January 12, 2017

Via Email (techforum@bpa.gov) to Rahul Kukreti

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

Re: Comments of Avista and PSE on BPA's Tariff Engagement Design

Avista Corporation ("Avista") and Puget Sound Energy, Inc. ("PSE") hereby comment on BPA's Tariff Engagement Design. In the presentation dated December 13, 2016, entitled "Kick-Off for Tariff Engagement Design,"[1] BPA indicates that:

(i) BPA's Open Access Transmission Tariff ("OATT") currently requires Federal Energy Regulatory Commission ("FERC") approval for BPA OATT changes.[2]

(ii) BPA intends to stop seeking safe harbor reciprocity for its OATT.[3]

(iii) BPA intends to revise section 9 of its OATT so that it can make future changes to the tariff through a regional public process.[4]

(iv) BPA will "[r]ecognize and support the need for certainty and predictability in BPA transmission service terms and conditions."[5]

(v) BPA will "[r]espect existing avenues available to customers to seek third party oversight (Federal Power Act 210, 211, 211A, 212, 9th Circuit)."[6]

It appears that the purpose of the Tariff Engagement Design is to "to design a new public process before making a final, written determination adopting a new process."[7]

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[1] Bonneville Power Administration, Kick-Off for Tariff Engagement Design, available at https://www.bpa.gov/transmission/CustomerInvolvement/TariffEngagementDesign/Documents/tariff-customer-kickoff-meeting-121316.pdf (Dec. 13, 2016) (the "Design Presentation").

[2] Design Presentation at slide 7.

[3] Design Presentation at slide 8.

[4] Design Presentation at slide 4.

[5] Design Presentation at slide 9.

[6] Design Presentation at slide 9.

[7] Design Presentation at slide 10.

1. BPA Should Conduct a Public Process and Issue a Reasoned Decision Regarding Whether or Not BPA Should Seek to Remove From its OATT the Requirement for FERC Approval of OATT Changes

Before determining to seek to remove the requirement in OATT section 9 for FERC approval of changes to terms and conditions of the OATT, BPA should (i) conduct a public process regarding whether or not BPA should seek to remove such requirement and (ii) issue a reasoned decision regarding such determination.

The Design Presentation states that "BPA submits tariff changes to FERC under FERC's tariff reciprocity safe harbor process.[8] However, section 9 of the BPA OATT does not require BPA to seek safe harbor reciprocity for its OATT. Instead, section 9 allows BPA to change the terms and conditions of the BPA OATT upon a determination by the FERC that such change (i) is just and reasonable and not unduly discriminatory or preferential *or* (ii) meets the non-public utility reciprocity requirements pursuant to a request for declaratory order under 18 CFR § 35.28(e).[9]

Even assuming, without conceding, that the second test only applies if BPA is seeking reciprocity safe harbor status from FERC, the use of the disjunctive "or" in this provision of section 9 provides two alternative tests, the first of which does not require BPA to seek a FERC determination that changes to the terms and conditions of the OATT meet the non-public utility reciprocity requirements. Accordingly, there is no inherent conflict between the existing section 9 of the BPA OATT and BPA's decision to stop seeking safe harbor reciprocity for its OATT. Indeed, BPA can make changes to the terms and conditions of its OATT in accordance with existing section 9 of the BPA OATT notwithstanding its decision to stop seeking safe harbor reciprocity for its OATT.

If BPA is not seeking safe harbor reciprocity status, the current section 9 of the BPA OATT still provides important safeguards in ensuring that any change sought by BPA must be determined by FERC to be just and reasonable and not unduly discriminatory or preferential. Indeed, these standards are applicable to BPA transmission terms and conditions ordered by FERC pursuant to Federal Power Act § 211(a).[10]

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[8] Design Presentation at slide 7. In its letter dated November 22, 2016, to the region, BPA stated that it has "determined that Bonneville did not have the legal authority to delegate its obligation to set terms and conditions of its tariff to FERC." It should be noted that BPA has not conducted a public process and has not issued a reasoned decision in making that determination. In that regard, BPA has not delegated its obligation to set terms and conditions of its tariff to FERC. Rather, it has agreed to seek a FERC determination that any changes to its terms and conditions are either (i) just and reasonable and not unduly discriminatory or preferential or (ii) meet the non-public utility reciprocity requirements pursuant to a request for declaratory order under 18 CFR § 35.28(e). BPA has the legal authority to make such agreements (see, e.g., section 9(a) of the NWPA, section 2(f) of the Bonneville Project Act). Moreover, FERC has authority to make such determination (see, e.g., sections 211(a) and 212 of the Federal Power Act).

