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Re: Tariff Engagement Design

The Northwest and Intermountain Power Producers Coalition (NIPPC) appreciates the opportunity to provide the following comments to the Bonneville Power Administration on its proposed Tariff Engagement Design Process.

## 1. Safe Harbor Reciprocity

Staff reported in the presentation on December 13 that Bonneville lost its safe harbor status for reciprocity in 2007 after its FERC Order No. 890 compliance filings were rejected. Staff also reported that it intends to stop seeking safe harbor reciprocity status for Bonneville's Open Access Transmission Tariff (OATT). Staff justified its intentions by asserting: 1) conforming Bonneville's tariff would require considerable investment without commensurate benefits; 2) conforming Bonneville's tariff would conflict with Bonneville's statutory obligation and 3) Bonneville could maintain safe harbor reciprocity through other means.

As a threshold matter, NIPPC does not yet agree with Staff that the decision to abandon safe harbor status under the OATT is the right one. In Order No. 888, FERC required non-public utilities - like Bonneville - that own or control transmission facilities to provide reciprocal service as a condition of taking transmission service under the OATT of a public utility. One method of satisfying the reciprocity requirement allows non-public utilities like Bonneville to file an OATT voluntarily with FERC seeking a declaratory order of "safe harbor" status finding that the proposed tariff provisions "substantially conform or are superior to" the pro forma OATT. While Staff may have adequately justified the decision to abandon "safe harbor" status internally, the information shared with the public on this question is not sufficient to support that decision. Customers need more than the bald assertions in a single slide to fully understand Staff's decision. It's also not clear that the Staff's decision making process fully identified and considered the potential risks associated with abandoning safe harbor reciprocity.<sup>1</sup>

## 2. Section 9

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<sup>1</sup> For example, currently Bonneville customers who control nearby transmission lines also take transmission service from Bonneville. A customer that owns both generation and transmission assets is unlikely to refuse to provide Bonneville with comparable transmission service over its transmission system. But consider what might happen if a vertically integrated utility were to restructure to become separate entities controlling transmission and generation assets. The generation owning entity could take service from Bonneville while the transmission owning entity could refuse service to BPA on comparable terms. The language in a service agreement with the generator owning entity would not ensure comparable service for Bonneville as a transmission customer.

Since 2001, Bonneville has submitted changes to its OATT to FERC for review and approval. Even if Staff's decision to forego seeking safe harbor status is the correct one, there may still be good reasons for Bonneville to continue to seek FERC approval for tariff changes. Staff has outlined discrete instances in which FERC has declined to approve specific tariff language proposed by Bonneville; and for a variety of reasons, Bonneville has decided not to conform its language to that required by FERC. But the vast majority of OATT provisions do not justify deviations from the FERC pro forma OATT. And to the extent that Bonneville seeks minor modifications in an effort to improve upon the pro forma OATT, there are real benefits to having that proposed tariff language reviewed and analyzed by experts at FERC and others outside the echo chamber of the Pacific Northwest.

One benefit of FERC review of tariff language is to protect Bonneville and the region from unintended consequences. Bonneville's transmission system plays a critical role in the safe, reliable and cost effective delivery of energy across the Western Interconnection. The terms and conditions of service on its transmission system must be clear and consistent with language in other markets. NIPPC believes there is a significant benefit to having Bonneville's tariff language reviewed and vetted through FERC's tariff amendment procedures. The risk that a minor deviation in language could create commercial disruption is remote, but real. Even if Bonneville decides to forego safe harbor reciprocity, that alone does not justify the decision to eliminate FERC review and oversight of Bonneville's tariff. Even if FERC's role in reviewing Bonneville's tariff is merely advisory, that review serves as a check to prevent Bonneville and the rest of the region from potentially severe unintended consequences.

Continuing to file tariff revisions with FERC has other benefits. The FERC process is valuable to Bonneville, customers and practitioners around the country. The notice provisions, timelines, and other rules associated with filing tariff changes at FERC are well established and understood. The certainty of what to file, how to file it, when it needs to be filed and what will happen after it's filed provide real benefits to Bonneville and its customers. NIPPC believes that replacing the certainty of the FERC process with a process that is informal, ad hoc and confusing will not provide any benefit to Bonneville or its customers.

### 3. Scope of FERC Review

Nothing in the existing Section 9 of Bonneville's OATT expands the scope of FERC's authority over Bonneville. Likewise, removing Section 9 from the OATT will not change FERC's authority over Bonneville under the Federal Power Act. FERC's early review of changes to Bonneville's OATT under the existing Section 9 (even if other sections remain non-conforming) will provide a process to identify early tariff language which may violate provisions of the Federal Power Act. Evidence of a "regional process" will not override the restrictions of the Federal Power Act. As Staff noted in December, Bonneville's proposed tariff revision mechanisms will not replace or supplant the existing mechanisms available to customers who seek review of Bonneville decisions.

