REVISED Comments of PacifiCorp, Idaho Power Company, and Puget Sound Energy, Inc.
Tariff Engagement Design
January 13, 2017
(original comments filed on January 12, 2017)

PacifiCorp, Idaho Power Company, and Puget Sound Energy, Inc. ("Commenting Parties") appreciate the opportunity to provide comments to the Bonneville Power Administration ("Bonneville" or "BPA") in response to its "Tariff Engagement Design Questionnaire," as well as its related November 22, 2016 letter indicating its intention "to revise its open access transmission tariff so that it can make future changes to the tariff through a regional public process."[1] On December 13, 2016, BPA held a workshop titled "Kick-Off for Tariff Engagement Design." At that workshop, BPA requested that customers respond to several specific questions concerning BPA's proposed public process, and provide "any additional comments, feedback or questions."[2]

As discussed in more detail below, Commenting Parties believe BPA's unilateral removal from Section 9 of the requirement for Federal Energy Regulatory Commission ("FERC" or "Commission") approval of tariff revisions and replacement of that requirement with a mechanism that permits BPA to make unilateral tariff modifications after conducting a public process is unlawful and a violation of BPA's existing contractual commitments. Moreover, even if BPA's proposal were lawful, it would create unacceptable business risk and uncertainty for transmission customers.

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[1] Letter from Michelle Manary, Vice President, Bonneville Transmission Marketing and Sales, to Regional Customers, Stakeholders and Other Interested Parties at 1 (Nov. 22, 2016), *available at* https://www.bpa.gov/transmission/CustomerInvolvement/TariffEngagementDesign/Documents/Letter-to-Stakeholders-Customer-112216.pdf (last accessed Jan. 4, 2017).

[2] Bonneville Power Admin., Tariff Engagement Design Questionnaire at 1 (Dec. 18, 2016), *available at* https://www.bpa.gov/transmission/CustomerInvolvement/TariffEngagementDesign/Documents/tariff-engagement-questionnaire.pdf (last accessed Jan. 4, 2017).

It is unclear whether there is any specific issue driving BPA to propose these changes. BPA has indicated a general frustration with FERC's unwillingness to approve some of its proposed tariff modifications, and since BPA has stated that it no longer intends to pursue reciprocity status for its overall tariff, the agency does not wish to make future filings seeking declaratory order findings that proposed tariff modifications satisfy the Section 9 standards. The Commission has been willing to issue orders addressing whether or not specific proposed changes to BPA's tariff satisfy the Section 9 standards, notwithstanding the fact that BPA's overall tariff does not. While this may not be a desirable state of things, it is a construct that was agreed upon in settlements over twenty years ago, and it provides critical protection for the interests of both BPA and transmission customers.

Under the current approach, BPA does not have a reciprocal tariff. It is not required to propose *any* tariff changes, and it maintains the ability to propose *any* tariff changes it wants to make. Customers have the ability to argue for or against such changes before a neutral third-party, FERC. FERC then has the ability to issue a declaratory order stating its finding on whether that the proposed tariff modifications satisfy the standards included in Section 9. As discussed in Section II.B below, the standards in Section 9 reflect the standards that would be applied to BPA's tariff if a transmission customer were to file a FERC complaint regarding BPA's transmission service. The tariff in its current form places the burden on BPA to demonstrate in the first instance that proposed tariff modifications are lawful. BPA now wishes to move that burden to the transmission customer, who would then have to bring a costly and time-consuming complaint in order to demonstrate that a tariff modification is not lawful. The burden of an FPA Section 211 or 211A order is significant from both a legal and practical standpoint, and transmission customers should not have to seek such an order to ensure

continued open access service under BPA's tariff. BPA is required by law to provide open access transmission service. It is entirely appropriate that BPA's tariff changes must satisfy the minimum standards for open access – and indeed, those are the very standards that are set forth in Section 9. The only reason BPA would need to remove itself from those standards is to enable the ability to make tariff changes that do not satisfy them.

BPA's proposal is exceptionally one-sided and fundamentally unfair, and the inherent legal infirmities will place the tariff terms and conditions in a continuing uncertain status for all customers going forward. BPA should not seek to disrupt the Section 9 tariff construct. It is appropriate for BPA to maintain this initial burden regarding tariff changes – as a matter of contract, law, and policy. Commenting Parties urge BPA to abandon this proposal and to work cooperatively with transmission customers to meet the challenges and opportunities presented by the changing utility industry.

These comments have been revised solely to add Puget Sound Energy, Inc. as a Commenting Party, and are otherwise the same as the joint comments submitted on January 12, 2017 by PacifiCorp and Idaho Power Company.

