

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Bonneville Power Administration)
v.) Docket Nos. EL15-13-000
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 EL15-13-001
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**ANSWER OF THE TRADE ASSOCIATIONS AND SUPPORTING CUSTOMERS
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DISPOSITION**

To: The Honorable Philip C. Baten

I. INTRODUCTION

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),¹ the American Public Power Association (“APPA”), the Large Public Power Council (“LPPC”), the National Rural Electric Cooperative Association (“NRECA”), the Public Power Council, the Northwest Requirements Utilities and the Pacific Northwest Generating Cooperative (collectively, “the Trade Associations”) hereby answer in support of the Motion for Partial Summary Disposition (“Motion”) filed by Bonneville Power Administration (“BPA”) in this docket on February 22, 2016.² The Trade Associations’ support for BPA is compelled by their conviction that PacifiCorp has no basis in FERC precedent for denying transmission service to BPA, and the concern that PacifiCorp’s position, if uncorrected and widely adopted, could disrupt transmission service to municipal and cooperative utilities nationwide, to the detriment of millions of consumers.

¹ 18 C.F.R. §§ 385.213 (2015).

² The Trade Associations’ motions to intervene were granted by the Commission in its Order on Complaint and Establishing Hearing and Settlement Judge Procedures, *Bonneville Power Admin. v. PacifiCorp*, 151 FERC ¶ 61,003, at P 93 (2015).

A. Summary of Position

PacifiCorp is required by its Open Access Transmission Tariff (“OATT”) to provide transmission service to BPA. PacifiCorp’s contention that it is entitled to deny transmission service to BPA on the ground that BPA does not provide reciprocal service rests on the incorrect assertion that BPA must maintain a FERC-approved safe harbor OATT in order to provide reciprocal service. APPA, LPPC and NRECA previously intervened in this case to correct PacifiCorp’s misstatement of controlling FERC precedent on this very point,³ and the Trade Associations now support BPA’s Motion for the same reason. BPA is right that this matter raises no issue of material fact and that summary disposition is warranted.

The Trade Associations further agree with BPA that PacifiCorp is contractually bound to provide BPA with reciprocal transmission service, and that PacifiCorp’s service must be provided under its OATT, consistent with the Commission’s open access precedent.

B. The Trade Associations’ Interest

The Trade Associations represent the interests of the nation’s public power and cooperative utility community. Like BPA, the Trade Associations’ members are generally exempt from FERC regulation pursuant to section 201(f) of Federal Power Act (“FPA”),⁴ and they operate within FERC’s reciprocity framework. The members of the Trade Associations depend on open access transmission service by transmission-owning public utilities to serve their customers economically.

³ See Motion to Intervene Out of Time and Limited Comments of the Large Public Power Council and the American Public Power Association, Docket No. EL15-13 (Dec. 30, 2014). These comments were joined by NRECA on Jan. 6, 2015. See Motion to Intervene Out-Of-Time and Statement in Support of the National Rural Electric Cooperative Association, Docket No. EL15-13 (Jan. 6, 2015).

⁴ 16 U.S.C. § 824(f).

The terms under which the Trade Associations' members obtain access to the nation's electric grid are of vital importance. The Trade Associations respect the Commission's determination that their non-jurisdictional members must provide reciprocal service to transmission-owning public utilities such as PacifiCorp, but emphasize that PacifiCorp's position undermines the Commission's framework and places service to millions of customers of the Trade Associations' members at risk.

II. ANSWER

A. BPA is Correct that there is No Genuine Issue of Material Fact with Respect to BPA's Provision of Reciprocal Service to PacifiCorp.

PacifiCorp witness Joseph P. Hoerner incorrectly claims in his answering testimony that BPA fails to provide PacifiCorp with reciprocal service, on the ground that BPA does not maintain a FERC-approved safe harbor tariff.⁵ The assertion that a safe harbor tariff is required to provide reciprocal service is a misstatement of controlling FERC precedent, and Mr. Hoerner makes no case that BPA otherwise fails to provide reciprocal transmission service. In his cross-answering testimony, Mr. Hoerner appears to concede that an alternative to a safe-harbor tariff is provided by FERC precedent, but he misstates the options available to BPA, and provides no evidence for the conclusion that BPA fails to provide reciprocal service.⁶ Because there is no genuine issue of material fact on the question whether BPA provides reciprocal service, summary disposition of the issue is warranted.

According to Mr. Hoerner, BPA is not "entitled to demand open access transmission services from PacifiCorp" because BPA fails to provide reciprocal open access transmission

⁵ Exh. PAC-66 at 28-32.

