

Customer Comments on BPA's Proposed Draft Tariff Language

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**Comments of Iberdrola Renewables, Inc.
on Bonneville Power Administration's Proposed
Draft Tariff Language Introduced at the January 18, 2012 BOATT Meeting**

1. BPA Must File an FPA Section 211A Tariff, not a Reciprocity Tariff

Bonneville Power Administration (“BPA” or “Bonneville”) stated at the January 18, 2012 BOATT meeting that it intends to file a voluntary reciprocity/safe harbor tariff some time in late March 2012, despite the fact that BPA has been ordered by the Federal Energy Regulatory Commission (“Commission”) to file an open access transmission tariff (“OATT”) that meets the standards of Federal Power Act Section 211A by March 6, 2012.¹ BPA has announced that it does not intend to make such a filing, and instead will file only an oversupply cost allocation proposal as a compliance filing in response to the Commission’s order.

Iberdrola Renewables opposes BPA’s approach and believes it to be inconsistent with the Commission’s order. BPA must abide by the Commission’s directive – it cannot substitute its own preferred approach, submitting a filing under a standard and a timeline BPA finds more advantageous.

Seeking and maintaining reciprocity status is voluntary. As BPA’s past decisions have demonstrated, transmission customers have no certainty that an unregulated transmission provider operating under a reciprocity tariff will continue to follow Commission open access transmission policies, maintain reciprocity status, or abide by the terms and conditions of its reciprocity tariff. Indeed, BPA believes that it can unilaterally amend its OATTs and Large Generator Interconnection Agreements (“LGIA”) under a reciprocity tariff, and BPA has made attempts to do so.² Such a construct is unacceptable to counterparties and unworkable in a business environment.

2. Common Service Provisions, New Section 1A

BPA proposes a new tariff section 1A, entitled “Standard of Development, Interpretation, and Change” which provides:

The Transmission Provider’s organic statutes provide, among other things, that the Transmission Provider shall make transmission available to third parties on a fair and nondiscriminatory basis but only if the Transmission Provider’s transmission capacity:

¹ *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, 137 FERC ¶ 61,185 at P 30 (2011); 16 U.S.C. ¶ 824j-1.

² See, e.g., Administrator’s Final Record of Decision, BPA’s Interim Environmental Redispatch and Negative Pricing Policies at 17, 38-39, dated May 13, 2011, available at: http://www.bpa.gov/corporate/pubs/RODS/2011/ERandNegativePricing_FinalROD_web.pdf (noting that Bonneville would be unilaterally amending Appendix C of its LGIAs to specifically reference Environmental Redispatch and providing misguided support for that position in response to commenters’ concern that Bonneville does not in fact have the right to unilaterally amend LGIAs).

- is in “excess of the capacity required to transmit electric power generated or acquired by the United States,” 16 U.S.C. § 837d,
- “is not required for the transmission of Federal energy,” 16 U.S.C. § 837e,
- is made available subject to “(1) any contractual obligations of the Administrator; (2) any other obligations under existing law; and (3) the availability of capacity in the Federal transmission system,” 16 U.S.C. § 839f(d),

and the transmission service:

- “is not in conflict with the Administrator’s other marketing obligations and the policies of [the Northwest Power Act] and other applicable laws,” 16 U.S.C. § 839f(i)(1),

and can be provided

- “without substantial interference with [the Administrator’s] power marketing program, applicable operating limitations or existing contractual obligations,” 16 U.S.C. § 839f(i)(3).

In addition, acting pursuant to section 211A of the Federal Power Act, the Federal Energy Regulatory Commission may require the Transmission Provider to provide transmission services on terms and conditions that are comparable to those under which the Transmission Provider provides transmission services to itself and that are not unduly discriminatory or preferential. 16 U.S.C. § 824j-1(b).

Under the Transmission Provider’s organic statutes, “[n]o contract for the transmission of non-Federal energy on a firm basis shall be affected by any increase, subsequent to the execution of such contract, in the requirements for transmission of Federal energy, the energy described in section 9 [of the Transmission System Act, dealing with downstream power benefits available to Canada by treaty], or other electric energy.” 16 U.S.C. § 837e.

The Transmission Provider is subject to a variety of other statutes, including environmental statutes such as the National Environmental Policy Act, Endangered Species Act, and Clean Water Act.

The Transmission Provider has adopted this Tariff in the belief that it satisfies the statutory requirements set forth above. In the event the Transmission Provider determines that it can no longer meet its statutory requirements under this Tariff, the Transmission Provider reserves its right to revise this Tariff in accordance with the procedures set forth in the Tariff.