I. Background

Before 1996, transmission providers, including BPA, provided transmission service under the terms and conditions specified in bilateral contracts. As a general matter, such contracts could only be amended by mutual agreement. In 1996, in order to remedy "existing and future undue discrimination in the industry and realize the significant customer benefits that will come with open access,"[3] the Commission promulgated Order No. 888, requiring public

[3] *Promoting Wholesale Competition Through Open Access Non- Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 at 31,635 (1996) ("Order No. 888"), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*,

utility transmission providers to offer transmission service under the terms and conditions contained in a *pro forma* Open Access Transmission Tariff ("OATT"). Section 9 of the *pro forma* OATT allows a Transmission Provider to unilaterally propose changes to its OATT, but such changes only become effective if the Commission determines that they are just and reasonable and not unduly discriminatory or preferential.[4] The Commission has allowed Transmission Providers to propose non-rate terms and conditions that differ from the *pro forma* OATT if such terms and conditions are "consistent with or superior to" the *pro forma* OATT.[5]

Order No. 888 did not require non-public utility transmission providers, such as BPA, to file an OATT, however, it conditioned non-public utilities' use of public utility open access services on an agreement to offer comparable transmission services in return.[6] FERC established three methods for non-public utilities to satisfy this condition, (often referred to as the "reciprocity condition"): (1) by submitting a "safe-harbor" reciprocity tariff, (2) through bilateral agreement with the public utility, including provisions affirmatively addressing the public utility's desire for reciprocity, or (3) by receiving a voluntary waiver from the public utility.[7] In 1996, BPA chose the first option, and endeavored to adopt the *pro forma* tariff, with some

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Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888- C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[4] *Pro forma* OATT, § 9 ("Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the right of the Transmission Provider to unilaterally make application to the Commission for a change in rates, terms and conditions, charges, classification of service, Service Agreement, rule or regulation under Section 205 of the Federal Power Act and under the Commission's rules and regulations promulgated thereunder."); 16 U.S.C. § 824d (2012).

[5] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 135, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

[6] Order No. 888 at 31,761-62; Order No. 890 at P 162.

[7] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at P 799, fn. 574 (2011) ("Order No. 1000") (Appx. R-34) (citing, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 163 (2007) (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,285-86)), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 771 (2012) ("Order No. 1000-A").

deviations, in order to obtain "safe-harbor" reciprocity status. As part of this transition, BPA needed to convert its existing bilateral transmission contracts to the new tariff construct. In order to develop tariff terms, conditions and rates for service, BPA implemented a formal regional hearing process,[8] similar to that described in section 212(i)(2)(A)(ii) of the Federal Power Act,[9] with the intention of having FERC review the Administrator's ultimate determination of tariff terms and conditions concurrent with its review of BPA's transmission rates.[10]

BPA and its customers ultimately reached agreement on the BPA tariff terms and conditions, and entered into a Transmission Rates and Terms and Conditions Settlement Agreement ("1996 Settlement Agreement").[11] The tariff's Standard Form of Service Agreement attached to the 1996 Settlement Agreement included the following language:

> Unless otherwise mutually agreed in writing by the parties, Bonneville may change the terms and conditions of the Tariff upon, and only upon, a determination by the Commission that such change is just and reasonable and not unduly discriminatory or preferential.[12]

In the 1996 Terms and Conditions Proceeding: Administrator's Record of Decision issued on June 20, 1996, the Administrator adopted the tariff terms and conditions consistent with the 1996 Settlement Agreement.[13]

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[8] The terms and conditions hearing process was designated Docket No. TC-96. The TC-96 proceeding was placed on the same procedural schedule as the BP-96 rate proceeding, and the two proceedings were held concurrently.

[9] 16 U.S.C. § 824k(i)(2)(A)(ii) (2012).

[10] *See Bonneville Power Admin.*, "Bonneville Power Administration's Petition for Declaratory Order Regarding Transmission Terms and Conditions," Docket No. NJ97-3-000 at 4-6 (Dec. 16, 1996) ("1996 T&C Petition for Declaratory Order").

[11] *See id.* at Attachment 5.

[12] *Id*. at Attachment 2, Bonneville Power Administration Point-to-Point Transmission Service Tariff § 1.1, TC-96-FS-BPA-02 at 64; *Id*. at Attachment 2, Bonneville Power Administration Network Integration Service Tariff § 1.1, TC-96-FS-BPA-01 at 44.

[13] BONNEVILLE POWER ADMIN., 1996 TRANSMISSION TERMS AND CONDITIONS PROCEEDING: ADMINISTRATOR'S RECORD OF DECISION, TC-96-A-01 at 33-34 (dated Jun. 1996).

BPA submitted the a request for declaratory order to FERC seeking a finding that the tariff terms and conditions satisfied the "safe-harbor" reciprocity standard, explaining that "[t]he number of parties signing the [1996 Settlement Agreement] and the diversity of their interests, from full requirements customers to wheeling-only customers, is a testament to the strength of the consensus on settlement."[14] Regarding future tariff modifications, BPA's Petition for Declaratory Order explained:

> BPA may impose subsequent Tariff changes upon Customers who have executed Service Agreements only upon a determination by the Commission that the changes are just and reasonable, not unduly discriminatory or preferential, unless otherwise agreed in writing. (Service Agreements, § 1.1). Though not required to do so under law, BPA agreed to this as part of the Transmission Settlement.[15]

FERC granted BPA's request for a declaratory order and found that, with certain modifications, BPA's submitted tariff was consistent with or superior to the requirements of Order No. 888.[16]

In 2001, BPA held another tariff terms and conditions proceeding,[17] proposing to modify a number of tariff provisions.[18] BPA and its transmission customers again reached settlement on tariff terms and conditions ("2001 Settlement Agreement").[19] As part of that process, BPA and the transmission customers agreed to remove the tariff modification language from the Standard

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[14] *Bonneville Power Admin.*, "Bonneville Power Administration's Petition for Declaratory Order Regarding Transmission Rates," Docket No. NJ97-3-000 at 11 (Dec. 20, 1996); *see also* 1996 T&C Petition for Declaratory Order at 22 (emphasizing the importance of the "consensus and the underlying *quid pro quo's* negotiated among the parties to obtain the complex settlement").