⁶ Exh. PAC-170 at 15-18.

service under Commission policy.⁷ The witness asserts that BPA may only establish that it provides reciprocal service through a safe harbor tariff, approved by FERC. The question and answer at Exh. PAC-66 at 30:19-22 read as follows:

Q. BPA argues that it has provided PacifiCorp with rollover rights in other circumstances - is that reciprocity?

A. No. Reciprocity safe harbor treatment is granted by the Commission, and BPA has not had it since 2009.⁸

Mr. Hoerner makes no other attempt to show that BPA fails to provide PacifiCorp with reciprocal transmission service.⁹ In fact, he concedes that BPA provides transmission service to PacifiCorp under mutual agreement.¹⁰

PacifiCorp's position that a FERC-approved safe harbor tariff is required in order for BPA to provide reciprocal service is contradicted by binding Commission precedent, as BPA's Motion plainly demonstrates. The Commission initially conceived the reciprocity condition in Order Nos. 888 and 888-A, where it held that “[i]t would not be in the public interest to allow a non-public utility to take non-discriminatory transmission service from a public utility at the same time it refuses to provide comparable service to the public utility.”¹¹ In Order No. 888-A, the Commission refined the reciprocity concept, explaining that a non-public utility may satisfy

⁷ Exh. PAC-66, 30:19-22.

⁸ At Exh. PAC-66, 30:4-7, Mr. Hoerner states that BPA has been unable to secure an order from FERC approving its safe harbor tariff filing since 2009.

⁹ Mr. Hoerner's testimony reflects the position taken by PacifiCorp in its November 19, 2014 Answer to BPA's complaint. There, PacifiCorp asserted that the fact that BPA does not have a safe harbor OATT amounted to a “[f]ailure to maintain reciprocity,” and a “refusal to offer comparable open access services to PacifiCorp . . .”

¹⁰ Exh. PAC-66, 31:13-16.

¹¹ *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, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,285, *order on reh'g*, 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).

its reciprocity obligation in *one of three ways*: through use of a reciprocity tariff, bilateral agreements with a jurisdictional public utility, or by receiving a voluntary waiver of the reciprocity condition from a public utility.¹²

In Order No. 890 the Commission reiterated the framework under which reciprocal service may be provided, and the options available to non-public utilities to satisfy the reciprocity requirement. As the Commission again held, a non-public utility may satisfy the reciprocity condition by (1) offering service pursuant to a reciprocity tariff (*i.e.*, a FERC-approved “safe-harbor” tariff); (2) providing service under a bilateral agreement that satisfies the reciprocity condition; or (3) securing waiver of the reciprocity condition by the jurisdictional utility from which service is taken.¹³ The Commission repeated this policy in Order Nos. 1000 and 1000-A, as BPA points out.¹⁴

In his cross-answering testimony, Mr. Hoerner backtracks from his exclusive focus on a reciprocity safe-harbor tariff, acknowledging that the Commission has established alternatives, though he grossly misstates what they are. The question and answer at Exh. PAC-170, 17:1-4 is as follows:

- Q. Are there other ways to satisfy reciprocity besides maintaining a reciprocal tariff?
- A. Yes. It is my understanding that a non-public utility can seek a waiver from the Commission, or a voluntary agreement from a public utility that a bilateral contract satisfies the condition for that particular utility.

¹² Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,180-81.

¹³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 191, *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, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

¹⁴ Motion at pp. 29-30 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at P 799 & n.574 (2011) (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 163 (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; *order on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014)).

Mr. Hoerner goes on to assert that BPA has neither a waiver from the Commission, nor PacifiCorp's agreement that a bilateral contract satisfies the reciprocity condition for PacifiCorp.¹⁵

This limited exchange is a complete fabrication as to Commission policy. In fact, as noted, in Order Nos. 888-A, 890, 1000 and 1000-A, the Commission held that, independent of securing a reciprocity safe-harbor tariff, a non-public utility may satisfy the reciprocity condition by providing service bilaterally, or securing waiver from the public utility (not FERC). Underscoring this point, the Commission in Order No. 1000 held as follows:

Under the *pro forma* OATT, a non-public utility transmission provider may satisfy the reciprocity condition in one of three ways. First, it may provide service under a tariff that has been approved by the Commission under the voluntary "safe harbor" provision of the *pro forma* OATT. A non-public utility transmission provider 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. The non-public utility transmission provider then must offer service under its reciprocity tariff to any public utility transmission provider whose transmission service the non-public utility transmission provider seeks to use. Second, the non-public utility transmission provider may provide service to a public utility transmission provider under a bilateral agreement that satisfies its reciprocity obligation. Finally, the non-public utility transmission provider may seek a waiver of reciprocity condition from the public utility transmission provider.¹⁶

The measure of reciprocal service applicable to bilateral agreements is provided by section 6 of the *pro forma* OATT (reflected by PacifiCorp in its OATT), which reads as follows:

A Transmission Customer receiving transmission service under this Tariff agrees to provide comparable transmission service that it is capable of

¹⁵ Exh. PAC-170, 17:5-8.

¹⁶ See *supra*., fn. 14.

providing to the Transmission Provider on similar terms and conditions over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer and over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer's corporate Affiliates.¹⁷

BPA's service to PacifiCorp is provided under a bilateral agreement reflecting the terms of its OATT. PacifiCorp makes no effort whatsoever to establish that this service fails to meet the standard established in section 6 of its OATT, and instead rests its argument solely on the ground that BPA fails to offer service under a FERC-approved tariff. With PacifiCorp having raised no issue of material fact as to whether BPA meets its reciprocal service obligation, summary disposition of the issue is fully justified.

