate future or prospective rate adjustments designed to offset past rate case errors. While the semantics could be debated, this essentially equates to a form of retroactive ratemaking. ICNU does not point this out in order to raise the issue of BPA's authority to engage in retroactive ratemaking.[1/] But, this clarification is important to distinguish the Proposal and Response from a course of conduct in which a prior error is recognized and then corrected on a going-forward basis only, such that the error is merely not repeated in the future. This course is distinct from the *additional* implementation of a rate adjustment or offset meant to "make right" the original error through the Proposal and Response or, in the phrasing used by Snohomish PUD, "make affected customers whole."[2/]

In support of ICNU's understanding, the following explanations and descriptions from the recent workshop presentation are listed:

- As prescribed within potential Staff Guidelines, "[a]djustment would be effectuated in next general rate case (rates reduced/increased to offset error)";[3/]
- Under the Proposal and Response, "[c]orrecting errors (i.e., *adjustment of future rates to offset error*) is limited to one rate period)";[4/] and

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1/ ICNU is not addressing the retrospective ratemaking authority issue in these comments, although the issue was strenuously contested by several parties in the BP-16 rate case, in the precise context of a similar error correction proposal. See BP-16-A-02, Administrator's Final Record of Decision ("BP-16 Final ROD") at 102-05 (July 23, 2015).

2/ Snohomish PUD Presentation, Error Correction Proposal Update at 4 ("Updated Proposal Presentation") (June 29, 2016).

3/ BPA Presentation, BP-18 Rate Case Workshop: Staff's Response to Snohomish PUD's Error Correction Proposal ("Response Presentation") at 6 (August 10, 2016).

4/ Id. at 9.

- Under the Response: "Errors would be corrected through future rate adjustments (rates reduced/increased to offset error) in the next general rate case."[5/]

ICNU believes that some BPA customers and end-use consumers could be significantly harmed by rate increases designed to offset prior errors.[6/] For example, customers are likely to make budgeting decisions based on prior rate determinations. If it later turns out that BPA made an error, and the agency seeks to correct this error by increasing future rates beyond what would have otherwise been approved, then the reasonable expectations of customers will be undermined. At the very least, customers and consumers would have to conduct future financial planning with far less certainty, knowing that new errors might be discovered, followed by correcting adjustments in the next rate case. All of this was confirmed by the Administrator in the BP-16 Final ROD: "It is critical that, in order to plan their business affairs, parties know that established rates will not be revisited except under the most extraordinary circumstances."[7/]

Moreover, the significance of these potential impacts should not be underestimated. Among the feedback to the Proposal already received from customers, Staff noted the recommendation to "[o]nly correct errors that result in *substantial* financial impacts."[8/] By definition, an error correction adjustment conforming to this recommendation would have a "substantial" offsetting impact in proportion to the original error. Thus, whether Staff were to develop a threshold criterion to trigger corrections based on dollar values or rate impact percentages is irrelevant—whatever the metric employed, offsetting adjustment impacts would always be financially "substantial" and potentially harmful to customers in similar degree.

B. Precedent

Staff recognizes that, "[w]hatever [the] Administrator decides in [a] rate case, a precedent could be established."[9/] ICNU would suggest that the Administrator recently established a strong precedent in the most recent rate case on this very issue of offsetting error correction adjustments, and that the precedent established was a well-reasoned determination against normalizing the sort of "make right" adjustments now under consideration. Thus, ICNU does not believe that Staff should pursue efforts to develop error correction guidelines, since the

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5/ Id.

6/ For convenience, hereafter the term "customer" may also refer to end-use consumers on BPA's system taking power directly from the agency's preference customers. As representative of some of the largest end-use consumers on BPA's system, ICNU members would likely be impacted considerably by the effects of future error correction offsets.

7/ BP-16 Final ROD at 103.

8/ Response Presentation at 2 (emphasis added).

9/ Id. at 7.

formulation and establishment of prescriptive guidelines would necessarily contemplate that consideration of error correction offsets would become a routine element of future rate cases.

