

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

TransAlta Energy Marketing (U.S.)

Docket No. EL03-125-000

v.

Bonneville Power Administration

ORDER INITIATING DISPUTE RESOLUTION PROCEDURES

(Issued August 13, 2003)

1. On May 16, 2003, TransAlta Energy Marketing (U.S.) Inc. (TransAlta) filed a complaint against Bonneville Power Administration (BPA), a non-public utility (Complaint). TransAlta alleges that BPA is violating the terms and conditions of its Commission-approved open access transmission/reciprocity tariff (OATT) by denying TransAlta rollover rights on two long-term transmission service agreements that expire later this year. On June 5, 2003, BPA filed a response to TransAlta's complaint maintaining that TransAlta is not entitled to rollover rights under its agreements. In this order, the Commission will initiate dispute resolution procedures.

Complaint

2. TransAlta states that it desires to exercise its rollover rights on two long-term transmission contracts. It explains that the contracts are for point-to-point transmission across BPA's Southern Intertie into California from the Pacific Northwest. One agreement commenced on September 1, 2000, and expires on August 31, 2003, while the other commenced on November 1, 2000 and expires October 31, 2003.

3. TransAlta complains that BPA's refusal to honor its right to rollover its contracts is contrary to the express provisions of BPA's Commission-approved OATT. TransAlta states that Section 2.2 of the OATT governs BPA's reservation priority for existing firm service customers. TransAlta maintains that it is an existing firm service customer and thus has the right to continue to take transmission service from BPA when the contracts expire.

4. TransAlta states that BPA explained that a settlement agreement (June Settlement) authorizes BPA to establish a class of non-historically-served customers, including TransAlta, and restrict those customers' rollover rights. It maintains that it never consented to such a restriction on its rollover rights, and that such a restriction is unenforceable as a business practice because it is inconsistent with BPA's OATT.

5. TransAlta also states that BPA did not include the restriction on rollover rights in its published business practices pertaining to Section 2.2. TransAlta contends that BPA's published business practice regarding rollover rights indicates that BPA intends to adhere to the text of Section 2.2 of the OATT, which is identical to the text of the Commission's pro forma OATT. TransAlta maintains that BPA's proposed business practice to restrict the rollover rights of some of its customers appears in only two places—Section 3 of the June Settlement and the cover letter thereto. TransAlta asserts that BPA has neither sought, nor obtained, approval for such an implementation of Section 2.2 of the OATT.

6. TransAlta contends that the Commission order accepting the OATT recognizes the right of an adversely affected transmission customer to challenge the rollover provision in the June Settlement. TransAlta states that the Commission order specifically discussed Section 2.2 of the OATT. According to TransAlta, the Commission's discussion was in response to an intervenor that expressed concern that, despite express language in the OATT to the contrary, BPA may attempt to deny rollover rights for the same reasons as those upon which BPA has now based its denial of TransAlta's request. It asserts that in response to the intervenor's concern, the Commission reiterated that the language in the OATT is identical to that of the Commission's pro forma OATT; and the OATT was an acceptable reciprocity tariff that guarantees comparable service to all users. TransAlta points to the Commission's statement that "allegations of improper implementation of the OATT by [BPA] are matters more appropriately addressed at such time as [BPA] takes such actions." TransAlta deduces that the Commission's approval of the OATT cannot be relied upon as a waiver of TransAlta's right to challenge an improper implementation of Section 2.2. TransAlta believes that it maintains a right to challenge BPA's refusal to honor TransAlta's right to rollover its agreements.

7. TransAlta complains that to the extent the June Settlement could be construed to restrict TransAlta's rollover rights, the June Settlement is unenforceable because it constitutes an unapproved business practice that is inconsistent with the express provisions of the OATT and significantly affects the terms and conditions of TransAlta's service under the tariff. TransAlta contends the fact that BPA is a non-public utility operating under a reciprocity transmission tariff that does not alter this. TransAlta states that the Commission will only accept a reciprocity tariff if it determines that the OATT

contains terms and conditions that substantially conform with or are superior to those in

8. TransAlta states that BPA contends that its intent in including its current, conforming Section 2.2 provision was not to extend rollover rights beyond its historical transmission customers.³ TransAlta contends that such an interpretation is inconsistent with the express terms of the OATT. According to TransAlta, such an interpretation is not supported by BPA's published business practices, which simply convey an intent to be consistent with Commission policy. TransAlta believes that when a transmission provider's interpretation of its OATT differs from the express language thereof in a manner that significantly affects the rights of its customers under the tariff, the transmission owner must seek Commission approval of such an interpretation. TransAlta adds that the Commission has routinely and unequivocally required the recognition of rollover rights.

