

January 11, 2010

The Honorable Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

RE: *Southwest Power Pool, Inc.*, Docket No. ER10-\_\_\_\_\_  
Submission of Meter Agent Services Agreement

Dear Secretary Bose:

In accordance with the terms of Southwest Power Pool, Inc.'s ("SPP") Open Access Transmission Tariff ("SPP Tariff"), SPP encloses for filing an executed Meter Agent Services Agreement ("Meter Agent Agreement") between Basin Electric Power Cooperative ("Basin Electric") as the Market Participant and Western Area Power Administration as the Meter Agent ("WAPA").<sup>1</sup> SPP is submitting this filing because the Basin Electric Agreement includes terms and conditions that do not conform to the standard form of Meter Agent Agreement that is in the SPP Tariff.<sup>2</sup> SPP requests that the Federal Energy Regulatory Commission ("Commission") accept the Basin Electric Agreement with an effective date of December 1, 2009.

**I. Background and General Justification for Non-Conforming Provisions**

Basin Electric is a not-for-profit generation and transmission cooperative that provides supplemental power to a consortium of rural electric cooperatives in nine states. Basin Electric serves 2.8 million electric consumers through its 136 member cooperative systems.

WAPA is one of four Federal Power Marketing Administrations within the Department of Energy. WAPA was created in 1977 by section 302(a)(1) of the Department of Energy Organization Act, 42 U.S.C. § 7152, to perform the power marketing and transmission functions from multi-use water projects.

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<sup>1</sup> The Meter Agent Agreement submitted herein is known as the "Basin Electric Agreement," and Basin Electric and WAPA are collectively "the Parties."

<sup>2</sup> See SPP Tariff at Attachment AM (hereinafter the "*pro forma* Meter Agent Agreement").

The Parties entered into the Basin Electric Agreement to facilitate Basin Electric's decision to have WAPA serve as the Meter Agent for Market Participant resources and load. However, WAPA's status as a federal agency requires that certain non-conforming terms and provisions be included in the Basin Electric Agreement. As detailed below, WAPA insisted that many of the non-conforming modifications be added because the modifications are required by federal statute, and the non-conforming language is similar to the language of the relevant federal statute. In addition, several non-conforming provisions were taken from the "General Power Contract Provisions" that are included in WAPA's standard power marketing contract.<sup>3</sup>

## **II. Description and Justifications for Non-Conforming Provisions**

The Basin Electric Agreement, which is attached as Exhibit I to this submittal, is identical in all material respects to the *pro forma* Meter Agent Agreement, except for the language described below.<sup>4</sup>

### **A. Non-conforming language required due to WAPA's status as a federal agency**

- 1) Article 2.2 – Extended Term: Language has been added clarifying that the extended term of the Basin Electric Agreement will not extend beyond January 31, 2030. WAPA stated this modification is necessary because federal law only permits WAPA to enter into contracts with terms of no more than 40 years.<sup>5</sup> As a result, the Basin Electric Agreement required a fixed expiration date to comply with federal law.

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<sup>3</sup> See *Western Area Power Administration General Power Contract Provisions*, available at <http://www.wapa.gov/powerm/pmgpcp.htm>. (hereinafter the "WAPA General Power Contract").

<sup>4</sup> SPP has included redlined pages illustrating the differences between the Basin Electric Agreement and the *pro forma* Meter Agent Agreement in Exhibit II.

<sup>5</sup> See 43 U.S.C. § 485(h)(c)(2).

- 2) Article 3.1 – Force Majeure: WAPA revised the “Force Majeure” provisions in Article 3.1 to be more consistent with the “Uncontrollable Forces” provisions in the WAPA General Power Contract. The non-conforming language retains many of the same terms from Article 3.1 of the *pro forma* Meter Agent Agreement, with additional phrases from the WAPA General Power Contracts.
- 3) Article 3.2.1 – Liability:<sup>6</sup> The “Indemnification” provisions in Article 3.2.1 of the *pro forma* Meter Agent Agreement have been revised to clarify that Basin Electric agrees to indemnify and hold harmless WAPA for certain claims, but that WAPA cannot agree to indemnify Basin Electric for the same claims. WAPA required this modification because federal law prohibits WAPA from obligating or spending money that it does not already have in an appropriation or fund.<sup>7</sup> Therefore, WAPA asserts it is prohibited from obligating itself to indemnify others when the amount for such indemnification is indefinite and potentially unlimited.