In the BP-16 rate case, the Administrator was faced with the Transmission issue of "[w]hether BPA should correct the misallocation of O&M costs made in the BP-14 rate case."[10/] The Administrator decided not "to fix the error," pointing out that revisitation of prior rate decisions through corrective offsets has not been and should not be a normative agency practice: "Correction of the BP-14 error would be *the first time* that, on its own initiative, BPA has revisited rates in one rate case to correct for a ratemaking error or decision it made in a prior rate case. Rates should not be revisited lightly …."[11/] More specifically, in response to the argument that BPA should take corrective action to "compensate customers whose rates increased because of the error," the Administrator reasoned as follows: "Rate stability and finality are among the most significant ratemaking principles. It is critical that, in order to plan their business affairs, parties know that established rates will not be revisited except under the most extraordinary circumstances."[12/]

Several elements of this determination are worth closer examination as Staff considers whether it should devote resources and further public process to the development of guidelines that could make error correction offsets a normative component of BPA ratemaking. First, the fact that the Administrator plainly viewed an error correction offset as a revisitation of prior rates (e.g., "established rates will not be revisited") shows that the Proposal is inconsistent with the Administrator's view, in claiming that an error correction offset "[w]ould not 'reach back' and affect past customer budgets/decision[s], only rates going forward with the aim of making affected customers whole."[13/] And, since the Proposal, Response, and the BP-16 revisitation issue all relate to the potential correction of an error only in the immediately preceding rate case, the comparisons here are apples to apples.[14/]

Second, the emphatic phrasing used by the Administrator speaks against further process to essentially undo the BP-16 determination on rate revisitation. The Administrator's

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10/ BP-16 Final ROD at 102.

11/ Id. at 103 (emphasis added). Also, ICNU notes that this issue was addressed after the Administrator considered "Power Rate Development Changes." Id. at 27-30. This is relevant because Staff opened the recent workshop discussion by stating that the Administrator handled error correction issues differently in the BP-16 rate case, and ICNU assumes that Staff was referencing the uncontested Power allocation correction on the "PGE WNP-3 Settlement." Id. at 29-30. ICNU does not understand the two issues to be equivalent in terms of the present context, however, given that the Administrator addressed the Transmission O&M issue after the Power allocation correction, yet still concluded that Staff's requested Transmission correction "would be *the first time* that, on its own initiative, BPA has revisited rates in one rate case to correct for a ratemaking error or decision it made in a prior rate case." Id. at 103 (emphasis added).

12/ Id. at 103.

13/ Updated Proposal Presentation at 9.

14/ Compare Response Presentation at 9 (noting that error correction in both the Proposal and Response "is limited to one rate period") with BP-16 Final ROD at 103 (evaluating only a "[c]orrection of the BP-14 error").

evaluation of this issue opens with this definitive statement: "Rate stability and finality are among the *most significant* ratemaking principles."[15/] At best, any attempt to minimize or undersell the fundamental significance of normalizing consideration of error correction offsets, through the establishment of future guidelines, does not appropriately value the Administrator's opening statement. Likewise, the Administrator found it "critical" that customers should be able to "know that established rates will not be revisited except under the *most extraordinary circumstances*."[16/] In light of such emphasis upon the very limited circumstances in which the Administrator envisioned error correction offsets to be even potentially appropriate, ICNU cannot reconcile further efforts to develop and adopt guidelines to prescribe considerations on what should be an extremely rare practice. If value is to be placed upon the Administrator's recent conclusion that "[r]ates should not be revisited lightly,"[17/] then a normalizing guideline process should be abandoned.

Third, the precedential effect of the Administrator's reasoning ought to be considered carefully. In BP-16 briefing, ICNU noted the following standards which are applicable to the present contemplation of guidelines that would "reverse course" on BPA's recent position regarding the rarity of rate revisitation and error correction offsets:

> As a federal agency, should BPA wish to reverse its course, it is required to supply a "reasoned analysis for the change." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). In doing so, it must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Northwest Environmental Defense Center v. Bonneville Power Admin., 477 F.3d 668, 687-688 (9th Cir. 2007) (quoting State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).[18/]

ICNU believes that it would be unrealistic to expect that the Administrator might offer a "reasoned analysis" or be able to "articulate a satisfactory explanation" for a reversal of his BP-16 determination. Specifically, the Administrator supported the decision to reject an error correction offset and rate revisitation by explaining that, "in order to plan their business affairs," it is critical that customers "know that established rates will not be revisited except under the most extraordinary circumstances."[19/] The need for customers to plan future business affairs through "[r]ate stability and finality," via the reasonable certainty that rates will very rarely "be revisited," is a sound supporting line of reasoning whose premise has not changed since the BP-16 Final ROD. Indeed, it would be difficult to argue that the Administrator's

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15/ BP-16 Final ROD at 103 (emphasis added).
16/ Id.
17/ Id.
18/ BP-16-B-IN-01, Initial Brief of ICNU at 10 (May 1, 2015).
19/ BP-16 Final ROD at 103.

rationale is anything but foundational to any concept of sound business principles which BPA should follow at all times.

