



January 26, 2012

VIA EMAIL

Tech Forum
Bonneville Power Administration
Transmission Services
PO Box 491
Vancouver, WA 98666
techforum@bpa.gov

Re: Joint Public Power Comments on BPA's Proposed Section 1A of the BPA Open-Access Transmission Tariff

Dear Tech Forum:

The Public Power Council; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Clark County, Washington; Eugene Water and Electric Board; Flathead Electric Cooperative; Public Utility District No. 1 of Franklin County, Washington; Public Utility District No. 1 of Snohomish County, Washington; Northwest Requirements Utilities; Pacific Northwest Generating Cooperative; and Western Public Agencies Group submit these comments in response to BPA's proposed Section 1A to its Open Access Transmission Tariff ("OATT"). Based on BPA's representations, these comments assume that BPA intends to submit an OATT reciprocity filing with the Federal Energy Regulatory Commission ("FERC").

As a federal agency, BPA is subject to various legal obligations stemming from federal statutes. When private parties enter into agreements with BPA, they do so with the understanding that BPA must comply with those obligations, and that may affect the terms of their agreements.¹ By the same token, when BPA agrees to provide transmission service under the OATT, it does so with the qualification that its legal obligations may affect how it provides such service and how it implements the terms and conditions of its tariff. The bottom line is that BPA must implement its tariff in a manner that is not inconsistent with its statutes and ensuing legal obligations.

In an apparent effort to reconcile these obligations, BPA selectively cited to some, but not all, of its applicable statutes and then interspersed these citations with its interpretation of its duties. It concluded by expressing its belief that its tariff "satisfies the statutory requirements" it cited. Unfortunately, this approach suffers from fundamental problems.

¹ See *Louisville & Nashville R.R. Co. v. Mottley*, 219 US 467 (1911) (when parties enter into contracts, they do so with the understanding that their contracts are subject to existing laws).

First, by listing some statutes while omitting others, BPA implied either that its obligations under the statutes not specifically listed will not affect how it implements the tariff or that the tariff does not satisfy the unlisted statutory obligations. Both implications are contrary to existing legal precedent and are unacceptable from a policy perspective. They suggest that BPA has examined all of its existing statutes and determined it will never need to accommodate them in implementing its tariff. In reality, one can envision a circumstance that triggers an obligation under a statute not listed in BPA's proposed language.

Second, BPA's list of the applicable statutory provisions is incomplete and its attempt to interpret and explain those provisions was done in a vacuum and without the benefit of specific facts. Such interpretations are unnecessary and invite challenges based on hypothetical fact patterns. The tariff should not be used as an instrument for defining and interpreting exclusive and preemptive statutory obligations that might arise in the operation of BPA's transmission system. Instead, a broad statement acknowledging BPA's obligations under applicable statutes and the need to comply with those obligations would strike the right balance without forcing BPA to deliberate at this time the consequences of various hypothetical circumstances.

Third, BPA's statement that it "has adopted this Tariff in the belief that it satisfies the statutory requirements set forth above" is inappropriate for inclusion in the tariff and can be read to mean that BPA has interpreted its statutes to be consistent with the tariff. To the contrary, BPA has to implement the tariff in a manner and only to the extent that the tariff does not conflict with or impede the fulfillment of its statutory obligations. In other words, it is the tariff that has to accommodate the statutes, and BPA's ensuing obligations, and not the other way around.

Finally, BPA's proposed language on Common Service Provisions fails to adequately protect BPA's right and obligation to comply with federal statutes while implementing its tariff and is, therefore, deficient. Instead of trying to revise this language, BPA should abandon it altogether in favor of the much simpler approach on this issue chosen by its sister agency, the Western Area Power Administration ("WAPA"). WAPA's OATT has been approved by FERC and states in relevant part:

9 Regulatory Filings

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 changes in terms and conditions, classification of service, or Service Agreement, consistent with the Commission's rules and regulations and Transmission Provider[s] statutory obligations.

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.

This approach would sufficiently preserve BPA's right to implement the terms and conditions of its tariff in a manner that is consistent with its statutory obligations. Additionally, FERC has already approved this approach and accepted WAPA's tariff as an acceptable reciprocity tariff.² Therefore, BPA could substitute the existing Section 9 of its tariff with this section and avoid prolonging the debate on this issue.

The preference customers have argued again and again that BPA must preserve its right to implement the OATT in a manner that is consistent with its statutes and have rejected all proposals that fall short of that goal. BPA staff previously indicated that it would be meeting with customer subgroups to discuss the treatment of statutes in the tariff. Representatives of the preference customers would like to further discuss this issue with you. PPC staff will contact you with available dates and times.

Thank you for your consideration.



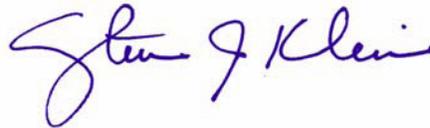
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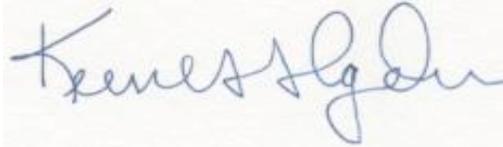
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² *Western Area Power Administration*, 133 FERC P 61193 (2010).

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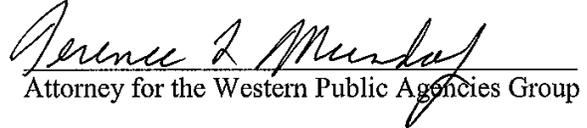
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/s/ Zabyn Towner

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Attorney for the Western Public Agencies Group

cc: Randy Roach, Executive Vice President and BPA General Counsel
Cathy Ehli, Vice President, Transmission Marketing and Sales
Richard Gillman, Manager, Transmission Policy Development and Analysis
PPC Rates and Contracts Committee