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<sup>6</sup> Article 3.2 of the *pro forma* Meter Agent Agreement is titled “Indemnification,” but the Parties changed the title of Article 3.2 in the Basin Electric Agreement to “Liability.”

<sup>7</sup> 31 U.S.C. § 1341(a)(1)(A)-(B) (“Anti-Deficiency Act”) (“An officer or employee of the United States Government or of the District of Columbia government may not (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law”).

- 4) Article 3.6.1 – Contingent Upon Appropriations and Authorizations: A new Article 3.6.1.1 has been added to the Basin Electric Agreement indicating that WAPA’s activities and expenditures are contingent upon Congress making the required appropriations. Article 3.6.1.1 provides that, if such appropriations are not made, Basin Electric agrees to release WAPA from its contractual obligations and from all liability under the Basin Electric Agreement. A new Article 3.6.1.2 also has been added to the Basin Electric Agreement clarifying that WAPA may require authorization to receive and expend funds advanced from Basin Electric, and that if such authorization is not received, Basin Electric will release WAPA from its contractual obligations and all liability. WAPA required these new provisions because the Anti-Deficiency Act prohibits WAPA from committing to future obligations for payment or a monetary expense that has not been appropriated by Congress.<sup>8</sup>
  
- 5) Article 3.2.2: A new Article 3.2.2 has been added clarifying that the liability for negligence of the United States and WAPA is limited by the Federal Tort Claims Act,<sup>9</sup> which governs the liability of federal agencies in cases of negligence.

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<sup>8</sup> *See id.*

<sup>9</sup> While the Basin Electric Agreement cites the following provisions as the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1346(c), 2401(b), 2402, 2671, 2672, and 2674-2680, the Basin Electric Agreement also makes clear that WAPA is subject to additional provisions of the Federal Tort Claims Act “as amended or supplemented.” *See* Basin Electric Agreement at Article 3.2.2.

- 6) Article 3.6<sup>10</sup> – Participation by the United States: WAPA added new Article 3.6 providing that participation by the United States, through WAPA, in the SPP Tariff is subject to acts of Congress and to regulations and rate schedules promulgated by the Secretary of Energy.<sup>11</sup> Article 3.6 also provides that the Secretary of Energy may submit disputes arising under the SPP Tariff to arbitration. Finally, in the event of a conflict between the “federal participation provisions” (*i.e.*, Articles 3.6.1-3.6.6 of the Basin Electric Agreement) and any other provisions of the SPP Tariff, the federal participation provisions will govern. WAPA added this language to clarify that, due to the Supremacy Clause of the United States Constitution,<sup>12</sup> WAPA is bound by federal law, and when federal law conflicts with other regulations, federal law will control. The Commission accepted similar language in the Midwest Independent Transmission System Operator, Inc.’s (“Midwest ISO”) Open Access Transmission and Energy Markets Tariff (“Midwest ISO OATT”).<sup>13</sup>

WAPA required each of the following federal participation provisions because they are required to be included in federal contracts:

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<sup>10</sup> Article 1.2(1) contains non-conforming language referencing Article 3.6.

<sup>11</sup> *See* Basin Electric Agreement at Article 3.6.

<sup>12</sup> *See* U.S. Const. art. VI, cl. 2.