[15] 1996 T&C Petition for Declaratory Order at 27-28.

[16] *Bonneville Power Admin.*, 80 FERC ¶ 61,119 (1997).

[17] This terms and conditions hearing process was given the designation of Docket No. TC-02.

[18] On March 15, 2000, BPA filed a Federal Register Notice of "Proposed Open Access Transmission Tariff; Public Hearing and Opportunities for Public Review and Comment." 65 Fed. Reg. 14,098 (2000) ("BPA's Transmission Business Line (TBL) is proposing open access non-rate terms and conditions for transmission service over the Federal Columbia River Transmission System (FCRTS). Such terms and conditions are proposed to be effective October 1, 2001. By this notice, the TBL is announcing commencement of a formal administrative proceeding, procedures for intervention, and a comment period for non-party participants.").

[19] *See Bonneville Power Admin.*, "Bonneville Power Administration's Petition for Declaratory Order Regarding Transmission Terms and Conditions," Docket No. NJ01-1-000 at 6-8 (Dec. 14, 2000) ("2001 T&C Petition for Declaratory Order").

Form of Service Agreement, and incorporate the current tariff modification language in Section 9 of the tariff:

> Nothing contained in the Tariff shall be construed as affecting in any way the right of the Transmission Provider to unilaterally propose a change in rates, terms and conditions, charges or classification of service. The Transmission Provider may, subject to the provisions of the applicable Service Agreement under this Tariff, change the rates that apply to transmission service under such Service Agreement pursuant to applicable law. The Transmission Provider may, subject to the provisions of the applicable Service Agreement under this Tariff, change the terms and conditions of this Tariff upon, and only upon, a determination by the Commission that (i) such change is just and reasonable and not unduly discriminatory or preferential, or (ii) such change meets the non-public utility reciprocity requirements pursuant to a request for declaratory order under 18 CFR § 35.28(e).
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> Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and pursuant to the Commission's rules and regulations promulgated thereunder. [20]

The 1996 and 2001 Settlement Agreements were both reached after extensive negotiations wherein BPA worked with its customers to develop mutually agreeable tariff terms and conditions.[21] Customers were in many cases trading in their existing long-term firm bilateral transmission service agreements for service under the BPA tariff—necessarily, the certainty of BPA's terms and conditions was a very important aspect of the settlements. In

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[20] *See id.*, Attachment A at § 9.

[21] 1996 T&C Petition for Declaratory Order at 2 ("The tariffs and their associated rates are the result of a broad and complex regional settlement reached at the end of lengthy hearings conducted before two hearing officers."); 2001 T&C Petition for Declaratory Order at 2 ("Bonneville's proposed OATT is the result of a comprehensive, multi-party settlement that was reached during formal hearings conducted before a Hearing Officer."); *id.* at 6 ("On June 20, 2000, following weeks of negotiations, the settling parties reached agreement on a comprehensive settlement agreement, which included the terms and conditions of Bonneville's proposed OATT."); *Bonneville Power Admin.*, "Motion to Intervene of Pacific Northwest Generating Cooperative," Docket No. NJ97-3-000 at 4 (Jan. 31, 1997) ("PNGC NJ01-1-000 Intervention") ("[T]he settlement producing this OATT was reached only after protracted and hard-fought negotiations that were open to public scrutiny and participation by every segment of the industry and every interest.")

addition, BPA's satisfaction of open access standards and its commitment to achieve and retain reciprocity was at the time very important to BPA's transmission customers.[22]

While the Commission granted reciprocity status for BPA's tariff from 1997 to 2009, BPA lost reciprocity status when it declined to adopt tariff reforms required by Order Nos. 890, 764, 739 and 1000. BPA's tariff, however, still contains the 2001 Settlement Agreement language in Section 9, requiring the Commission to make certain findings before BPA tariff modifications can become effective.

