

May 30, 2018

Via email:

techforum@bpa.gov

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

Re: TC-20 Comments of PacifiCorp on Certain of BPA’s Proposed Tariff Changes and Related Matters from April 23, 2018 TC-20 Meeting

PacifiCorp submits comments on certain of BPA’s Proposed Tariff changes and related matters presented in BPA’s April 23, 2018 TC-20 Meeting. PacifiCorp supports the comments raised by other customer groups¹ and also comments separately to underscore the Company’s concern regarding one proposed Tariff edit in particular, and how it relates to BPA’s increasing use of non-Tariff business practices and other informal documentation to substantively alter customers’ terms and conditions of service.

1. BPA’s Commitment to Certainty, Predictability, and Alignment with FERC’s *Pro Forma* Tariff and Industry Best Practices Where Possible

In general, PacifiCorp supports many of the drivers behind BPA’s decision to align with FERC’s *pro forma* tariff and industry best practices to the extent possible. PacifiCorp has been encouraged by BPA’s commitment to “providing customers with certainty and predictability,”² and assurances of “transparency regarding the reasons for a deviation” from FERC’s *pro forma* tariff.³ As BPA has acknowledged, “[b]y offering an open access transmission service product portfolio that is consistent with industry standards, [BPA] will leverage the flexibilities provided within the *pro forma* tariff.”⁴

The *pro forma* tariff, and industry best practices, can only flex so far, however, while still providing customers with certainty, predictability, and transparency. In this vein, FERC, and the courts, have often expressed concern when transmission providers use business practices, or other informal documentation to “significantly affect...rates, terms or conditions.”⁵ Although PacifiCorp recognizes BPA is not subject to all of the same Federal Power Act provisions as a

¹ Specifically, PacifiCorp supports—and is a co-commenter of—the Section 9 and other Tariff section comments submitted on May 30, 2018, by Avangrid, Avista, Idaho Power, PacifiCorp, Portland General Electric, and Puget Sound Energy.

² Bonneville Power Admin., TSP-TPP-2, *Letter to the Region*, 2, (Nov. 22, 2016), available at <https://www.bpa.gov/transmission/CustomerInvolvement/TariffEngagementDesign/Documents/Letter-to-Stakeholders-Customer-112216.pdf> (hereinafter Nov. 22, 2016 Letter to the Region).

³ *Id.*

⁴ Bonneville Power Admin., *BPA Strategic Plan 2018-2023*, 50 (Jan 2018), available at <https://www.bpa.gov/StrategicPlan/StrategicPlan/2018-Strategic-Plan.pdf>

⁵ See e.g., *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 1358 (2006), *order on reh’g*, 119 FERC ¶ 61,076, *order on reh’g*, 120 FERC ¶ 61,271 (2007); see also *KeySpan Ravenswood v. FERC*, 474 F.3d 804, 811 (D.C. Cir. 2007); *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985).

traditional utility, the Company is concerned that BPA may be undermining this important industry standard and transparency norm. Isolated reliance on Business Practices or other informal documents can create unpredictable and inconsistent tariff implementation risks for customers, as well as potential compliance risks for BPA under the Federal Power Act provisions to which BPA is subject. Other parties have also raised concerns about BPA's use of Business Practices to significantly affect rates, terms, or conditions of service outside of its Tariff.⁶ Ultimately, this Tariff-implementation disconnect will undermine BPA's stated objective with the TC-20 process: to "[o]ffer more standardized products and services by better aligning BPA's Open Access Transmission Tariff with pro forma and industry best practices."⁷

2. BPA's Proposed Revision to Section 12.1

In this context, the proposed revision to Section 12.1 of the Tariff, entitled "Internal Dispute Resolution Procedures," raises concern for PacifiCorp. BPA proposes to strike the requirement that disputes regarding changes to "the Tariff, or any Service Agreement entered into under the Tariff" be presented to FERC for resolution. Notwithstanding BPA's argument that this edit was made in accordance with its statutory obligations,⁸ this revision effectively broadens the scope of issues subject to BPA's Tariff Section 12.1 Internal Dispute Resolution Procedures—procedures that BPA has already substantively altered through informal "Transmission Billing Dispute Procedures," which are not described or referenced in BPA's Tariff, nor are they available in a BPA Business Practice posted to OASIS. To PacifiCorp's knowledge, these procedures are only available under a section of BPA's website discussing billing issues.⁹

More specifically, in response to a recent dispute raised by PacifiCorp, BPA introduced for the first time the above-noted non-tariff, non-Business Practice "Transmission Billing Dispute Procedures." BPA relied on those procedures to add several new threshold steps before the dispute resolution process could begin. For example, BPA created a new requirement that BPA must formally "recognize" a dispute—a formal recognition that BPA will not grant unless the customer provides information about, and documentation supporting, the merits of the

⁶ See, e.g. Comments of Avangrid Renewables, LLC and Idaho Power Company on the Proposed BP-20 Schedule and Ancillary and Control Area Services Proposal (May 4, 2018), available at <https://www.bpa.gov/--Finance/RateCases/BP-20/Comments/2018.05.04/Avangrid%20Renewables%20and%20Idaho%20Power%20BP-20%20Kick-Off%20Comments.pdf>. Notably, in its May 29, 2018 response to customers' May 4, 2018 comments, BPA did not address these concerns raised by Avangrid or Idaho Power. Bonneville Power Admin, *Responses to Comments on the BP-20 Rate Case Workshop on April 24, 2018*, <https://www.bpa.gov/Finance/RateCases/BP-20/Comments/2018.05.04/BPA-Responses-to-Apr24-Workshop-Comments.pdf>.