[9] Bonneville Power Administration Transmission Services, *Open Access Transmission Tariff*, section 9, available at https://www.bpa.gov/transmission/Doing%20Business/Tariff/Documents/bpa_oatt.pdf (effective date of February 2, 2016) (emphasis added).

[10] Federal Power Act § 212(a).

In short, BPA's determination to no longer seek the safe harbor reciprocity would mean that BPA could still seek a FERC determination pursuant to the current section 9 that any changes to the terms and conditions of the BPA OATT are just and reasonable and not unduly discriminatory or preferential. In its letter to the region dated November 22, 2016, BPA stated that it "understands and appreciates the value to [its] customers of certainty and predictability for Bonneville's transmission service terms and conditions." BPA further stated that it "is committed to aligning its tariff with FERC's pro forma open access tariff as closely as possible." The requirement in section 9 of BPA's OATT to seek a FERC determination for any changes to the terms and conditions of the BPA OATT plays an important role in ensuring consistency between BPA's OATT and the terms and conditions of transmission service provided by FERC jurisdictional transmission providers in the region and in providing BPA's transmission customers certainty regarding the terms and conditions under which they contract with BPA for transmission service. Before determining to seek to remove its OATT requirement for FERC approval of OATT changes, BPA should conduct a public process regarding whether or not BPA should seek to remove such requirement and issue a reasoned decision regarding such determination.[11]

Any changes to the terms and conditions of the BPA OATT should be just and reasonable and not unduly discriminatory or preferential, particularly in light of BPA's role as an important transmission provider in the region. It is difficult to overstate the importance of BPA transmission to the electricity industry in the Pacific Northwest. BPA operates over 15,000 circuit miles of high voltage lines, representing about 75 percent of the high voltage grid in the Pacific Northwest.[12] Transmission customers in the Pacific Northwest rely on BPA transmission to move power from resources to loads and need terms and conditions for BPA transmission service that are consistent with the terms and conditions under which other transmission service is provided in the region, durable, and fair. Long-term decisions, such as resources acquisition or development activities, are predicated, in part, on appropriate BPA terms and conditions. The application of a just and reasonable and not unduly discriminatory or preferential standard for changes in BPA's OATT promotes BPA transmission terms and conditions that are consistent with other transmission service in the region and that are durable and fair.

2. If the Requirement for FERC Approval of BPA OATT Changes Were Removed, BPA Should Follow the Procedures Established in Section 212(i)(2) of the Federal Power Act With Respect to the Terms and Conditions of the BPA OATT

As discussed above, BPA need not seek to abandon the existing section 9 of its OATT based on a decision to no longer seek safe harbor reciprocity. If, however, the requirement for FERC approval of BPA OATT changes is removed from section 9 of BPA's OATT, BPA should follow the procedures established in section 212(i)(2) of the Federal Power Act, 16 U.S.C.

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[11] BPA conducted a public process before determining to include the OATT requirement for FERC approval of OATT changes, and a public process should be conducted and a reasoned decision issued before BPA determines to remove such requirement.

[12] Bonneville Power Administration, *BPA Transmission: Moving the Power of the Northwest*, available at https://www.bpa.gov/news/pubs/FactSheets/fs-201306-BPA-transmission-moving-the-power-of-the-Northwest.pdf (June 2013).

§ 824k(i)(2), with respect to the terms and conditions of the BPA OATT. Section 212(i)(2) of the Federal Power Act establishes an "off-the-shelf" procedure for the determination of terms and conditions for transmission service on the Federal Columbia River Transmission System that focuses primarily on a record to be developed by BPA and that BPA could implement.

Section 212(i)(2)(A) of the Federal Power Act includes provisions with respect to BPA's establishment of terms and conditions of general applicability for transmission service, pursuant to which the Administrator may provide an opportunity for a hearing, and in so doing is to

> (i) provide notice in the Federal Register and state in such notice the written explanation of the reasons why the specific terms and conditions for transmission services are not being offered or are being proposed;
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> (ii) adhere to the procedural requirements of paragraphs (1) through (3) of section 7(i) of the Northwest Power Act, 16 U.S.C. § 839e(i), except that the hearing officer shall make a recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record; and
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> (iii) make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer, based on the hearing record, consideration of the hearing officer's recommended decision, section 211 of the Federal Power Act, 16 U.S.C. § 824j.