In 2008, BPA discussed and requested comments on whether it should revise Section 9 of its tariff to eliminate the requirement for FERC approval of tariff changes and instead allow BPA to unilaterally change the tariff after a public process involving transmission customers and interested parties.[23] At the time, BPA explained that removing the FERC approval provisions from its tariff would mean that BPA could amend its tariff unilaterally, but it indicated to

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[22] *See e.g.*, PNGC NJ01-1-000 Intervention at 4 ("The Commission should apply the same standards to BPA's open access tariff that it applies to open access tariffs of jurisdictional utilities."); *Bonneville Power Admin.*, "Motion to Intervene of the Public Generating Pool," Docket No. NJ97-3-000 at 3 (Feb. 3, 1997) ("PGP does not seek intervention, at this time, to contest BPA's Petitions for Declaratory Order. PGP will contest BPA's Petitions, however, if FERC determines that BPA's proposed 1996 Transmission Rate and Terms and Conditions Proceedings in Dockets WP/TR-96 and TC-96 fail to meet all applicable standards set forth in (1) the Pacific Northwest Electric Power Planning and Conservation Act standards 'equitable allocation' and 'widest possible use consistent with sound business principles,' 16 U.S.C. §§ 838g, 839e(a); (2) the Federal Power Act, as amended by the Energy Policy Act of 1992, standards of 'not unjust, unreasonable, unduly discriminatory or preferential,' 16 U.S.C. §824k(i)(1)(B)(ii); and (3) the Energy Policy Act of 1992 comparability standard, 16 U.S.C. § 824j and 824k."); *Bonneville Power Admin.*, "Public Power Council's Motion for Leave to Intervene," Docket No. NJ97-3-000 at 3 (Feb. 3, 1997) ("As purchasers of wholesale electric power and transmission services from BPA, PPC members have encouraged and supported BPA's development of transmission tariff terms and conditions and rates that are consistent with the Commission's open access policies."); *Bonneville Power Admin.*, "Motion to Intervene and Protest of the Industrial Customers of Northwest Utilities," Docket No. NJ97-3-000 at 3-8 (Feb. 3, 1997) (arguing that FERC should require BPA to provide open access even if BPA were not voluntarily filing a reciprocity tariff); *Bonneville Power Admin.*, "Motion to Intervene and Comments of British Columbia Power Exchange Corporation," Docket No. NJ97-3-000 at 15-17 (Feb. 3, 1997) (urging FERC approval of tariffs be conditioned on full open access compliance); *Bonneville Power Admin.*, "Motion to Intervene of Portland General Electric Company," Docket No. NJ97-3-000 at 3 (Jan. 31, 1997); *Bonneville Power Admin.*, "Motion of Electric Clearinghouse, Inc. for Leave to Intervene and Protest," Docket No. NJ97-3-000 at 3 (Feb. 5, 1997).

[23] BPA discussed this potential Section 9 change at the June 9, 2008 meeting of the Transmission Issues Policy Steering Commission ("TIPSC"). BPA later issued a document which described these proposed changes and answered customer questions regarding those proposed changes. BONNEVILLE POWER ADMIN., RESPONSE TO QUESTIONS RAISED AT TIPSC REGARDING PROPOSAL TO MODIFY SECTION 9 OF BPA'S TARIFF (Sept. 2008).

customers that making a unilateral change without FERC approval would cause BPA to sacrifice its reciprocity status, and it "therefore would not make such a change lightly."[24] BPA reasoned that as long as it continued filing all proposed tariff changes and agreed with and followed FERC directives related to those changes, then it would keep its reciprocity status and nothing would change despite the removal of Section 9. BPA received significant resistance from customers and ultimately abandoned the 2008 proposal.

II. Comments

A. BPA's Proposal Does Not Satisfy the Contract Standards Contained in BPA's Tariff

BPA cannot change its tariff – including the language in Section 9 of its tariff – unless the Commission finds that the proposed change (1) is just and reasonable and not unduly discriminatory or preferential, or (2) such change meets the non-public utility reciprocity requirements pursuant to a request for declaratory order under 18 CFR § 35.28(e). BPA's proposal to remove Section 9 and replace it with the unilateral ability for BPA to modify the tariff after a public comment process does not satisfy either of the Section 9 standards for tariff modification.

1. BPA's Proposal is Unjust, Unreasonable, Unduly Discriminatory and Preferential

The first standard contained in Section 9 of BPA's tariff permits tariff changes if the Commission finds that the change is just and reasonable and not unduly discriminatory or preferential. BPA has never sought Commission approval for a tariff change under this standard; instead, all proposed changes have been submitted as a declaratory order request for a finding that such changes satisfy the Commission's reciprocity requirements. While BPA has never submitted any tariff changes to FERC seeking a finding that this standard was met, it remains, as

[24] *Id.* at 3.

a matter of contract, a standard by which a BPA tariff modification might be found acceptable by FERC.

BPA has suggested that this standard is not appropriate because it is essentially the same as the standard applicable to public utility rate, terms and conditions changes under Section 205 of the Federal Power Act ("FPA"), and BPA is not a public utility. Commenting Parties disagree that this standard is not appropriate for BPA tariff changes. The words contained in this standard are found in FPA provisions that apply to BPA, and in particular, to BPA's provision of transmission services. FPA Section 211A requires BPA to provide transmission services on terms and conditions that are "comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential."[25] FPA Section 212(a) specifies that FPA Sections 210 and 211 orders requiring transmitting utilities to provide interconnection or wheeling services shall be at rates, charges, terms and conditions that are "just and reasonable, and not unduly discriminatory or preferential."[26]

BPA's proposal to remove Section 9 and replace it with the unilateral ability for BPA to modify the tariff after a public comment process is unjust and unreasonable because it gives one party to the contract the ability to alter the terms and conditions – potentially to decrease performance obligations it has made, or increase the performance obligations owed by the other party, or both. Such a construct is antithetical to nature of a contract, where legal duties arise for both parties from a valid agreement with consideration.