Removing Section 9 from Bonneville's OATT shifts the burden of demonstrating that tariff changes proposed by Bonneville are lawful. Currently, when Bonneville submits its proposed tariff revisions to FERC under Section 9, it must demonstrate that those changes are consistent with the Federal Power Act. Customers who disagree have a ready forum at FERC to review the proposed tariff language under the Federal Power Act. But if Bonneville is allowed to make tariff changes unilaterally, even after engaging in a regional process, the burden would shift to customers to file a complaint at FERC alleging violations of the Federal Power Act.

#### 4. Contractual Rights in Absence of FERC Oversight

In the absence of FERC oversight, other non-jurisdictional entities have included termination rights as part of their reformed tariff. The Western Area Power Administration, for instance, allows termination of transmission service contracts if "...an adjustment in the formula or rate results in an increase in the charges for Transmission Customers..." (WAPA OATT, Attachment J, Section 1.0.). As described in their initial Request for Declaratory Order in 1998, Western made this change:

"... to reflect the fact that it is not a public utility and is not subject to the Commission's jurisdiction under Section 205 and 206 of the Federal Power Act. As a result Western does not submit its contracts for Commission approval, nor does it seek Commission permission to terminate contracts." (Petition for Declaratory Order, Docket NJ98-1 at page 13.)

Similarly, if Bonneville pursues its proposal to avoid substantive review by FERC, it should grant similar termination rights under conditions, which disadvantage Transmission Customers.

#### 5. Timing

Why now? NIPPC is not persuaded that immediate action is needed to change how Bonneville updates its tariff language. As Staff noted, Bonneville has not enjoyed reciprocity status since 2001. Staff could simply identify specific sections of the OATT as "NOT APPROVED BY FERC" and continue as it has for the past 15 years. As future tariff changes are needed, Bonneville could submit those to FERC under its existing Section 9. In any event, NIPPC is not convinced that now is the best time for Bonneville to seek to make significant changes in its relationship with FERC.

#### 6. BPA Public Process

NIPPC recognizes and appreciates Bonneville's efforts to engage with customers in an open and transparent manner in developing new and changing policies. NIPPC suggests that Bonneville incorporate as the final stage of any public process, a decision on whether new tariff language is required and if so, preparing a draft of the tariff language as part of the public process on the underlying substantive issue. Once Staff has issued any draft tariff changes and provided customers with the opportunity to comment in the underlying substantive process, Bonneville can then pursue some mechanism to incorporate that draft language into its tariff. As noted above, NIPPC believes the best mechanism for Bonneville to use would be to continue to file proposed changes with FERC under Section 9 in order to take advantage of an independent review by a non-regional expert on transmission tariffs.

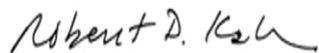
If Bonneville does insist on removing Section 9 from its tariff and forgoing review of proposed tariff language by FERC, then the replacement process must provide practitioners with an equivalent degree of predictability and certainty as that offered by FERC. Bonneville must ensure that notice of proposed tariff language is made not only to existing customers but to all potentially interested stakeholders within and outside the "Region". Rules regarding deadlines to respond must be clear and predictable. Rules regarding how to submit comments and any requirements for the content of comments must be clear and predictable. Of the three staff proposals outlined on December 13, the only proposal that would meet these requirements would be to apply an existing formal process such as the NW Power Act 7(i) process to tariff revisions.

While Staff identified the benefits associated with the flexibility offered by the Scalable Process and the Case by Case Process, NIPPC believes Staff has failed to fully appreciate the confusion and uncertainty that would result from that procedural uncertainty. In either the Scalable or Case by Case process, practitioners would need to identify the timeline and process unique to each transmission revision process. Bonneville would also likely struggle to identify adequate notice mechanisms to ensure that all interested parties — not just existing customers — have notice of the proposed changes. Because tariff changes are likely to be rare, the increased resources required of staff and customers to engage in a formal process are not likely to be a significant burden.

Tariff changes should not be undertaken lightly. Changes to the tariff are not simply technical or academic exercises, but modify the terms and conditions under which customers take service. Changing the terms and conditions of transmission service may have a significant impact on whether customers want to continue to take service from Bonneville or have unforeseen consequences to markets outside of the Pacific Northwest.

NIPPC believes that Bonneville, its customers and other stakeholders benefit from an independent review of proposed tariff language by FERC under Section 9. But should Bonneville decide to abandon Section 9, and seek an alternative process; Bonneville must ensure that any replacement process provides robust notice and procedural certainty. The fact that a formal tariff revision process requires an investment of resources and staff time equivalent to a rate case is not a bad thing. The administrative hurdles that accompany a formal process similar to a 7(i) process will reassure customers that the terms and conditions under which they take service will not be changed on a whim, on uncertain notice, with an uncertain mechanism to respond.

Again, thank you for the opportunity to comment on this extremely important matter.



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