I. INTRODUCTION

NewSun Energy Transmission Company LLC ("NewSun") provides these comments in response to the Bonneville Power Administration's ("BPA" or "Bonneville") abrupt recent announcement regarding Transmission Service Request ("TSR") Data Exhibit Validation Requirements Enforcement ("New Data Exhibit Policy"). While BPA initially proposed this new policy in a May 17, 2024 draft, the updated draft of July 2 and the BPA workshop on the same topic held on July 9, 2024 do not materially change or remedy the immense scope of problems triggered by this new policy proposal. Additionally, the backward looking exposure and jeopardy imposed upon transmission customers based on this type of policy changes is disruptive, dangerous, and ultimately likely to risk and undermine TCs' collective ability to rationally invest in expansion of the BPA transmission system, including via the well-established TSEP mechanisms, which rely on customer funding to advance; how can a TC invest in TSR deposits or PEAs if BPA can retroactively impose new criteria on the TC and TSRs afterwards the could force queue removal—even *after* funding years of upgrades engineering and other costs?

While *some* of the changes in the New Data Exhibit Policy are merely clarifications and technical information requirements—and thus reasonable and appropriate as Bonneville works to effectuate studies based on correct technical assumptions—in this case BPA also included new requirements that are <u>not</u> *merely* technical, not merely fuller expressions of existing policies and tariff language—but rather extend into Bonneville attempting to require disclosure of, screen, and assert review authority and judgment and discretion as to what is appropriate use of the transmission system—in BPA's opinion. BPA ultimately now creates or asserts a right (in its transmission function, no less) to discriminate and pontificate on the which of a diversity of transmission requestors' intended market uses of requested transmission service are "real" and when they comprise "real need" or real contemplated market activity and proposed transmission system uses. This is fundamentally anti-thetical to the entire principles and concept of OPEN access transmission, to which BPA's OATT expresses its dedication.

Ultimately, BPA's proposed change amounts to a change to the tariff itself and should go through appropriate channels for making tariff changes. And should be subject to a robust review of consequences, including the application of Federal Power Act criteria, analysis of discriminatory

The new criteria, particularly as relates Point of Delivery ("POD") requirements (paragraph 3), demands that Transmission Customers[1] ("TCs") not only *disclose* a TC's intended *commercial* counterparty for the use, but puts an obligation upon TCs to demonstrate a "need" for the Transmission Service, or a commercial relationship on the receiving end.

[1] Capitalized terms are as defined in the BPA Open Access Transmission Tariff ("OATT") unless otherwise noted.

In particular Bonneville requests, as the primary means, some written confirmation by a Load Serving Entity ("LSE") that *that* specific LSE (and *only* that specific LSE) has an "IRP action plan," an "intention," "interest" or "need" for the transmission service or some other "business relationship" for the proposed request—notwithstanding the incredible diversity of potential, intended, planned, or proposed beneficial uses, commercial possibilities, pursuits, or multi-system power delivery and marketing purposes that the Transmission Service might ultimately support—many or most of which contemplated *uses* maturation and viability *ultimately hinges* on actually *receiving a study* from BPA, as a (presumably heretofore market neutral) Transmission Provider in order for the TC to advance, consummate, or otherwise invest and transact around with one or more counterparties. Worse, many of those LSEs are the competitors of those seeking transmission system, even to the same system.

In short, LSE[2] consent, or LSE-provided documentation (directly or indirectly) is demanded by BPA to *prove* that a market actor's transmission request is *worthy* of being studied. Effectively this inserts the timelines, processes, discretion, biases, delays, policy variances, staffing levels, profit motives, competition manipulation, procurements, analysis, managerial philosophies of LSEs, both Investor-Owned Utilities ("IOUs"), which have well-established commercial biases, and public power ("COUs")—along with impacts and back-feed loops of IOU-facing regulatory processes, regulator competencies (and deficiencies and biases and deferences), and associated regulatory timelines, and biases—along with innumerable other issues into the middle of *any* commercial endeavor, transaction, investment strategy, or even routine action involving the request of Long-Term transmission service.[3] It also elevates certain users of the transmission system above

---

[2] Or some other undefined party with whom a "business relationship" might be demonstrated. Presumably this means some large industrial load or power marketing counterparty. But this bears similar bias, abuse, delay, and commercial reality incompatibility risks and complications, which are similarly undeveloped and not reflected in the complex implications of the BPA Market Use TSR Screening Policy.

[3] Alternatively, the TC may provide proof of some other Long-Term Firm Point to Point Service at the POD. But this presents a similar suite of problems, given realities of LSE's transmission rights or ownership of such systems, and wholly ignores that (for good reasons, including good economics, and superior cost, flexibility, and beneficial use of the transmission system's short-term transmission capacity, which may be employed as/if/when power is delivered to a POD, in the event (as commonly occurs) a TC, or a power marketing counterparty to a TC, seeks to deliver some or all of varying amounts of power which might be delivered to that POR on the "next" transmission system, to effectuate delivery. In short, this policy ignores that there is no reason to require, and actually material harm in requiring, *confirmed* long-term service existing on a receiving transmission system for a double-wheel type power delivery transaction. Indeed, setting aside the biases for a limited set of incumbents, and the barriers and timelines (more studies) involved in securing separate long-term service with another transmission provider, and that such BPA requirement did not exist for LTF TSRs before [DATE], this would force not only economically inefficient use of the transmission, reducing dynamic beneficial use of short-term firm and non-firm transmission capacity, but propel a flood of long-term firm requests onto such 3rd party transmission owners ("TOs"), driving a separate set of upgrades and timelines on those TOs, given the higher (more conservative) review criteria for Long-Term Firm (as opposed to more liberally available, dynamically allocated, and dynamically accessible short-term capacity). Which would not only force burdens and consequences upon other transmission owners, but backfeed delays and problems unnecessarily onto the BPA system as a condition of getting power to such a point—

others. Under BPA's proposal, there are those that can grant, including to themselves, the right to request LTF PTP on the BPA system; and there are those that cannot. Those who can include all IOUs and all ESS entities, who are often the direct competitors of other market participants, IPPs, power plant developers, and have vested interests in not granting competitors such permissions and blessings as they might afford themselves, as well as derive direct competitive advantages from the potential removal of competitors TSRs from the BPA queue, as will no doubt result from this policy (as per BPA's express purpose, as BPA will forcibly "decline" and remove TSRs it deems not legitimate). Collectively, as per the BPA Data Exhibit policy update, the "**BPA Market Use TSR Screening Policy"**.