BPA's transmission customers agreed in the 2001 Settlement Agreement to the language in Section 9 because parties took comfort that a neutral third party -- the Commission -- would

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[25] 16 U.S.C. § 824j-1(b)(2012).

[26] *Id.* § 824k(a).

review BPA's proposed changes against the known standards articulated in the tariff, and only permit them to go into effect if such standards were satisfied. Removal of both the standards and the neutral third party is unjust and unreasonable.

BPA's proposal is also unduly discriminatory and preferential because it would provide BPA – itself a transmission customer taking service under its own tariff – with the ability to unilaterally change the terms and conditions of service. No other transmission customer has this ability. Such an opportunity is of great potential benefit to BPA, in its capacity both as a transmission provider and as a transmission customer under its own tariff, providing BPA an advantage over all other transmission customers (who do not have a similar ability to alter the terms and conditions of tariff service from BPA).

2. BPA's Proposal Does Not Satisfy the Commission's Reciprocity Requirements

The second standard set forth in Section 9 of BPA's tariff permits changes proposed by BPA to become effective if the Commission finds that the proposed change "meets the non-public utility reciprocity requirements pursuant to a request for declaratory order under 18 CFR § 35.28(e)." The Commission has stated that tariff terms and conditions will satisfy the non-public utility reciprocity standard if they "substantially conform with or are superior to" the *pro forma* OATT terms and conditions.[27]

BPA's proposal to remove Section 9 does not substantially conform with, and is not superior to, the terms and conditions of the *pro forma* OATT. As discussed above, the *pro forma* OATT permits transmission providers to propose tariff changes, but such changes only become

[27] Order No. 1000-A at P 772 ("We affirm the Commission's determination in Order No. 1000 that to maintain a reciprocity tariff under the voluntary 'safe harbor' provision, a non-public utility transmission provider must ensure that the provisions of that tariff *substantially conform, or are superior*, to the *pro forma* OATT. . .") (emphasis added); *see also* Order No. 890 at P 163 ("First, it may provide service under a tariff that has been approved by the Commission under the voluntary "safe harbor" provision. A non-public utility using this alternative submits a reciprocity tariff to the Commission seeking a declaratory order that the proposed reciprocity tariff *substantially conforms to, or is superior to*, the *pro forma* OATT.") (emphasis added).

effective if the Commission finds that they satisfy the requirements of FPA Section 205, (*i.e.*, they are just and reasonable and not unduly discriminatory or preferential). The *pro forma* OATT does not permit transmission providers to make unilateral tariff changes after conducting a public process. BPA's proposal significantly disadvantages transmission customers. Indeed, by theoretically permitting *any* tariff provision to be changed in *any* manner, (even after a public process), BPA's proposal leaves transmission customers with no idea what their transmission contract rights may be in the future, or if they will have any rights at all. Such a change is not substantially consistent with the *pro forma* OATT, and certainly is not superior to it.

B. BPA's Proposal Does Not Satisfy FPA Sections 211A or 212(a) Standards

In the Energy Policy Act of 2005 ("EPAct 2005"),[28] Congress enacted FPA Section 211A,[29] vesting the Commission with jurisdiction to eliminate undue discrimination by any entity, including BPA. Under FPA Section 211A, the Commission may order BPA to provide transmission and interconnection services on terms and conditions that are comparable to those it provides itself and that are not unduly discriminatory or preferential.[30] Specifically, FPA Section 211A(b) states:

> [T]he Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services (1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.[31]

FERC has already once exercised 211A jurisdiction over BPA, finding that Bonneville's Environmental Redispatch Policy resulted in non-comparable treatment of certain generating

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28 *Energy Policy Act of 2005*, Pub. L. No. 109-58, 119 Stat. 594 (2005).

29 16 U.S.C. § 824j-1(b) (2012).

30 *Id.*

31 *Id.*

resources under FPA section 211A.[32] In that case, FERC ordered to BPA to make tariff modifications to correct the undue discrimination identified in the Environmental Redispatch Policy, and those provisions of BPA's tariff, along with the associated rates, remain under the Commission's 211A jurisdiction.[33]

As discussed above, the language in Section 9 of BPA's tariff was developed specifically for BPA in the 1996 and 2001 terms and conditions settlements, and was designed to follow the *pro forma* OATT structure for tariff modifications, but to apply a standard of review applicable to BPA. FERC accepted this standard, and BPA and FERC have operated under it for nearly twenty years. BPA's proposal to remove Section 9 and replace it with an ability for BPA to make unilateral tariff modifications after a public process would provide BPA – itself a transmission customer taking service under its own tariff – with the ability to unilaterally change the terms and conditions of transmission service. Other transmission customers do not have a similar ability to make unilateral modifications to BPA's tariff.[34] The ability to make unilateral changes provides BPA with an advantage over all other transmission customers. BPA's proposal is inherently non-comparable, and unduly discriminatory and preferential.

In addition, as discussed above, FPA Section 212(a) specifies that FPA Sections 210 and 211 orders requiring transmitting utilities to provide interconnection or wheeling services shall be at rates, charges, terms and conditions that are just and reasonable, and not unduly discriminatory or preferential.