Iberdrola Renewables opposes the inclusion of Section 1A in any BPA tariff. As discussed in more detail below, Iberdrola Renewables considers the proposed language to be inaccurate, incomplete, taken out of context, misconstrued, and likely to create, rather than limit, ambiguity and uncertainty regarding BPA’s statutory obligations.³

In addition, Iberdrola Renewables notes that BPA’s strained statutory “interpretation” discussed below appears to signal a troubling intent to engage in future discriminatory conduct. Indeed, as one example, during a September 14, 2011 public meeting, Bonneville suggested that it would use an earlier but very similar version of this Section 1A policy to reserve itself the right to circumvent the entire OATT process governing customer access to available transmission capacity by “jumping to the top” of Bonneville’s transmission queue. Such a queue jumping mechanism would be inconsistent with fundamental aspects of the Commission’s open access principles, namely the first-come, first-served policy for available transmission capacity allocation embodied in the *pro forma* OATT.⁴ While Bonneville’s current proposed Section 1A does not specifically reference this queue jumping proposal, or any other specific and harmful application of the “priority access” policy, Iberdrola Renewables is concerned that BPA intends Section 1A as a placeholder that will permit BPA to implement these types of unduly discriminatory practices.

A. BPA’s Proposed Section 1A Makes Overly-Broad and Inaccurate Conclusions

The proposed Section 1A makes a sweeping conclusion that BPA’s provision of transmission capacity for non-Federal power must not conflict or substantially interfere with BPA’s power marketing program or other marketing obligations. This extremely broad construction of the quoted statutory language is contrary to the clear intent of BPA’s organic statutes. To that end, while Iberdrola Renewables recognizes that BPA’s statutes may limit the transmission service available for non-Federal power to the capacity on BPA’s transmission system that is in excess of that required to transmit Federal power, it is illogical to broaden that limitation by also suggesting that transmission service can only be provided to non-Federal power if such service creates no adverse effect on BPA’s power marketing program or other marketing obligations. To broaden the limitation in this manner would effectively render the statutes’ requirement of the provision of surplus transmission void, as almost any argument of “adverse effect” by BPA’s Power Services could claim priority over the transmission non-Federal power.

³ On June 28, 2011, Avista Corporation, PacifiCorp and Puget Sound Energy, Inc. (collectively, “IOUs”) filed comments on, among other things, a policy that was similar, although not identical, to Bonneville’s proposed Section 1A language. Iberdrola Renewables generally supported the IOU comments and, given the similarity between the earlier Bonneville policy addressed in the IOUs’ comments and the current Section 1A language, Iberdrola Renewables’ instant comments reflect the IOUs’ comments in several respects.

⁴ See, e.g., Section 13.2(i), 13.2(iv).

B. BPA’s Proposed Section 1A Provides No Context for Statutory Quotations and Distorts the Intended Meaning

Not only is BPA’s interpretation of its organic statutes dangerously overbroad and inaccurate, but it is wholly unsupported. BPA’s proposed Section 1A excerpts and re-assembles portions of BPA’s organic statutes without reference to the broader statutory framework. As one example,⁵ proposed Section 1A fails to recognize that Section 9(i)(1) of the Northwest Power Act⁶ pertains only to BPA’s acquisition or disposition of electricity at the request and expense of its customers. In fact, the subsection 9(i)(1)(B) statement quoted in proposed Section 1A – “is not in conflict with the Administrator’s other marketing obligations” – is even further limited to only BPA’s disposition of electricity per customer request. To suggest that statement regarding the effect on BPA’s marketing obligations applies to and limits BPA’s provision of transmission service generally not only ignores basic rules of statutory construction, but it recklessly removes only selective statutory phrases to eliminate the necessary context and distort the intended meaning.

C. Any BPA Tariff Revisions Must Be Approved By the Commission

After excerpting portions of statutes out of context and referencing some of BPA’s other statutory obligations, BPA’s proposed Section 1A states:

The Transmission Provider has adopted this Tariff in the belief that it satisfies the statutory requirements set forth above. In the event the Transmission Provider determines that it can no longer meet its statutory requirements under this Tariff, the Transmission Provider reserves its right to revise this Tariff in accordance with the procedures set forth in the Tariff.

Iberdrola Renewables reiterates its position that BPA should follow the Commission’s directive to Bonneville to file a tariff which comports with the Federal Power Act Section 211A standards. BPA cannot “reserve the right” to modify the tariff outside of the Commission’s approval process.

⁵ Other examples include: (1) Bonneville’s failure to give effect to critical modifiers in the quoted passages (e.g., the word *substantial* in “without substantial interference with [the Administrator’s] power marketing program”); (2) Bonneville’s disregard for Northwest Power Act Section 9(d) and Transmission Act Section 6, which both direct Bonneville to provide transmission to utilities for non-Federal power without any qualifications related to Bonneville’s power marketing program or other marketing obligations discussed in Northwest Power Act Section 9(i); (3) Bonneville’s failure to properly acknowledge its statutory obligation in Regional Preference Act Section 6 to honor its contracts for transmission of non-Federal power; and (4) Bonneville’s disregard for its statutory obligation to construct facilities for the transmission of Federal and non-Federal power as set forth in, for example, Transmission System Act Section 4.

⁶ 16 U.S.C. § 839f(i)(1).