9. TransAlta estimates that BPA's refusal to honor TransAlta's right to rollover the BPA Transmission Contracts would cost TransAlta approximately \$1 to \$3 million per year. TransAlta states that the long-term transmission capacity available to it is limited and that its rollover rights are its only means to retain the necessary transmission capacity. Additionally, TransAlta asserts that permitting BPA to restrict TransAlta's rollover rights would greatly compromise TransAlta's ability to continue selling power in the Pacific Northwest and would reduce the value of TransAlta's generation assets.

10. TransAlta asks the Commission to direct BPA to recognize TransAlta's rollover rights, and grant TransAlta's rollover requests with respect to its agreements.

Notice of Filings and Pleadings

11. Notice of TransAlta's complaint was published in the Federal Register, 68 Fed. Reg. 31,696 (2003), with comments, interventions and protests due on June 5, 2003.

12. BPA filed a timely answer in this proceeding and Powerex Corp. filed a timely motion to intervene. Additionally, on June 20, 2003, TransAlta filed an answer to BPA's answer.

BPA's Answer

³BPA's original reciprocity tariff did not include rollover rights for its transmission customers.

13. BPA responds that it is undisputed that TransAlta does not qualify for rollover rights under the terms of the June Settlement and BPA's traditional business practices.

14. BPA states that in March 2000 it began a terms and conditions proceeding to consider changes to its OATT. It explains that on April 20, 2000, a settlement was reached with respect to rates and on June 20, 2000, a settlement was reached on all tariff issues (the June Settlement). BPA states that the June Settlement includes a phase-in of pro forma Section 2.2. BPA avers that TransAlta was a party to the terms and conditions case. Also, BPA asserts that while TransAlta did not execute the June Settlement, it did not file an objection either. BPA says that it filed the OATT, including the June Settlement, with the Commission and that TransAlta did not file an objection with the Commission to any aspect of BPA's filing.

15. BPA explains that in adopting the pro forma Section 2.2 in its OATT, BPA was faced with a significant transition issue. BPA states that it was unable to provide all customers Section 2.2 rights because it had previously entered into long term transmission contracts under its previous reciprocity tariff, which did not include Section 2.2 rights, that resulted in constrained capacity on a number of paths. Therefore, BPA maintains that it did not have adequate transmission capacity to provide all customers rollover rights when it filed the OATT.

16. Thus, BPA asserts that its transitional business practices are consistent with or superior to Section 2.2 of the pro forma tariff. BPA agrees with TransAlta that the Commission has approved restrictions on rollover rights when, at the time of executing the transmission agreement, the transmission provider has insufficient capacity to provide rollover rights. BPA asserts that a lack of capacity is exactly why BPA had to adopt a phase-in of rollover rights; the alternative would have been to commit more transmission capacity than it has.

17. BPA further contends that it and the parties to the OATT approval proceeding agreed to a phase-in of rollover rights (Section 3 of the June Settlement). BPA states that Section 3 provides that the proposed OATT Section 2.2 does not apply to transmission service that was requested prior to October 1, 2001, except as provided in Section 3 of the June Settlement. BPA states that Section 3.1 applies OATT Section 2.2 to BPA's historic customers and Section 3.2 provides that Section 2.2 of the OATT applies to service with a service commencement date on or after October 1, 2001, unless such service was

requested between April 20, 2000,⁴ and the day before the "Designated Day"⁵ BPA

⁴BPA explains that April 20, 2000, was the day on which the parties to the BPA

explains that the "Designated Day" is the 31st day after BPA posted the proposed OATT transition implementation procedures on its OASIS, or September 25, 2000. BPA believes that, under the June Settlement, neither of TransAlta's requests qualify for Section 2.2 rights. BPA adds that it adopted detailed procedures to implement the Designated Day and posted them on its OASIS. It further adds that it accepted comments and posted the final version on September 15, 2000, which showed that the Southern Intertie was already constrained.