Parties affected by this "prove it to BPA" obligation include a broad diversity of TCs, including (Independent Power Producers ("IPPs"), other LSEs (and their power marketing operations), third party managers of LSE loads (such as PNGC or ESSs), power marketers, as well as current and prospective major industrial loads. The new policy would be problematic even if it was well defined and had been adopted after thorough review.

Instant adoption through a change in business practices is even more problematic because stakeholders have had no meaningful chance to review the proposal, identify its flaws, and suggest alternatives that would address BPA's concerns without undermining competition and unnecessarily complicating interconnection processes as the new policy does. Moreover, after the first workshop, our discussions with a sampling of key representative stakeholders confirmed that the full scope and ramifications of the policy were not well-understood, if hardly at all, particularly in terms of various harms. BPA's misrepresentation of the changes as mere re-expressions of existing policies contributed to this misunderstanding.

These requirements had never been seen or discussed before. They comprise a material policy change in substance and in practice. They have broad ramifications, however well intended, that have not been appropriately noticed, discussed, analyzed, or understood—neither adequately by BPA nor by the many stakeholders that will inevitably suffer from the new policy.

Even with BPA's partial delay after the first workshop of this policy, BPA never set a proper briefing and workshop and comment deadline. But rather stopped until some uncertain time, then re-announced a partial change abruptly, another workshop, and another woefully inadequate time period. BPA did not during this time period before re-announcing a 2nd workshop, with a new short comment deadline, and posting mild revisions, endeavor to follow up and more fully understand the issues raised by NewSun

---

notwithstanding that delivery to that point might serve a multitude of purposes, counterparties, systems, loads, and uses at, or near, or otherwise accessible (including through redirects) at the requested POD.

Energy in the 1st workshop. NewSun raised these issues extensively in the first meeting, but BPA's 7/2/24 revisions did essentially nothing to address them.

Nor did BPA respond meaningfully to numerous requests from NewSun for clarifications on a subset of affiliated TCs TSRs for which BPA had sent TCs cure notices under this new policy, even in cases where the TSRs had provided a response of additional information and data, attempting to comply with the new ill-defined policies, and/or had pointed out contradictions.

But rather has left TCs with the understanding that the policy will only be understandable *after* BPA fully adopts it—and such will be when deficiencies are noticed and cure periods begin, with fatal consequences overhanging the TSRs positions, as well as exposure—for the TC (directly) and POD recipients (indirectly)—to restacking of the queue to the material disadvantage of the TSR's proposed business plan if BPA does not concur with the "need" or real-ness of a particulate TSR.

Which BPA consent to "need" demonstration could be denied even in logical need cases, or in a number of obvious reference cases from the past decade. Like, based on the last workshop, when it was confirmed that TSRs to the UEC system endeavoring to confirm, seek, or fund system expansion for the mega load growth there would not be deemed valid need, likely would be rejected.

How can it be that BPA would propose a policy that would reject the cases, backward looking, that were the most obvious needs for the region? That cannot be the basis of acceptable policy making—nor an acceptable metric for a permitted use of the transmission system—that looking back in time BPA would have shut down entrepreneurial endeavors to serve the obviously needed cases for the region. Nor, effectively, that such being acceptable to BPA would only demonstrable "after the fact", when in reality both the load developers and generation developers need the concrete, real, time stamped, *actually* studied information that can only come from being properly studied for transmission service, in order to even make development investment decisions. For which the degree and complexity of existing transmission system capacity availability is a critical information set, as is the information about what scope of upgrades are necessary.

BPA's entire approach here runs contrary to the prevailing and historical methods of transmission system use, service requests, and investment in gen and load interacting with the availability and complexity of service.

For example, some TSRs attempting to delivery power from Big Eddy to Ponderosa, a major load development area for BPA customers, including for the local cooperative and for a decade of PacifiCorp efforts to serve additional load, a TC was tasked with proving a need there, even as BPA has a major Evolving Grid project already approved for that location and as PacifiCorp is planning a new 500-KV line through and to the same connected substations, after years and years of BPA involvement and process related to

potential load service there. Yet somehow a TC needs to "prove" that there's a need there—and is being told that it couldn't redirect the TSR to/from the PAC vs coop/NT POD at that location, nor use cross-beneficiary need as a justification.

But meanwhile—discriminatory treatment alert!—no doubt that PAC or the other local LSE—or *any other LSE ESS in the PNW*—in this Prineville/Ponderosa case could legitimately request service there under BPAs new policy. Just not NewSun. Just not other IPPs or TCs that are not acting as ESS's. Except maybe one or two options that already have relationships (but would effectively box out competition option development.)

All of those would be discrimated against with additional burdens of proof which they would have to provide BPA—and hope, subject to fatal consequences, if BPA in its sole discretion does or does not allows that service request to even receive a study.

These are just a couple examples of the numerous insufficiently answered questions, discriminatory outcomes ensured by this policy, and insufficiency of consideration of consequences and incompatibility with open access transmission that are embedded in this new policy approach.

Additionally, Transmission Service is a deeply versatile and flexible asset that is used to serve a variety of loads that can vary greatly over time. Normal uses of the transmission system vary immensely—and are not limited merely to static point-to-point transmission service over years. Transmission is commonly requested—and funded, maintained, and renewed—to service a diversity of uses, many of which are quite dynamic, particularly for power marketers, generators, and LSEs seeking to serve multiple customers and/or loads, which are sometimes similarly accessible over common transmission paths, at adjoining or nearly located PODs, or for which transmission can otherwise be redirected. Transmission redirects allow power to be provided to different users at different PODs, both in response to dynamic transmission system conditions and to changes in electricity demand, which is also dynamic, not static as the new policy seems to assume. These diverse uses fundamentally inform and influence the decision of Transmission Customers to accept and commit to pay for long-term firm service, as well as enables their creativity and diversity of solutions available to extract more beneficial use for themselves and the market from the transmission system.