B. BPA is Correct That PacifiCorp is Contractually Obligated to Provide BPA with Transmission Service.

BPA has established, and PacifiCorp does not dispute, that BPA provides transmission service to PacifiCorp under an agreement reflecting the terms of the BPA OATT.¹⁸ As BPA's Motion states,¹⁹ section 6 of its tariff, like the PacifiCorp tariff, reflects FERC's *pro forma* OATT and specifies that a "[t]ransmission Customer receiving transmission service under this Tariff agrees to provide comparable transmission service that it is capable of providing to the Transmission Provider on similar terms and conditions...."

As BPA notes, BPA witness Kenneth H. Johnston establishes that this language is incorporated into the parties' service agreement.²⁰ PacifiCorp witness Hoerner does not dispute this, and it is consistent with precedent establishing that the terms of a utility's tariff comprise

¹⁷ See PacifiCorp OATT, available at: <http://www.oasis.oati.com/ppw/index.html>.

¹⁸ Johnston Testimony; Exh. BPA-31,10:11 – 12:3.

¹⁹ Motion at 34.

²⁰ *Id.*

the terms of the contract under which service is taken.²¹ The plain meaning of the language (“[t]ransmission customer agrees to provide transmission service...”) obviously requires PacifiCorp to provide BPA with transmission service, and the failure to do so is a breach of contract. There is no genuine issue of material fact on this point.

C. BPA is Correct that PacifiCorp Must Provide Transmission Service Under its OATT to BPA.

In the absence of a good-faith determination under section 6 of its OATT that BPA fails to provide reciprocal service, PacifiCorp is in violation of its OATT for refusing to offer transmission service to BPA under the tariff. Section 1.12 of PacifiCorp’s OATT defines an “Eligible Customer” as follows:

- (i) Any electric utility (including the Transmission Provider and any power marketer), Federal power marketing agency, or any person generating electric energy for sale for resale is an Eligible Customer under the Tariff. Electric energy sold or produced by such entity may be electric energy produced in the United States, Canada or Mexico.²²

As a Federal Power Marketing Agency, BPA is an eligible customer under this tariff provision, triggering PacifiCorp’s obligation to provide transmission service under the OATT. Under the FPA, all rate schedules and terms of service offered by jurisdictional utilities must be filed with FERC, and may not be changed without the Commission’s approval.²³ Section 6 of PacifiCorp’s OATT, quoted above, mitigates this obligation only if there is a good faith basis for determining

²¹ See *Metro E. Ctr. for Conditioning & Health v. Qwest Commc’n Int’l, Inc.*, 294 F.3d 924, 926 (7th Cir. 2002) (“Metro”) (“[t]he tariff is an offer that the customer accepts by using the product”); *Atl. & Gulf Stevedores, Inc. v. Alter Co.*, 617 F.2d 397, 401 n.16 (5th Cir. 1980) (“*Atl. & Gulf*”) (“[a] party who makes use of the facilities or service offered and rendered by another under the terms of a validly promulgated tariff impliedly consents to be bound by the tariff’s terms.”).

²² See *supra*, fn. 17.

²³ See 16 U.S.C. §§ 824d(c), (d).

that BPA has failed to provide reciprocal service.²⁴ None is present here. With no issue of fact as to PacifiCorp’s obligation, summary disposition is again warranted.

D. The Public Interest Calls for the Judge to Grant BPA’s Motion

Rule 217 of FERC’s Rules of Practice and Procedure²⁵ empowers the Presiding Judge to summarily dispose of all or part of a proceeding upon determining that there is no genuine issue of material fact. The public interest calls for the exercise of this authority here. Disposition calls only for a straightforward reading of controlling Commission precedent and nothing is gained by asking the Presiding Judge and the parties to expend scarce resources at hearing.

Perhaps more important, particularly to the millions of customers represented by the Trade Associations, the risk that PacifiCorp’s misapplication of Commission precedent may encourage others to withhold transmission service to non-public utilities on similarly specious grounds calls for a quick and decisive resolution. PacifiCorp’s position appears designed to secure commercial advantage, and what it risks is the participation by non-public utilities in FERC’s open access framework on terms envisioned by the Commission. The Judge should quickly set this matter to rest.

III. CONCLUSION

For the foregoing reasons, the Trade Associations respectfully request that the Presiding Administrative Law Judge grant BPA’s Motion for Partial Summary Disposition in this proceeding to the extent addressed above.

²⁴ See Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,289 (“In the Final Rule, we explained that a public utility may refuse to provide open-access transmission service to a non-public utility if its denial is based on a good faith assertion that the non-public utility has not met the Commission’s reciprocity requirements.”).

²⁵ 18 C.F.R. § 385.217 (2015).

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Respectfully submitted,

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Dated: March 7, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, via electronic mail or first class mail, upon each party on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington, D.C., this 7th day of March, 2016.

/s/
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