Moreover, the Administrator's acknowledgment that "[r]atemaking is an intricate and complicated endeavor" means that even guidelines limited to the correction of purely "ministerial" or "calculation errors" may be challenging to implement in actual ratemaking practice.[20/] Also, after noting that customer identity and usage are never identical between rate periods, the Administrator found that "the effects of the error cannot be corrected precisely …. To the extent that the correction affects a new customer or one that has significantly changed its usage, correction could compound the error."[21/] Since these factors and dynamics will always exist, it is highly doubtful that a reasoned articulation could be supplied in order to justify a course reversal via rate revisitation "guidelines" being established in the BP-18 rate case.

C. Administrator Discretion

The development of actual guidelines to prescribe the future handling of error corrections would seem in tension with a fundamental BPA interest according to Staff: retaining full Administrator discretion to handle error corrections in future rate cases. Specifically, Staff expressed concern over the Proposal's recommendation to develop an error correction policy because "[a]doption of the policy would significantly restrict [the] Administrator's discretion."[22/] While ICNU believes that the Administrator's discretion should be limited in certain circumstances, there may be an internal inconsistency within the Response which undermines further development of error correction guidelines.

That is, for the guidelines to be of more than academic value, and worth the effort of creating, they must be sufficiently proscriptive in order to provide customers with reasonable certainty as to how BPA will actually treat error correction issues. To this end, Staff cites "[c]onsistency" as a salutary aspect of the Proposal,[23/] and also believes that "guidelines would provide consistent criteria" for future error correction evaluation by the agency.[24/] Yet, this level of agency proscription would necessarily limit the Administrator's flexibility in applying his or her discretion in future rate cases—otherwise, guidelines which may be inconsistently applied or freely overruled provide no certainty or prescriptive value to customers. In this sense, the ultimate and practical inefficacy of future guidelines may be apparent through Staff's own representation that the Administrator would "retain[] *full discretion* to decide if and how an error will be addressed," even after guidelines are developed.[25/]

20/ Response Presentation at 6. ICNU would agree with a point, raised during workshop discussion, that even simple mathematical errors could affect contested policy determinations, such that an attempt to correct an error could also unwind a contested decision.

21/ BP-16 Final ROD at 104.

22/ Response Presentation at 3.

23/ Id. at 4.

24/ Id. at 7.

25/ Id. (emphasis added).

As a final word on the impact that "guidelines" might have on future Administrator discretion, ICNU offers the following statement from the Administrator himself: "the proposal to revisit the BP-14 rates also raises a *significant policy issue*—the importance of rate finality."[26/] In sum, the Administrator apparently considered that the issues of rate revisitation and rate finality were entwined with "significant policy." Any relevant distinction, therefore, between the adoption of an error correction offset "policy" advocated in the Proposal, and the development of "guidelines" advanced in the Response, could be a false dichotomy. Both are designed to "provide consistent criteria" to address the correction of rate errors,[27/] and both would provide criteria to correct errors from a prior rate period.[28/] Thus, from the perspective articulated by the Administrator on the issue of rate revisitation, both "policy" and "guidelines" options must be considered as integrally associated with "significant policy," such that Staff's concern over restrictions on Administrator discretion associated with the Proposal must equally apply to the development of guidelines: "Adoption of the *policy* would significantly restrict [the] Administrator's discretion."[29/]

Conclusion

ICNU appreciates that Staff has been willing to consider the Proposal, and Staff's sincere attention and the level of effort devoted to customer concerns is apparent in the Response. Nevertheless, for all the reasons noted in these comments, ICNU does not believe that Staff should devote any further resources to the development of error correction offset guidelines. Also, considering these points within the present environment in which BPA is taking many positive steps to achieve cost competitiveness, it becomes all the more difficult to justify the agency expense required to develop the proposed guidelines at this time.

26/ BP-16 Final ROD at 104 (emphasis added).
27/ Response Presentation at 7.
28/ Id. at 9.
29/ Id. at 3 (emphasis added).