⁷ Bonneville Power Admin., *BPA Strategic Plan 2018-2023*, 50 (Jan 2018), available at <https://www.bpa.gov/StrategicPlan/StrategicPlan/2018-Strategic-Plan.pdf> (setting out BPA's Objective 4d of the 2018-2023 strategic plan).

⁸ Bonneville Power Admin., *Tariff proposals for sections that differ from FERC Pro Forma tariff due to Bonneville's statutory and legal obligations, authorities, and responsibilities* (April 30, 2018), available at https://www.bpa.gov/Finance/RateCases/BP-20/Meetings/Tariff-Proceeding/April%2030,%202018%20-%20Updated%20Documents%20From%20April%2023%20Workshop/Tariff%20proposalsdifferduetostatutory_04302018.pdf (last visited May 29, 2018).

⁹ See Attachment A for a copy of BPA's non-tariff Transmission Billing Dispute Procedures, which are also currently available on BPA's website at: <https://www.bpa.gov/Doing%20Business/billing/Billing/Billing-Dispute-Procedures-Transmission.pdf> (last accessed May 29, 2018).

customer's position and the "relief sought."¹⁰ After this "recognition" occurs, BPA's non-tariff procedures state that BPA will proceed to a "Dispute Evaluation and Determination by BPA," during which BPA will "review the merits of the dispute" and make a unilateral determination on how the dispute—to which BPA itself is a party—should be resolved on the merits.¹¹ In PacifiCorp's recent experience, BPA unilaterally determined that PacifiCorp had not provided "affirmative evidence to refute the validity" of the disputed charge. As a result, BPA also decided that PacifiCorp could no longer place the disputed funds in an escrow account because PacifiCorp did not do so before BPA issued its unilateral determination on the merits of PacifiCorp's dispute.¹² Instead, BPA informed PacifiCorp that it would be "closing out" the dispute and that if PacifiCorp did not immediately pay the disputed funds, BPA would begin collecting payment through either administrative offset or the U.S. Department of Treasury debt collection process without further notice.

As PacifiCorp explained to BPA in the context of that particular dispute, and will reiterate again here, BPA's non-tariff procedures are flatly inconsistent with industry best practices, BPA's Tariff, and FERC precedent. For instance, BPA Tariff Section 7.3 states that BPA will continue to provide service to the customer as long as the customer "(i) continues to make all payments not in dispute, and (ii) pays into an independent escrow account the portion of the invoice in dispute, pending resolution of such dispute." If the transmission customer fails to meet these two requirements, then BPA may provide notice to the customer of its intention to suspend service, not to simply begin collecting the disputed funds.

BPA's non-tariff procedures also ignore FERC precedent rejecting BPA's previous attempt to require full payment of disputed invoice amounts. In response to FERC's 1996 landmark order establishing open access transmission principles (Order No. 888), BPA developed and filed its transmission tariff for approval under FERC's reciprocity requirements.¹³ BPA's proposed tariff deviated from certain provisions of FERC's *pro forma* OATT, including the billing dispute provisions. While FERC's *pro forma* tariff provided (and still provides) that a transmission customer must pay any disputed portions of an invoice into an independent escrow account, BPA proposed to require full payment of disputed amounts to BPA, subject to potential refund later depending on the outcome of the dispute. FERC found "the proposed modification not consistent with—indeed, inferior to—that of the *pro forma* tariff," and conditioned its reciprocity finding on BPA's conforming its billing dispute provision to the FERC *pro forma* tariff provision.¹⁴ BPA complied with FERC's requirement in a subsequent filing in that proceeding, and BPA's (existing and proposed new) tariff still contains the same provisions today. PacifiCorp sees no reason for BPA to begin interpreting the same billing dispute provisions in a different manner simply because it has abandoned its reciprocity status. If that is

¹⁰ BPA Transmission Billing Dispute Procedures, Section 1.

¹¹ *Id.*, Section 5.

¹² When BPA did offer a draft escrow agreement, BPA proposed to give itself the unilateral right to determine whether and how the disputed funds held in escrow should be disbursed—a decision that is usually subject to a *joint* determination by both parties to the escrow agreement. BPA claims it is currently revising its escrow agreement template, so it is unclear to PacifiCorp if BPA will still condone such an approach going forward.