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[32] *See Iberdrola Renewables, Inc. v. Bonneville Power Admin.*, 137 FERC ¶ 61,185 (2011).

[33] Attachment P was approved by FERC in conjunction with the correlated rate proposal under FPA Section 211A. *Iberdrola Renewables, Inc. v. Bonneville Power Admin.*, 141 FERC ¶ 61,234 (2012); *Iberdrola Renewables, Inc. v. Bonneville Power Admin.*, 149 FERC ¶ 61,044 (2014).

[34] In the December 13, 2016, BPA Tariff Engagement Design Workshop, BPA stated that it would consider allowing customers to propose possible Tariff modifications through its customer comment process. Again it is important to note that the opportunity to provide comment is not comparable to the Administrator's ability to make final determinations.

C. Removal of Section 9 is a Breach of the 1996 and 2001 Settlement Agreements

BPA's proposal to remove Section 9 is also a breach of the 1996 and 2001 Settlement Agreements BPA entered into with its transmission customers. BPA and its customers engaged in lengthy and "hard-fought" formal negotiations in 1996 and 2001 to reach agreement on the terms and conditions of BPA's tariff, including the language in Section 9.[35] BPA acknowledged in its request for declaratory order that including a mechanism for third-party review of any future proposed BPA tariff changes was a critical settlement agreement term.[36] BPA cannot simply abrogate its settlement agreements.

In addition to having the requirement that a neutral third-party review BPA's proposed tariff modifications against a known standard in the tariff, several of BPA's customers also have this language in their individual service agreements. BPA's proposal to remove Section 9 from the tariff will not alter the effect of this language in the individual customer service agreements. Any move to unilaterally change these service agreements by BPA would be an additional breach of contract.

D. BPA's Proposal is Inconsistent with FERC's Prior Orders Permitting Tariff Withdrawal

BPA's proposal to unilaterally remove Section 9 and replace it with the unilateral ability for BPA to modify the tariff after a public comment process is inconsistent with FERC's prior orders permitting non-public utilities to withdraw their reciprocity tariffs. In the December 13, 2016, BPA Tariff Engagement Design Workshop, BPA noted that many non-public utilities are no longer maintaining reciprocity tariffs on file with FERC. To the extent this is the case, BPA

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[35] *See supra* n. 21 and surrounding text.

[36] 1996 T&C Petition for Declaratory Order at 27-28.

has acknowledged that most of these non-public utilities now provide transmission service through a Regional Transmission Organization ("RTO") of Independent System Operator ("ISO"), and not under a construct similar to BPA's proposal.

When the Commission has issued orders in the past approving a non-public utility's ability to withdraw its tariff, those cases involved two important factors not present here: (1) the non-public utility's original tariff contained an explicit right allowing the non-public utility to unilaterally withdraw its tariff under certain circumstances, and (2) the non-public utility's original tariff contained protections for existing customers to ensure that, in the event of tariff withdrawal, pre-existing service would continue to be provided under the same terms and conditions as before, as interpreted by FERC.

For example, Big Rivers Electric Corporation's ("Big Rivers") original reciprocity tariff[37] included a provision whereby the tariff and form of service agreement would terminate immediately at Big Rivers' option: (1) if, upon request made by Big Rivers, FERC declined to issue a declaratory order approving the Big Rivers tariff as complying with the reciprocity provisions; (2) if a FERC order approving the Big Rivers tariff as complying with reciprocity was vacated on appeal; or (3) if FERC subsequently altered its decision in a declaratory order that the Big Rivers tariff complies with the reciprocity requirement and required tariff modifications that Big Rivers found unacceptable.[38] However, in the event Big Rivers terminated its reciprocity tariff, *it would continue to provide firm and non-firm transmission service to existing transmission customers pursuant to contractual commitments specified in*

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[37] Big Rivers subsequently joined an RTO. S*ee, Big Rivers Elec. Corp.*, Docket Nos. NJ09-3-001, NJ11-11-000, Letter Order (issued Mar. 22, 2011); *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,175 (2010); *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER10-1024-000, Letter Order (issued May 26, 2010).

[38] Big Rivers Electric Corporation, Open Access Transmission Tariff, Section 9.0: Regulatory Filings.

service agreements so long as the transmission customers continue to grant reciprocal access to their own transmission systems.[39]

As another example, before joining an RTO, the East Kentucky Power Cooperative ("EKPC") had a reciprocity tariff[40] wherein EKPC reserved the right to withdraw and terminate its tariff, but the tariff also provided that EKPC would not terminate transmission service during the life of service agreements for either firm point-to-point service or network service.[41] Further, EKPC would provide thirty days' written notice before terminating service under service agreements for non-firm point-to-point service.[42] EKPC later cancelled its reciprocity tariff as part of EKPC's transition to the PJM regional transmission organization, and service provided under the prior EKPC reciprocity tariff was transferred to the FERC-approved PJM OATT,[43] with the exception of the provision of certain ancillary services for a customer that negotiated terms separately because it did not want to receive service through the PJM construct.[44]

The Commission has emphasized the importance of such customer protection commitments. In *South Carolina Public Service Authority*,[45] the Commission approved South Carolina Public Service Authority's ("Authority") proposal to include a provision that would allow the Authority to terminate its reciprocity tariff and associated service agreements in the event it was unable to satisfy reciprocity (but not merely because the Authority is unhappy with a

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39 *Id*. (emphasis added).