BPA's new policy's proposed rigidity—to single point uses only—strips TCs of their fully potential beneficial use of transmission. This is not only illogical and inappropriate, and restrictive of legitimate uses, but fundamentally destined to result in inherently inefficient use of the transmission system. The above Prineville/Ponderosa example is just a simple version of this problem, where BPA would require double the TSRs filed to serve potentially two customers at the same BPA POD bus (both served off the BPA Ponderosa 230-KV bus) and/or potentially place one requested POD recipient system in jeopardy (depending on BPA discretion on need), but treat the other as legitimate, even as loads on the ground are competing the LSEs and development opportunities against each other.

Worse, BPA has adopted this policy by dictate with little warning and without careful consideration of its negative consequences. Worse still, BPA has applied this new policy retroactively to existing TSRs that have already been accepted by BPA, putting millions of dollars of investments made in reliance on the stability of those TSRs at risk.

Backward looking policy changes are gravely concerning—jeopardize all existing TSRs in undefined ways—and destabilize the entire TSEP paradigm. During the BPA July 9 workshop, BPA kept stating that the "current" focus is on 2024/25 TSEP cycle TSRs, but would not commit to protection of prior TSRs that have already funded PEAs after going through a TSEP (or even NOS) cycle. BPA is also threatening TSRs that already went through validation in prior months, that will now have these new policies imposed on them. ***This is scary. When will a TC's TSR ever be safe? BPA is sending a message through this policy adoption that the answer is "Never".*** *Already approved? Just kidding. Sorry about the weeks of work, millions of dollars, business strategies, external consequences, years of learning and efforts, commercial conversations you may have had going on, PPAs you may have signed, … Never safe.*

NewSun is deeply concerned that this new policy will have severe consequences for the region, and transmission expansion itself, both by undercutting investments in critically-needed renewable generation and by providing cover for anti-competitive conduct. How can any TC ever invest in TSEP or a PEA again if BPA afterwards—one, two, three, five, ten years later—can come back and require conformance to a data exhibit policy change that could result in full loss of the TSR, and collateral damage to any and all investment strategies wrapped around that TSR? Much less that would be based on ill-defined, unknown, highly discretionary, black box criteria, which are influenced by the action and inactions of competitor LSEs, and for which certain competitors are given inherently discriminatory advantages—because they can always bless their own need, but others cannot.

Entire policy is rife with inherently discriminatory consequences and unavoidable problems, due to the nature of the judgment and discretion BPA is imposing, and privileges it is granting to certain types of transmission customers over others. There are very clear examples of how certain TCs can request any service they want, due to their own self-qualification. Essentially *any* LSE or ESS is granted an unlimited hall pass under BPA's policy to submit TSRs. And certain LSEs, with which many IPPs like NewSun compete, will have clear incentives to deny their blessings to their competitors, as well as to abuse the criteria BPA has defined to justify merit-worthy transmission service requests.

For example, PGE and PacifiCorp both compete with independent generation developers to provide power and load service to major loads within its system. But BPA has called into question *when* a TC may request service to support a prospective load. If PGE believes that, say, Intel or another large load, "needs" power in the future, under BPA's proposed policy that's good enough to be allowed a TSR be requested. Even if PGE

isn't sure that load will exist—and perhaps doesn't even know yet whether it can serve the load, or can get transmission service to serve the load. It may not be able to know that until BPA completes a TSR initial or full TSEP type evaluation. But PGE could request that. But for an IPP that is not an ESS, BPA would require that the load or PGE (its competitor) request service. The IPP might even (due to relationships or other competitive advantages) know *before* PGE that such load is likely to occur (either specifically or generally), and file a TSR *before PGE* files there. But BPA may reject that TSR filed by the IPP, say NewSun, then two weeks or two months later accept an identical TSR from PGE or *any other ESS* (or some other TSR otherwise competing for precious transmission capacity, flow gate ATC, sub-grid priority). BPA has thus created a competitive advantage for one set of TCs at the expense of another.

Indeed, BPA is now effectively signaling to a large group of LSEs that BPA is likely to cull huge numbers of otherwise valid TSRs from the transmission queue, TSRs belong to those LSEs' competitors. Signaling that BPA is about to favorably restack the TSR queue to the benefit of some but not others.

Worse, because there is no clear limit to when, how, if, whether, or under what circumstances and new criteria BPA may add new backward looking policy changes on *prior* TSRs, no one can *know which TSRs thus far filed*—including essentially the entirety of the LTF Pending Queue—BPA might put in jeopardy in the future.

There are a dozen variations on these problematic situations. All of them cut against certain TCs to the benefit of others—and some of those being harmed may also include other LSEs.

For example, if BPA proceeds, those IPPs like NewSun which have been already investing in pathways that could eventually or presently serve certain public power LSEs face a risk of removal from the queue. Not all of those public power LSEs have published IRPs, or even IRP process (as Alex Swerzbin at PNGC pointed out during the TC-25 GI Reform Process, in which BPA and the region *rejected* LSE-privileged approaches for open access opportunities to transmission system, as did FERC in its GI Reform Order 2022), nor may have been ready to file TSRs yet. Some of those public LSEs might be neighbors to IOU LSEs, thus competing for precious flow gate ATC, and priority in access to the existing transmission system. If independents like NewSun have requested transmission service to that public power LSE system (or even to a neighboring system with similar flow gate impacts and perhaps desirable redirectability), but are then forcibly removed by BPA for lack of "need", then BPA will effectively cause a restack of the queue that favors currently-junior TSRs that are held by ESSs and other IOU LSEs. But neither the IPP TC nor the public LSE TC in that case can *ever* recreate the position in line—the TSR queue seniority—that they had before this policy if BPA removes those TSRs. The harm is *irreparable*.

Additionally, some LSEs IRP schedules may not conform with the current BPA TSR Screening Criteria

NewSun feels that BPA is crossing a line with this change—unlike prior data exhibit policy updates, which were technical clarifications and validations—that sends an extremely destabilizing message to the region, to all transmission customers, about the instability of investing in BPA transmission expansion processes and tariffs.