18. BPA explains that as a non-public utility, it does not file tariff changes or business practices under section 205 of the FPA, which applies only to public utilities. BPA states that it has voluntarily filed an OATT pursuant to the Commission's safe harbor provision in Order No. 888. Also, BPA claims that it did file its transitional business practices with the Commission on December 14, 2000 and attached the June Settlement. According to BPA, in Section 3 of the June Settlement, it informed the Commission that the primary transition issue is created by the addition to the OATT of pro forma tariff Section 2.2. BPA contends that because of a shortage of transmission capacity, it could not simply replace the termination right with a rollover right. BPA asserts that Section 2.4(a) effectively incorporates BPA's transitional business practices, providing that customers have either a termination right or rollover rights.⁶ Thus, BPA argues that TransAlta's allegation that BPA's OATT provided no notice of the restriction on rollover rights is

incorrect. BPA believes that TransAlta was well aware that its transmission contracts did not qualify.

rate and tariff proceedings resolved the rates issues and committed to resolving all tariff issues. BPA clarifies that once the parties agreed on a procedure for phasing in rollover rights, BPA did not want the parties that attended the settlement discussions to be able to make transmission requests and obtain rollover rights before other transmission customers knew of or understood the process.

⁵See BPA Answer at 9.

⁶Section 2.4(a) of the OATT states "With respect to Service Agreements that do not qualify for rights under Section 2.2 above in accordance with the Transmission Provider's transitional business practices implementing Section 2.2 and that have a Service Commencement Date on or before September 30, 2001 (only to the extent the request for service was made before April 20, 2000), a Transmission Customer may reduce Reserved Capacity or terminate firm transmission service under this Tariff [upon two years' notice.]"

19. BPA adds that TransAlta is not the only BPA customer that does not qualify for rollover rights under BPA's transitional business practices. BPA asserts that if the Commission concludes that TransAlta is entitled to rollover rights, other BPA customers that until now have adhered to the restriction may request rollover rights. BPA concludes that the degree to which it may be compelled to over-commit its transmission is uncertain. According to BPA, should this result transpire and should BPA join RTO West, BPA's pre-existing transmission obligations may exceed the Congestion Management Assets BPA is able to make available to RTO West, and BPA may fail RTO West's catalog sufficiency test.

20. BPA concludes that since it is a non-public utility, the Commission does not have the authority to grant the relief that TransAlta has requested. BPA states that the Commission has authority only to find that BPA is not satisfying the Commission's requirements for reciprocity. BPA asserts the Commission should not make this finding.

TransAlta's Answer

21. In its June 20, 2003, answer to BPA's answer, TransAlta largely mirrors the arguments in its complaint. However, TransAlta now contends that the Commission should conclude that any attempt by BPA to implement its unapproved business practices by terminating service to TransAlta would void BPA's reciprocity tariff and preclude its status as an eligible customer under other OATTs.

Discussion

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely unopposed motion to intervene of Powerex Corp. serves to make it a party to this proceeding.

23. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept TransAlta's Answer as it assisted in our decision making process.

24. The Commission believes that it would be beneficial for the parties to resolve the matters at issue through settlement. To aid the parties in their settlement efforts, BPA and TransAlta should use the Commission's Dispute Resolution Service (DRS). To keep the Commission abreast of the settlement discussions, the DRS Staff will provide the Commission a status report on August 22, 2003.

25. In order for the Commission to have a more complete background to make a decision, we request that BPA submit a report to the Commission setting forth how both historic and non-historic customers seeking rollover rights have fared in the post-transition period, i.e., how many requests both historic and non-historic customers have made and how many denials each set of customers have received. BPA should also submit a list of agreements entered into on or after the effective date of its initial reciprocity OATT for which transmission was to commence in the future. BPA is requested include the date of each agreement, the service commencement date, the service termination date, and the amount of service provided. Finally, BPA should identify the amount of transmission capacity available on its system currently and over the next twelve months that could be used to continue providing service to TransAlta. BPA should submit this report by August 22, 2003.

The Commission orders:

(A) BPA and TransAlta shall utilize the Commission's Dispute Resolution Service, as discussed in the body of this order.

(B) By August 22, 2003, the Dispute Resolution Service shall file a report with the Commission on the status of the settlement discussions.

(C) By August 22, 2003, BPA should submit a report, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.