40 *See E. Ky. Power Coop., Inc.*, FERC Docket No. NJ11-2-000, Open Access Transmission Tariff, Order No. 714 Baseline Filing (Oct. 8, 2010) ("EKPC Reciprocity Tariff"). EKPC's OATT was approved by the Commission starting in 1997 and most recently affirmed in 2010. *See E. Ky. Power Coop., Inc.*, 130 FERC ¶ 61,072 (2010) (affirming "safe harbor" tariff).

41 EKPC Reciprocity Tariff at § 9 "Regulatory Filings and Withdrawal of Tariff".

42 *Id*.

43 *E. Ky. Power Coop., Inc.*, 144 FERC ¶ 61,063 at P 17 (2013).

44 *Id*. at P 4 (describing the parties' agreement executed under the review of the Kentucky Public Service Commission).

45 75 FERC ¶ 61,209 (1996).

Commission determination on the rates, terms or conditions in the tariff). Further, the Authority's tariff provided that if the Authority withdrew the tariff, it would continue to provide firm and non-firm service according to those preexisting contractual commitments. This was not simply a promise not to *cancel* the service agreements, it was a promise to continue to provide service for the remaining term of the service agreement under the terms and conditions prescribed by FERC during the time the Authority chose to accept the reciprocity condition. Despite protests to the withdrawal and termination provisions, FERC found the Authority's proposal reasonable, stating that:

> The Open Access Rule provides clearly that reciprocity is voluntary and that non-public utilities that do not wish to offer open access services may choose not to take service under a public utility's open access tariff. The Authority's termination and withdrawal provisions are consistent with this principle. *Conversely, the Authority recognizes that it is obligated to honor any firm commitments it will have made during the time it has accepted the reciprocity condition* and that it will lose any claim to reciprocity if it withdraws its tariff or terminates service thereunder, according to the terms of its contract.[46]

BPA does not have an explicit right to unilaterally withdraw or terminate its tariff. Further, even if BPA were permitted to remove Section 9, FERC policy would require BPA to honor its existing commitments to firm transmission customers, meaning the terms and conditions of service could not be unilaterally changed.

E. BPA's Proposal Violates Basic Principles of Contract Law

[46] *Id*. at 61,698 (emphasis added). *See also Orlando Utils. Comm'n*, 84 FERC ¶ 61,069 at 61,288 (1998) (approving a unilateral withdrawal provision because the Commission found a similar provision in the Authority's tariff reasonable, as "the voluntary nature of a non-public utility's participation under the Open Access Rule allows it to terminate its tariff unilaterally. Similarly, Orlando may choose not to take service under a public utility's open access tariff and to terminate its own tariff consistent with the principle of voluntary reciprocity for non-public utilities."). While BPA may try to cite to this or similar Commission language to support the proposition that BPA does not need a termination/withdrawal provision in its tariff in order to terminate or withdraw, we think it is also helpful for Avangrid Renewables because it seems to similarly support the argument that, by choosing to terminate its reciprocity OATT, BPA would also be choosing not to (or would no longer eligible to) take service under other public utility's OATTs.

BPA has recognized that its tariff "is a contract between BPA and its customers, which are bound by the terms of the Tariff."[47] The United States Court of Appeals for the Ninth Circuit has held that "one party cannot unilaterally modify a contract without the consent of the other party or without consideration."[48] Ninth Circuit precedent makes clear that a proposed change to a contract's terms and conditions is merely an offer, and the other party will not be bound by it unless it accepts the new offer.[49] By removing neutral third-party review of proposed tariff modifications against a known standard, BPA would be fundamentally altering the bargain. BPA's customers would have no meaningful opportunity to accept or reject BPA's unilateral tariff changes, notwithstanding BPA's suggestion that customers might be provided with an opportunity to comment on proposed changes. The opportunity to comment is not a substitute for consent or consideration.

Moreover, contracts permitting unilateral modifications by one party have been considered by the courts[50] to be procedurally and/or substantively defective when there is inequality in bargaining power between the parties, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice.[51] Due to BPA's ownership of

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[47] Answer of the Bonneville Power Administration to the Request for Clarification by Powerex Corp, Docket No. RM10-22-001 (Sept. 30, 2010).

[48] *See e.g., Douglas v. Talk America,* 495 F.3d 1062 (9th Cir. 2007) ("[A] revised contract is merely an offer and does not bind the parties until it is accepted."); *Union Pac. RR v Chi., Milwaukee, St. Paul & Pac. RR*, 549 F.2d 114, 188 (9th Cir. 1976) ("One party cannot unilaterally modify a contract without the consent of the other party or without consideration.").

[49] *Union Pac. RR v Chi.,* 549 F.2d at 188.