While it very much seems that the underlying goal of BPA here is well-intended, born of a practical desire to conduct a functional study, in the face of growing demands on its system and commensurate volumes of requests (an issue to which NewSun is sympathetic), and thus somehow limit volume to study, *this entire mode of approach*, implementing a Market Use Screening TSR Screening Policy, *is rife with problems*, contradictions, conflicts of interest, discriminatory biases, and unavoidable facilitation of abuses and distortions, all to be rendered against a backdrop in which BPA becomes the sole conflict arbiter and adjudicator of what comprises merit-worthy market activities and transmission related requests and development and trading investments or transactions. As well being rife with other fundamental inconsistencies with: core principles of Open Access Transmission; filed rate doctrine; mitigation of backward looking harm; facilitation of investment into its core processes; non-discriminatory treatment of transmission customers; and neutrality of BPA's platform. It is also inconsistent with many clearly expressed principles by BPA during the TC-25 GI reform process that it would not be either clearing the queue nor picking winners and losers.

For these reasons, NewSun urges BPA to immediately reverse the New Data Exhibit Policy *as relates the BPA Market Use TSR Screening Policy*, for the POD (i.e. remove Section 3 entirely). And to modify Section 2 (POR) policies to make clear that the ability to bring power from any connected systems is acceptable—and should <u>not</u> require a contract from an adjoining transmission system (which may not even be constrained, and/or have access to hourly transmission capacity) but merely should be satisfactory to that market participant, whose judgment on upstream access to transmission should not be questioned, vetted, or disapproved by BPA as a condition of the ability to use BPA transmission capacity (though which it may merely be passing through, or be a final step on a larger TC contemplated commercial path).

Alternatively, BPA should:

(1) suspend the new policy (particularly those above) until the region has had an opportunity to fully consider the potential negative consequences of the policy, including likely need to deal with through a rate case level process; and

(2) in all cases apply any new policy adopted by BPA prospectively <u>only</u> to new TSRs, filed *after* the date of the new policy.

However, that said, while we believe that this policy is inappropriate going forward in *any* form applying BPA Market Use TSR Screening to open access to the transmission system, we stress that BPA should treat the entire idea of *any* backward looking risks being created to LTF TSRs after their submission as an "electrical rail" to avoid at all costs, lest

BPA destabilize the entire stability of BPA as a platform and the ability of parties to invest in BPA transmission service, studies, PEAs, and other expansion activities. Which will inevitably further challenge BPA's ability to collect PEA dollars necessary to advance projects resultant from TSEP studies.

In all cases, BPA should be ensuring that *any* Transmission Customer can Request Transmission Service—and be evaluated for its offer, immediately, and through whatever studies. Anything less than this is a violation of the core premises of open access transmission—and thus also of BPA's own OATT.

II. BACKGROUND

NewSun invests in and manages affiliates engaged in the development of renewable energy and power storage facilities, including qualifying facilities ("QFs") that sell output under the Public Utility Regulatory Policies Act ("PURPA") and via non-PURPA transactions. NewSun has extensive experience in interconnection and transmission issues, including with BPA's implementation of its TSR Study and Expansion Process ("TSEP"). NewSun also transacts with regulated utilities, either via PURPA sales or through participation in request for proposals ("RFP") processes. NewSun also regularly participates in policy matters like implementation of greenhouse gas emission reduction targets and in Integrated Resource Planning ("IRP"). Consequently, NewSun is keenly aware of the issues surrounding transmission service requests, competition, and resource needs in the Pacific Northwest and how these matters will be impacted by BPA's proposed policy change regarding data exhibit requirements. NewSun has invested millions of dollars in projects depending on TSRs that have already been accepted by BPA and that have received awards of transmission service based on the queue positions of those TSRs.

On May 17, 2024, as amended on July 2, 2024, without prior warning, BPA announced the New Data Exhibit Policy, which adds a new "requirement" for data to be included in the "Receiving Party" field of the TSR Data Exhibit. BPA now for the first time requires that the Transmission Customer must provide a "[d]emonstration of a reasonable expectation that the Receiving Party may take delivery of the energy at the POD.

The following are examples of BPA's proposed acceptable need demonstration:

> " a. An approved action plan from an Integrated Resource Plan (IRP) that has been acknowledged, accepted, or otherwise finalized and indicates that the Receiving Party expects to hold a process to acquire generation for which the transmission service request could be utilized.
>
> b.Verifiable intention of the load-serving entity to take actions that might reflect a need for the requested transmission service (for example, to conduct a request for proposal for which the requested transmission service could be used to participate).

c. In the case of a request for point-to-point service for delivery to a network integration customer, documentation that such customer is interested in serving a portion of its load on point-to-point service.

d.Other demonstration of a business relationship that creates a reasonable expectation that the transmission service will be utilized consistent with the Receiving Party information cited in the Data Exhibit.

e.For delivery to a market hub, customer may enter "market delivery."

" In response to customer feedback, for TSRs submitted through the close of the 2025 cluster study window, BPA may provide more than one cure period if a customer notifies BPA it is working with the Receiving Party identified in a Data Exhibit to obtain information to demonstrate the reasonable expectation the Receiving Party may take delivery at the POD."

NewSun urges BPA to reconsider and reject this new policy, or at least suspend the new policy until it can be fully vetted by the region, for reasons we now explain.

II. ARGUMENT

A. The TSR data requirements are new policies, not merely enforcement of existing policy, nor prescribed under BPA's current OATT.

While BPA has asserted that the new data policy is merely an application of existing requirements, this is incorrect for several reasons.

First, Section 17.2(iii), which BPA points to as justifying the new policy, provides that a completed TSR application must include "*[t]he location* of the Point(s) of Receipt and Point(s) of Delivery and *the identities of the* Delivering Parties and the *Receiving Parties*." The OATT defines "Receiving Party" as "The entity receiving the capacity and energy transmitted by the Transmission Provider to Point(s) of Delivery." These provisions require only that an application reveal the location and identity of the intended Receiving Party. There is nothing requiring, or even implying, that BPA can also require that the TSR customer also provide evidence of some commercial relationship with the Receiving Party or plans to use some specific amount of power.

Because the new policy amounts to a change in the OATT, BPA cannot adopt the policy through a Business Practice. On the contrary, under OATT Section 9, any changes in the OATT can be made only after BPA conducts a proceeding complying with Section 212(i)(2)(A) of the Federal Power after a holding a hearing and adopted a Record of Decision. *See also* *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (tariff must set forth "all … practices … which in any manner affect or relate to … service, rates, and charges"); *MISO*, 140 FERC ¶ 61,171 at P 80 (2012) (where a new policy amounts to a change in the OATT, it cannot be adopted through business practices).