Importantly, if BPA has conducted such a section 212(i)(2) 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 BPA has not conducted a section 212(i)(2) hearing to determine transmission terms and conditions of general applicability, FERC is to determine whether to issue an order for transmission service in accordance with section 211, including providing the opportunity for a hearing. In this case, the benefit of FERC focus on a BPA record developed in the region is lost.

Each of the procedures set forth in section 212(i)(2) of the Federal Power Act provides important safeguards to both BPA and its transmission customers and is a process that could be implemented without the need to create a different regional public process for the consideration of proposed changes to the terms and conditions of the BPA OATT, which different public process would not have the benefit of requiring FERC to focus on a record developed by BPA in the region.

The procedures established in section 212(i)(2) of the Federal Power Act are closely akin to those established in Northwest Power Act section 7(i) for rate proceedings before BPA. BPA has long had a process for expedited 7(i) rate proceedings.[13] Similarly, BPA could establish procedures, under section 212(i)(2) of the Federal Power Act, for expedited proceedings under section 212(i)(2). In this sense, the procedures established in section 212(i)(2) of the Federal Power Act could fit within the "scalable" model described in the Design Presentation.

In short, the section 212(i)(2) procedures should facilitate a "regional" focus with respect to BPA OATT changes through development of a record before BPA. As stated above, BPA will "[r]espect existing avenues available to customers to seek third party oversight (Federal Power Act 210, 211, 211A, 212, 9th Circuit)." Section 212(i)(2) procedures help ensure the development of a record in the region that should be the focus of FERC consideration of BPA OATT changes. In the absence of section 212(i)(2) procedures, it is much more likely issues will be framed in the first instance in a petition to FERC under Federal Power Act section 211 or 211A. Undue reliance on section 211 or 211A does not appear to be the most appropriate way to effectuate BPA OATT changes that work for BPA and its transmission customers.

In any event, BPA should first consider proposed changes[14] to the terms and conditions of its OATT within a more informal stakeholder process that could, for example, allow for customer meetings and discussion. Such an approach should tend to promote regional consensus.

3. If the Requirement for FERC Approval of BPA OATT Changes Is Removed, BPA Should Not Seek to Adopt Changes Applicable Under Then-Existing Service Agreements if Such Changes Are Inconsistent with FERC's Pro Forma Tariff

Finally, if section 9 of BPA's OATT is revised to remove the requirement for FERC approval of changes, BPA should in any event not seek to make any change to the BPA OATT effective for a then-existing service agreement under the OATT if such change is inconsistent with FERC's requirements for the pro forma OATT for jurisdictional utilities. As noted above, in its letter to the region dated November 22, 2016, BPA stated that it "is committed to aligning its tariff with FERC's pro forma open access tariff as closely as possible." Changes to BPA's OATT that are consistent with FERC-required terms and conditions required in jurisdictional transmission providers' OATTs are consistent with that stated commitment. The ability for BPA to unilaterally make changes, applicable to existing transmission agreements, that are not consistent with FERC pro forma open access tariff requirements would create significant uncertainty and unpredictability regarding existing contracts for BPA transmission service.[15] It is particularly important that BPA customers with existing transmission service agreements not

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[13] *See* Bonneville Power Administration, United States Department of Energy, Rules of Procedure Governing Rate Proceedings, § 1010.10, available at https://www.bpa.gov/power/psp/rates/ratecases/7_i_rules.pdf.

[14] BPA transmission customers and potential transmission customers should be permitted to propose BPA transmission terms and conditions for consideration in a regional process as described herein. This should facilitate development of appropriate revisions to BPA transmission terms and conditions within the region and potentially reduce BPA customer need to rely on Federal Power Act sections 211 and 211A.

[15] As noted above, in its letter to the region dated November 22, 2016, BPA stated that it "understands and appreciates the value to [its] customers of certainty and predictability for Bonneville's transmission service terms and conditions."

be subject to requirements unilaterally changed by BPA that are inconsistent with FERC's pro forma OATT requirements. BPA customers receiving on-going service may well lack adequate time to seek relief from such requirements from FERC before suffering adverse effects from such unilateral BPA changes.

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Avista and PSE appreciate BPA's review of these comments and consideration of the recommendations contained herein. By return e-mail, please confirm BPA's receipt of these comments.