[50] Such determinations generally rely on the state law precedent, however, most states contain similar frameworks for considering the unconscionability of a contract. Unconscionability may be procedural or substantive. Procedural unconscionability refers to the conditions of contract formation and considers, among other factors, inequality in bargaining power between the parties. Substantive unconscionability generally refers to the terms of the contract and whether they contravene the public interest or public policy. Both procedural and substantive deficiencies—frequently in combination—can preclude enforcement of a contract or contract term on unconscionability grounds. *Bagley v. Mt. Bachelor, Inc.*, 356 Ore. 543, 555-56 (Or. Sup. Court 2014).

[51] *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Ore App 553, 566-567, 152 P3d 940, 948 (2007); *Acorn v. Household Intern. Inc.*, 211 F Supp 2d 1160, 1168 (ND Cal. 2002).

approximately 75 percent of the transmission system in the Pacific Northwest, BPA's customers do not have a meaningful choice in choosing transmission providers and transmission paths. Further, BPA's transmission customers developed their businesses and current transmission arrangements with BPA over many years, based on a reasonable expectation that their contracts would not one day be rendered illusory.[52]

F. BPA's Proposal Creates Unacceptable Uncertainty and Business Risk for Transmission Customers

BPA's proposal to unilaterally change the terms and conditions of the BPA tariff creates unacceptable uncertainty and business risk for BPA's transmission customers. Transmission customers cannot do business when the terms and conditions of their transmission contracts are effectively unknown, and subject to unilateral modification by BPA. Customers must have certainty in order to plan for the future and to reliably enter into business arrangements. Customers will be unable to appropriately anticipate the meaning of their transmission arrangements and will be unable to plan for their business going forward. Financial and credit based contracts related to all aspects of the customers' businesses will be put at risk. This vulnerability is further heightened as customers and BPA continue to engage in western regionalization efforts, as well as other opportunities to collaborate in good faith.

BPA is charged with assuring the implementation of its duties in a sound and businesslike manner.[53] Breaching twenty year old settlement agreements in order to impose a unilateral

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[52] *See, e.g.*, *Torncello v. United States*, 681 F.2d 756, 760 (Ct. Cl. 1982) (explaining that a contracting party "may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void"); *see also Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1357 (Fed. Cir. 2009) ("[T]here is the obvious question of whether making the contracts subject to whatever future federal law or policy may hold would make the contracts illusory.").

[53] 16 U.S.C. § 839f(b) (2012). Similarly, BPA is required to provide "the lowest possible rates to consumers consistent with sound business principles." *Id.* § 838g.

contract regime on captive transmission customers is not a sound and businesslike course of action.

III. Conclusion

For all of the reasons discussed above, BPA's proposal to remove Section 9 from its tariff and replace it with a mechanism that permits BPA to make unilateral tariff modifications after conducting a public process is unlawful and a violation of BPA's existing contractual commitments. Moreover, even if BPA's proposal were lawful, it would create unacceptable business risk and uncertainty for transmission customers.

Ensuring consistency with Section 9 standards before BPA tariff changes may take effect does not mean that BPA must maintain a "safe-harbor" reciprocity tariff in the future. BPA has submitted numerous petitions for declaratory order finding that individual proposed tariff changes satisfy this standard, and the Commission has issued orders on all such requests. Over the years, the Commission has found that *most* of BPA's proposed tariff changes satisfy this standard. It has, however, declined to find that *some* of BPA's proposed changes satisfied this standard.[54] BPA's tariff is not a "safe-harbor" reciprocity tariff unless *all* of the provisions satisfy reciprocity. Nevertheless, the Commission has continued to consider whether proposed tariff changes, on an individual basis, satisfy the non-public utility reciprocity standard, even though the overall tariff itself is not a reciprocity tariff.

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[54] *See e.g., Public Serv. Co., et al.,* 151 FERC ¶ 61,189 at P 11 (2015) ("We confirm that at the time of submitting its petition on June 9, 2013, Bonneville Power's OATT did not qualify for safe harbor status because the Commission had not made a finding that Bonneville Power's OATT substantially conforms with or is superior to the Commission's *pro forma* tariff since the issuance of Order No. 890."); *Bonneville Power Admin.,* 145 FERC ¶ 61,150 at ordering paragraph (b) (2013) (denying BPA's request for a reciprocity status determination because necessary tariff revisions had not yet been approved); *Bonneville Power Admin.,* 145 FERC ¶ 61,120 at P 9 (2013) (dismissing BPA's request for a reciprocity status determination because necessary tariff revisions had not yet been approved); *U.S. Dept. of Energy - Bonneville Power Admin.,* 130 FERC ¶ 61,260 at n.2 (2010) (Letter order stating "Bonneville must amend its tariff in response to the remaining requirements of Order No. 890 if it wishes to qualify for safe harbor treatment. Until Bonneville has amended its tariff in such a manner, it does not qualify for safe harbor treatment.").

BPA should not seek to disrupt the Section 9 tariff construct. It is appropriate for BPA to maintain the burden of ensuring that proposed tariff modifications satisfy the minimum open access requirements – as a matter of contract, law, and policy. Commenting Parties urge BPA to abandon this proposal and to work cooperatively with transmission customers to meet the challenges and opportunities presented by the changing utility industry.