Second, there is nothing in BPA's existing TSR Business Practice that could even remotely be interpreted to put customers on notice that one of the five designations regarding the Receiving Party is required—nor the general concept of "need justification" and commercial relationship demonstration as a *condition* of the right to transmission service, or good faith request validity.

On the contrary, BPA's existing Transmission Business Practice describes the general procedures around the submission and evaluation of Data Sheets. The business practice does not discuss what constitutes an acceptable demonstration that the Receiving Party will take delivery of energy at the POD. Additionally, the Data Sheet form itself likewise does not mandate a specific "acceptable demonstration" of the same. Instead, the Data Sheet requires customers to supply a "Down-stream Transmission Rights Reference" and offers "(Contract, AREF#, etc.)" as examples of acceptable information to be supplied.

BPA's approach also flies in the face of decades of LTF TSR requests in the region, on the BPA system, and generally throughout the country. Which have not required a "proof of need" for access to transmission or studies for transmission service. The lack of this criteria on prior data exhibits, as well as the years of no data exhibits at all, just permissible POD designations in the OASIS TSRs, is proof of this being new.

BPA's proposal to require evidence of an existing business relationship or evidence of the Receiving Party's need for the requested transmission is therefore a stark deviation from existing BPA policy and established industry practices. Such a deviation will meaningfully impact how transmission customers conduct business and submit TSRs, and it therefore significantly affects the rates, terms, and conditions of BPA's transmission service. NewSun objects to the new policy because it has been adopted without any apparent consideration of its potentially dire consequences, and without any effective opportunity for regional parties to raise or address these concerns.

BPA should therefore reconsider and reject the Data Policy. At a minimum, BPA should suspend the new policy and allow concerned parties to comment on the policy and identify alternatives that do not carry with them the serious consequences we identify here.

B. Applying the new policy to existing TSRs violates fundamental concepts of due process and utility regulation, and threatens to undermine necessary investments in renewable energy.

At BPA's July 9, 2024, meeting, it indicated that the new policy will be applied to all TSRs that are eligible to be studied in the 2025 TSEP, including ones that have been validated as long as they have not yet been studied, and that it will *also* apply the new policy retroactively to TSRs submitted for earlier periods if the TSR customer is required to

update data submitted with its TSR . This retroactive application of the new policy, especially to TSRs that BPA has already accepted, is fundamentally at odds with well-established industry legal norms such as the filed rate doctrine which, in order to protect established investment expectations, prohibit the application of new policies to rights established under existing tariffs. It is likewise at odds with fundamental notions of due process. And it threatens to undermine the stability of the BPA tariff structure that is fundamental to investments in regional energy infrastructure.

As the U.S. Court of Appeals for the Third Circuit recently concluded, the filed rate doctrine is a fundamental principle of utility regulation that requires "open and transparent filing of rates" and that "broadly proscribe[es] their retroactive adjustment." *PJM Power Providers Group. v. FERC,* 96 F.4th 390, 394 (3rd Cir. 2024). Hence, the filed rate doctrine "bind[s] regulated entities to charge only the rates" on file and "to change their rates only prospectively." *Id.* (*citing Oklahoma Gas & Elec. Co. v. FERC,* 11 F.4th 821, 829 (D.C. Cir. 2021)). The rule applies not just to filed tariffs, but to policies, such as BPA's TSR policy, that affect market participants. *Id.* at 395. Further, the filed rate doctrine arises not just from statutory requirements requiring utility tariffs to be filed but from fundamental due process requirements that prohibit retroactive application of new rules to established rights. An administrative rule is illegally retroactive if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prods*., 511 U.S. 244, 280 (1994).

A TSR that has been accepted and processed by BPA carries with it specific rights established by the TSR's queue position and award of transmission rights. Retroactive application of the new policy to existing TSRs therefore violates both the filed rate doctrine and due process rights more generally. It also threatens to undermine necessary investments in new generation and transmission that are essential for the region to meet its ambitious goals for decarbonizing the electricity sector without threatening electric reliability. Like all other entities investing in the region's electricity sector, NewSun relies on the stability of established rights, including rights associated with TSRs that have already been accepted and processed, to assure a stable legal platform for its investments. Retroactive application of the new data requirements threatens to invalidate TSRs that have already been accepted by BPA. This is not only illegal but creates serious doubts about the stability of the legal platforms upon which the extremely large investment needed to develop generation and transmission in this region rest.

Finally, NewSun believes that the new data requirements are contrary to BPA's statutory obligations to make transmission capacity available to non-federal customers. Section 6 of the Transmission Act[4] requires that BPA "shall make available . . . any capacity in the Federal transmission system" that is in excess of capacity needed to transmit federal power. Similarly, Section 6 of the Preference Act[5] requires that capacity on the interties "shall

[4] 16 U.S.C. § 838d.
[5] 16 U.S.C. § 837c.

be made available as a carrier of transmission of other [non-federal] electricity." BPA's attempt to condition the availability of transmission on the federal system on a showing that the receiving customer will use the power is contrary to these statutory requirements, which permit BPA to limit the availability of transmission capacity on the federal system only if it is needed to transmit federal power and provide no discretion to add additional conditions on the availability of transmission capacity.

BPA should therefore abandon the new policy as beyond its authority. At a minimum, the new policy should be applied only to TSRs that are filed after the effective date of the new policy. To do otherwise is both illegal and fundamentally unwise.

C. BPA's new policy lacks clear standards.

A huge portion of the qualifying "demonstration of a reasonable expectation that the Receiving Party may take delivery of the energy at the POD" are ill-defined, un-defined, ambiguous as to qualifying circumstances, and ultimately have been expressly punted by BPA staff during the workshop as to be determined during the post-implementation of the policy phase. In other words, BPA cannot clearly express, including upon inquiry in either work shop, what variety of cases would be accepted by BPA. But rather BPA confirmed in that workshop, as well as in writing to NewSun, that it would only determine how to apply these standards, and clarify how it might apply them, after it issues deficiency notices. Worse, there were clearly cases where BPA had not thought through all the permutations of circumstances that might apply, but BPA clearly confirmed that many cases that have over recent years proven to align with *actual market need*, including by some public LSEs which have had extraordinary load growth, would *not* be accepted. Creating clarity that confusion would occur and disputes would be likely as to what might qualify, all to be ultimately resolved in BPA's sole discretion, under the weight of cure periods, threat of removal, and threat of irreparable harm—leastwise to a material subset of transmission customers which are not afforded the discriminatory advantage of being able to bless their own TSRs' needs, and which happen to have IRP cycles which align with the heretofore unannounced and unanticipated new policy that would allow a LSE to have a qualifying need.