¹³ See generally *U.S. Dep't of Energy – Bonneville Power Admin.*, FERC Docket No. NJ97-3-000.

¹⁴ *U.S. Dep't of Energy – Bonneville Power Admin.*, 80 FERC ¶ 61,119 (1997).

indeed BPA's intention, PacifiCorp believes BPA should modify the terms and conditions of its tariff to reflect BPA's proposed new approach.

3. PacifiCorp Requests that BPA Explain the Intent Behind the Section 12.1 Revisions and Reconsider its Increasing use of non-Tariff Documents that Substantively Alter Customers' Terms and Conditions of Service

In the spirit of BPA's stated goal of "providing customers with certainty and predictability,"¹⁵ PacifiCorp requests that BPA clarify its intentions regarding its edits to Section 12.1, which appear to expand the scope of the current provision. PacifiCorp also requests clarity about whether BPA plans to continue to use its new "Transmission Billing Dispute Procedures" posted to BPA's website. If so, PacifiCorp seeks clarity on whether and how BPA intends to memorialize the new procedures in the terms and conditions of BPA's Tariff to ensure that BPA's internal dispute resolution process is a meaningful and fair process for all customers—a memorialization that will become even more critical if BPA expands the scope of Section 12.1 as proposed.

PacifiCorp agrees with BPA that "close alignment" with FERC's *pro forma* Tariff and industry best practices can "ease[] potential seams issues with neighboring investor-owned utilities and provide[] relative certainty to [BPA's] customers that [its] policies will track national policies where appropriate."¹⁶ PacifiCorp encourages BPA to put those aspirations into practice.

* * *

PacifiCorp appreciates 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.

¹⁵ Nov. 22, 2016 Letter to the Region at 2.

¹⁶ *Id.*

ATTACHMENT A

Transmission Billing Dispute Procedures

1. Billing Disputes – General Description and Notification to BPA

Customers may dispute transmission, ancillary or control area service charges billed by BPA as provided in sections 7 and 12 of BPA's Open Access Transmission Tariff (OATT) and section D.3 of BPA's General Rate Schedule Provisions for Transmission, Ancillary and Control Area Services.

To dispute a charge, a customer must notify its Transmission Account Executive in writing, providing the following information:

- a. Identify the time period and charge(s) being disputed;
- b. Provide a detailed explanation for the dispute;
- c. Provide any supporting documentation for the dispute; and
- d. Identify the relief sought.

2. Disputing a Billed Charge After Payment

If a customer pays the transmission charge that it is disputing, BPA will acknowledge in writing that the customer has paid the funds in dispute. Disputed payments will not be transferred out of BPA to an independent escrow account.

3. Disputing a Billed Charge Prior to Payment

If a customer disputes a transmission charge before making payment and instead desires to deposit the disputed funds in an independent escrow account, it must notify its Transmission Account Executive prior to the bill due date.

- a. The Account Executive will work with the customer to establish the [escrow agreement](#).
- b. The customer shall fund the escrow account pursuant to the terms of the escrow agreement.

4. Treatment of Funds

If the customer does not pay the disputed transmission charge to BPA by the bill due date or deposit the funds in an independent escrow account according to the terms of the escrow agreement, the customer will incur late charges and/or may be deemed to be in default.

- a. All funds not in dispute must be paid by the bill due date.
- b. Funds that have been previously paid to BPA shall not be transferred to an escrow account by BPA.
- c. Funds from future invoices are not permitted to be held in lieu of amounts previously paid, but later disputed. Each invoice will be treated separately.
- d. It is not permissible to withhold funds from an undisputed invoice to deposit into escrow for a previously paid, but later disputed, charge.



5. Dispute Evaluation and Determination by BPA

Upon receipt of the customer's notice of dispute, BPA will review the merits of the dispute.

- a. BPA will arrange an executive-level meeting with the customer to discuss the dispute as promptly as practicable.
- b. BPA will endeavor to complete its review within 60 calendar days of the executive meeting.
- c. The Transmission Account Executive will notify the customer in writing of BPA's decision/resolution regarding the dispute.
- d. Upon BPA's determination of the merits of the customer's dispute, BPA or the customer, if necessary, may pursue legal action or agree to seek alternative forms of dispute resolution such as mediation or arbitration.

6. Disbursement of Funds Upon Final Resolution of a Dispute

Upon a final resolution of a dispute through settlement, legal action or alternative dispute resolution, BPA will disburse funds paid directly to BPA consistent with the resolution. If the disputed funds have been deposited into an independent escrow account, the terms of the escrow agreement will govern regarding the disbursement of funds.

7. Exceptions

The following rates/charges have specific waiver provisions under BPA's Transmission Rate Schedule:

- a) Unauthorized Increase Charge (UIC); and
- b) Persistent Deviation Penalty Charge.

For these, the Transmission Customer should follow the applicable waiver provisions in seeking relief prior to considering a billing dispute.