Additionally, the standards under which BPA could retroactively take or remove TSRs by application of this policy (or similar future policy changes) are similarly unclear, except that a lingering threat seems to have been established. But the circumstances upon which BPA might abruptly again impose such a policy, including outside of a rate case or tariff proceeding, also have no clear criteria or standards.

Ultimately the result is a destabilization of the transmission service request environment and the prevailing paradigm of transmission expansion, which as noted and publicly espoused numerous times by the BPA Administrator is how BPA will manage and prioritize transmission expansion. Parties like NewSun which have relied on that framework, and the repeated public assertions of *this* framework, are now faced with risks

that those assertions and investments in those published and tariff frameworks and related business practices could result in abrupt changes to the safety of such investments, as well as the use or rejection of funds which BPA has taken under those policies, at any time, and without warning, and without regard for harm to customer investments directly or indirectly relying on those fundings and associated TSRs to serve needs or business endeavors, such as market trading strategies.

BPA's policies also lack clear standards about what duration of contract with an adjoining system is adequate under 2(c). And, as discussed below, if that's some sort of long-term right, that is also inappropriate, discriminatory, biased towards TO owner type LSEs and existing capacity holders, deprives rightful use of short-term capacity from being available and legitimate, and otherwise is harmful and without appropriate notice that might allow many TCs and power marketers to appropriately take advantage of that provision in comparison to other TCs that inherently would be grandfathered rights.

We also note that application of many of these standards presupposed some legititimate fulsome level of use of adjoining systems, or probability of needs asserted by certain TCs being more legitimate than others. But that is not fair nor reliable nor just nor reasonable either. Just because PGE or Brookfield asserts a load may exist 5-10 years from now doesn't make it necessarily more probable than if NewSun asserts it. But this is exactly what BPA presupposes, that certain assertions of need are more real than others. This is neither supported by a reasoned decision nor evidence in the record nor the history of actual practices and outcomes in the region. Indeed it may be, and has been, the opposite of what is true. Indeed, if the ability of a load to ever be served may be dependent on a transmission strategy being developed for certain generators and market supply combinations being put together successfully, which may be more likely to be done by someone like NewSun than the load's own LSE, for a variety of reasons, including expertise developed from transacting on the BPA system, synergistic investments, and core expertise, all of which may be *less* likely from certain LSEs (particularly if, say, an IOU has a bias towards transmission to/from a rate-based or rate-baseable generator they prefer, but which less likely to get timely or cost-viable transmission service), highlighting how this policy is both indefensible, non-reasoned, contrary to market common outcomes, and may actually impede and cost burden the transmission system by favoring or triggering transmission build-out plans which are actually less efficient, while discouraging parties ability to suss out superior solutions and marginal remaining capacities which can be beneficially used. As such BPA's policy proposal is actually harmful to the transmission system's beneficial utilization, as well as the market's ability to self solve problems and optimize achievable solutions on the existing and expanded systems. Parties can only do such if able to actually get transmission studies.

D. BPA's new policy encourages anti-competitive behavior and artificially disfavors non-ESS independent power producers and public LSEs.

The new requirements set forth in the Data Policy are strikingly similar to "commercial readiness" requirements FERC recently rejected because they are unduly anticompetitive. BPA's action in adopting the Data Policy requirements should be examined and rejected with FERC's findings in mind. Failure to comply with FERC's findings puts BPA at odds with FERC's open access policies and therefore places BPA's OATT out of compliance with FERC requirements and in violation of FERC's "Safe Harbor" policies.

Before detailing FERC's findings, we note that anti-competitive conduct remains a serious concern in the region, which still relies on traditional vertically integrated utilities that have an inherent incentive to use their control of transmission to artificially favor their own generation businesses and to disfavor their competitors in the generation market, NewSun among them. Although the region is committed to competitive solicitation policies intended to blunt utility monopoly abuse, those policies have met with, at best, limited success. Consider the recent history of Portland General Electric's ("PGE") RFP processes. Despite the Oregon legislature's mandate to provide for "diverse ownership" of resources and the Oregon Public Utility Commission's ("OPUC") competitive bidding rules, PGE's track record makes clear that it is nonetheless finding a way to favor its own projects. PGE has selected projects in which it has an ownership interest in nearly every RFP over the last decade. For example:

- In PGE's 2012 Capacity and Energy RFP (UM 1535), PGE selected the Carty Generating Station and Port Westward 2 projects, in which PGE owns a 100% stake.[6]

- In PGE's 2012 Renewable RFP (UM 1613), PGE selected the Tucannon River Wind Farm project, in which PGE owns a 100% stake.[7]

- In PGE's 2018 Renewable RFP (UM 1934), PGE selected the Wheatridge Wind, Solar, and Battery project, in which PGE owns a 1/3 share.[8]

- In PGE's 2021 All Source RFP (UM 2166), PGE selected four projects (Clearwater Wind, Troutdale BESS, Seaside BESS, and Evergreen BESS), which were all benchmark bids and in which PGE owns some or all of three out of four of the bids, with an aggregate 61% stake.[9]

Rather than supporting the regional and national policies favoring competition in the generation market, BPA's new policy will only empower and embolden utility self-dealing and promote anti-competitive practices. BPA's proposals to require transmission

[6] OPUC, UM 1535
[7] OPUC, UM 1613
[8] OPUC, UM 1934
[9] OPUC, UM 2166 and UE 427, as relates PGE's 2021 RFP, and Clearwater Wind project, for which ongoing investigation is occurring about RFP abuses and use of transmission service as a standard to deny or limit RFP participation and/or create artificial bidding advantages for PGE as the procuring LSE.

customers to provide a "verifiable intention" that an LSE has a need for the requested transmission service or demonstrate a business relationship that creates a reasonable expectation that the transmission service will be easily satisfied by incumbent utilities, who can simply point to their own LSE's needs for power. Independent power producers, on the other, will have to win an RFP or otherwise obtain a commitment from an end-use customer to buy power, a near-impossibility in a region that still permits utility incumbents to control access to retail markets. Further, independent power producers must, in order to allow time for permitting to be completed and transmission upgrades to be constructed, must anticipate electricity demand approximately ten years ahead of time. But neither LSEs nor customers will commit to purchases that far in advance. Hence, the requirement to identify specific customers with specific needs places independent producers in an impossible position.

BPA should adopt FERC's reasoning in Order No. 2023 and decline to enforce these proposals.

In the administrative process leading to the adoption of Order No. 2023, FERC initially proposed several commercial readiness requirements that are strikingly similar to BPA's new requirements. FERC's notice of proposed rulemaking ("NOPR") proposed a "commercial readiness demonstration" for transmission requests to remain in the queue for transmission service. These included:

- An executed term sheet;
- Reasonable evidence that the facility had been selected in a resource plan or RFP by or for an LSE or is being developed for sale to a large end-user;
- A provisional LGIA filed with FERC.

Many commenters opposed this approach to commercial readiness demonstrations because they are weighted heavily in favor of incumbent utilities. Like BPA's new requirements, FERC's proposed commercial readiness requirements artificially favored incumbent utilities because, for example, many utility RFPs require at least a position in an interconnection queue as a precondition to bidding. This places independent power producers in a Catch 22 because they cannot win an RPF without having a transmission position and, under FERC's proposal, they would be unable to obtain a transmission position without first having won an RFP.

NewSun argued to FERC that,

> unlike independent power producers, an incumbent, vertically integrated utility can easily meet the second prong of the readiness criteria to enter the interconnection queue and proceed to the facilities study by simply identifying its preferred resource in its own resource plan, selecting it as the

> winning bid in its own utility-run RFP, or just attesting that the utility is 'developing' the generating facility.[10]

Commenters raised a host of other issues with the proposed commercial readiness options. For example, providing a term sheet or PPA as evidence of commercial readiness is unreasonable because developers do not have sufficient information about interconnection costs to move forward with either when they enter the interconnection study process. FERC ultimately acknowledged commenters' anticompetitive concerns, and therefore eliminated the proposed readiness demonstrations from Order No. 2023, requiring instead that interconnection customers submit increasing commercial readiness deposits at the beginning of each stage in the interconnection process.

BPA should likewise eliminate the new data requirements because of their potential for promoting anti-competitive conduct and for artificially tipping the competitive playing field in favor of utility incumbents and against their competitors in the generation market.

Other unintended consequences may arise from BPA's proposed approach. For example, BPA would permit TSRs to list certain PORs (for example, NOB, COB and NWH) for "market purchases" but not others. This may artificially limit the development of new market hubs, and thereby constrain needed market liquidity in the region.

In addition, BPA's apparent attempt to avoid the anti-competitive consequences of its new policy has resulted in changes that create extreme ambiguity. For example, BPA has indicated that the listed demonstrations of "need" in the new policy as amended on July 2 are "examples of acceptable demonstrations," and that BPA requires a showing that the Receiving Party "may" take deliver of the energy at the POD. While NewSun welcomes BPA's additional flexibility, the new language is so ambiguous that it becomes impossible to determine what BPA might consider an acceptable demonstration that the Receiving Party "may" take delivery of the power. This, in turn, opens up the possibility that similarly-situated TSR customers may be treated differently simply because BPA lacks clear guidelnes on what an acceptable showing of "need" would be,

NewSun is also concerned that the showing of need will require that power customers reveal proprietary information about their plans for expansion of data centers and other power-intensive facilities. At best, this complicates the ability of non-utility TSR customers to meet the new "need" requirements BPA has proposed. At worst, it may make the demonstration impossible if the potential customer is unwilling to reveal this information.

Rather than relying on an arbitrary – and highly ambiguous – list of possible evidence that could validate the "need" for energy at a particular POR, BPA should rely on the willingness to TSR customers to invest in transmission infrastructure, by making TSR deposits, by funding engineering dollars (PEAs and ESAs), or execute funding

---

[10] at 629.

commitments or transmission service agreements towards future buildouts as the surest barometer that new transmission infrastructure will be needed and is wanted.

As NewSun has emphasized in the comments it recently submitted concerning BPA's proposal to impose withdrawal fees on customers that exit the transmission queue, BPA's unique Scalable Plan Blocks approach provides clear signals to TSR customers as to the costs they will incur to construct transmission upgrades to accommodate their TSRs. Once TSR customers have a clear indication of the upgrade costs they face, they can make an informed economic decision about whether the required investment is justified by the potential gains to be made by constructing the transmission.

Indeed, this is what had been successfully occurring under BPA TSEP process these past several years. BPA produced studies, provided costs and timing of plans of service to enable requested services, and customers responded with "put up or shut up" dollars, in the form of PEAs to continue. This new approach flies in the face of that—and undermines confidence in that, and similar mechanisms, if TSRs and funded dollars, and any surrounding business plans and investments, can instantaneously be put in jeopardy.

Rather than adding a new, ambiguous, and arbitrary requirement for TSR customers to demonstrate that their desginated Receiving Party has a need for the power, BPA should instead look to the willingness of TSR customers to fund transmission upgrades required under the Scalable Plan Blocks approach as the surest indication that transmission investments are actually needed—and its own recent success and history under TSEP. TSR customers will not invest the millions of dollars need to fund transmission upgrades without strong assurance that these investments will be honored, in a stable rational policy environment, which is neutral, and unbiased.

E. BPA's new policy inherently picks winners and losers.

For reasons described above, BPA's approach privileges certain TCs and market participants above others. This is inherently unfair.

BPA also inherently is facilitating the ability of certain market participants to inappropriately abuse this to self advantage. This is not academic or hypothetical. PGE has literally used transmission service being confirmed as *condition* of participation in its RFPs for over a decades—and successfully used this to eliminate and prevent competitors from participating in its PUC overseen procurement processes. Numerous parties have commented on this, including NIPPC and others, and in the OPUC UE 427 docket there are current investigations of whether PGE behaved inappropriately, including as relates transmission criteria. BPA should not be amplifying and facilitating such abuses. Nor creating mechanisms that IOU LSEs can use to disfavor competitors and self-deal through a BPA enable mechanism that impedes the ability of certain market participants to ever participate.

Similarly, PacifiCorp recently had an IRP with thousand of MWs of need, and an associated RFP. The next year PAC cancelled the RFP and filed an update to its IRP that eliminated all of that procurement – instead waiting for nuclear power plants for many years. BPA's policy would effectively enable PAC to abuse this discretion to help destroy or prevent TSRs from being filed, whilst proceeding to write roadmaps excluding numerous market options, and have BPA facilitate that competition suppression.

At a minimum, the problematicness of these scenarios require expansive vetting by BPA, which clearly has not occurred. We contend these issues are irreconcilable under any approach that imposes burdens to prove merit-worthy prospective use on the transmission system, and which bases those on some parties self-assessment of need at the detriment of others views of need.

F. Inconsistent with changing markets; imposed a BPA-only lagging view of market as standard for market participation.

Because BPA will always only be imposing its own view of what comprises adequate need, and requiring "proof", BPA will always be pre-filtering the market activity which can be considered and pursued through its transmission system, and doing so in arrears and in conflict with inherent entrepreneurial activity and ever-changing market conditions and opportunities.

Further, markets do not exist in a vacuum. There are numerous interactive uses of BPA's system which interface with surrounding systems, including the right to open access use of those systems. BPA demanding that only long-term confirmed uses of adjoining systems be permitted for PORs and PODs being valid, as relates prospective power transfers to and from such adjoining systems is illegitimate, inappropriately forces unnecessary costs and conditions upon use of BPA system (some of which may be unattainable, even if material beneficial use can occur without long-term rights). Those conditions (Section 2 for PORs) are also discriminatory in that they favor long-term rights holders and LSE TOs abilities to use BPA's system over those which might make short-term use of adjoining service—short-term transmission service, as demanded and as available, being a fundamental core product and use of transmission systems, which BPA's policy inappropriately demands as a condition of use of its transmission capacity. Further, this is occurring without appropriate notice, as those which did not already have such rights do not have the ability to then take timely actions to secure them before risk queue removal under this abruptly implemented policy. Which is a further discriminatory and biased consequence of this BPA approach.

G. BPA's new policy is unlikely to have the intended effect of reducing TSR and MW study volume.

BPA's articulates in its data exhibit that this policy is effectively intend to limit TSRs for the study to a more reasonable volume. However, BPA's articulated approach in which TSRs to certain locations in which need is agreed by BPA to exist, such as for a utility with a

need in their published IRP, will not limit those requests to the amount of published need (which it of course should not). But the message to the market it just to file TSRs to those locations. Thus BPA will still have huge volumes to those locations deemed acceptable by BPA. Because there is outsized demand to serve and compete for. So customers will then request those locations. Including because they'll believe they have a tariff based right to later redirect to other locations, if ever granted service (which they do).

Ultimately, BPA will still have an immense volume of TSRs to study. But it will have distorted artificially where those TSRs point.

H. BPA's new policy will distort the data it receives about where real transmission expansion needs exist.

Meanwhile, BPA will have distorted the data it receives. Because the suppression of certain TSRs PODs will then allow only TSRs to the BPA approved locations to be accepted. TCs will respond to that. So BPA will just get what it allows, while suppressing what TCs and the market *actually* thinks it needs. This will create amplifying distortions in favor of already problematic locations. Like all market hubs and the LSEs that actually have an IRP, coincidentally, today, or at any other checkpoint BPA invents.

For example, we already know that PGE is a very challenging system to get to. And the last TSEP required a half-dozen to dozen *major* projects to expand transmission service to PGE. But BPA in the last workshop confirmed that because PGE has a need, according to BPA's new standard and PGE's IRP, BPA will accept TSRs to that POD. So BPA will get those, in spades. Meanwhile a nearby LSE that doesn't have a published IRP, but might actually be a viable POD for someone trying to figure out how to serve load growth expected, or where a major load *could be sited*, including public LSEs, wouldn't be permitted to even get a study for service. So in that case the market can't find out what works, can't grow loads, the public LSE gets denied a revenue opportunity (or even the ability to evaluate its viability), and more attention and TSRs get pointed at the already constrained and problematic locations. Without the ability for TCs to get studies that might vet actual viable pathways.

Similarly, power marketers or project developers may believe they can blend market and generation power to serve a need somewhere, including by pulling power off systems adjoining BPA as needed. BPA's approach would not allow those market service methods and needs to be valid or even be studied. As such, another distortion in data BPA gets will occur, inappropriately misleading BPA as to what needs are where, by having hidden the information from itself through these policies. That is destined to result in misuse of precious human and financial resources distorted by the inherent biases this BPA Market Use TSR Screening Policy will impose and amplify.

I. BPA's new policy will burden staff with new unnecessary conflicts on these data exhibits now and later – and ultimately impede the current TSEP roll-out.

J. BPA policy is likely to create unnecessary litigation risk.

The diverse problematic implications of this policy are likely to result in parties being forced to consider federal court challenges and injunctions being requested and/or Section 2.11a Federal Power Act challenges.

Conclusion

BPA should immediately suspend and reverse the Data Policy because it is antithetical to regional and national policies favoring competition in the generation market. If BPA does not immediately overturn the Data Policy, it should at least suspend the policy to allow a process for regional interests to examine the potentially serious consequences of the policy. And, in no event should a new policy governing data submissions be applied to TSRs that have already been accepted by BPA. In doing so, BPA violates the filed rate doctrine, basic requirements of due process, and undermines the stability of investments in the region's electric generation and transmission systems. Among many other almost innumerable problems, which are generally irreparable and unavoidably inappropriate and biased and discriminatory in this context. The concept should be tabled. Including to avoid further destabilization of BPA's current functioning process and historically reliable, neutral platform, investment environment for Transmission Customers.

Affected parties include associated affiliates, not all of which are published here, for privacy and confidentiality reasons.

These comments would have covered additional problems and issues and examples, but BPA has not provided sufficient time and public process and consideration of these impacts in order to fully develop comments, arguments, and to discuss with other affected parties.