<sup>13</sup> *See* Midwest ISO OATT, Module A at § 12B.1 (“The participation by the United States through the Western Area Power Administration, or other Federal entity, in this Tariff is subject in all respects to acts of Congress and to regulations of the Secretary of Energy established thereunder, and to rate schedules promulgated by the Secretary of Energy. This reservation includes, but is not limited to, the statutory limitations upon the authority of the Secretary of Energy to submit disputes arising under this Tariff to arbitration. In the event of a conflict between these federal participation provisions and any other provision of this Tariff, these federal participation provisions shall have precedence with respect to the application of this Tariff to the United States.”).

- a. Article 3.6.2 – Covenant Against Contingent Fees: Article 3.6.2 has been added to clarify that no person or selling agency was retained by Basin Electric to secure the Basin Electric Agreement. Article 3.6.2 further provides that if Basin Electric violates this warranty, WAPA will have the right to annul the Basin Electric Agreement. WAPA required Article 3.6.2 because the Basin Electric Agreement was “awarded after using procedures other than sealed-bid procedures.”<sup>14</sup>
- b. Article 3.6.3 – Contract Work Hours and Safety Standards: The Parties added new Article 3.6.3 subjecting the Basin Electric Agreement to the provisions of the Contract Work Hours and Safety Standards Act (“Contract Work Hours Act”), 40 U.S.C. § 3701, *et seq.*, to the extent that the Basin Electric Agreement is of a character specified in the Contract Work Hours Act. WAPA insisted that Article 3.6.3 be added because it is a standard provision in federal contracts. The Commission has accepted similar language in other agreements submitted to FERC with WAPA as a party,<sup>15</sup> and similar language is part of the WAPA General Power Contract.<sup>16</sup>

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<sup>14</sup> See 41 U.S.C. § 254(a) (“Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.”).

<sup>15</sup> See *Otter Tail Power Co.*, Letter Order, Docket Nos. ER06-992-001 and -002 (Nov. 16, 2006) (accepting a Contract for Interconnection and Load Control Boundary among WAPA, the Midwest ISO, and Otter Tail Power Company which contained similar provisions regarding contract work hours and safety standards).

<sup>16</sup> WAPA General Power Contract at Article 43.

- c. Article 3.6.4 – Equal Opportunity Employment Practices: A new Article 3.6.4 incorporates by reference Section 202 of Executive Order No. 11,246,<sup>17</sup> which prohibits Basin Electric from discriminating against any employee or applicant for employment because of race, color, religion, sex, or national origin. WAPA requested the inclusion of the language in Article 3.6.4 as it is required by federal law.<sup>18</sup> The Commission has accepted similar language in other agreements submitted to FERC with WAPA as a party,<sup>19</sup> and similar language is part of the WAPA General Power Contract.<sup>20</sup>
  
- d. Article 3.6.5 – Use of Convict Labor: A new Article 3.6.5 prohibits Basin Electric from employing any person undergoing sentence of imprisonment in performing the contract, except as provided by federal statute<sup>21</sup> and Executive Order.<sup>22</sup> Because federal law requires federal contracts to include provisions like that in Article 3.6.5, WAPA requested inclusion of the language.<sup>23</sup> The Commission has accepted similar language in other agreements submitted to FERC with WAPA as a party,<sup>24</sup> and similar language is part of the WAPA General Power Contract.<sup>25</sup>

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<sup>17</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), *as amended in* Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (Oct. 5, 1978).

<sup>18</sup> *See* Exec. Order No. 11,246, 30 Fed. Reg. 12,319 at Section 202 (providing that all government contracting agencies shall include the language from Section 202 in every applicable government contract).

<sup>19</sup> *See supra* note 15.

<sup>20</sup> WAPA General Power Contract at Article 44.

<sup>21</sup> *See* 18 U.S.C. § 3622(c).

<sup>22</sup> Exec. Order No. 11,755, 39 Fed. Reg. 779 (Dec. 29, 1973), *as amended in* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987), *and* Exec. Order 12,943, 59 Fed. Reg. 64,553 (Dec. 13, 1994).

<sup>23</sup> *See id.* (“All contracts involving the use of appropriated funds which shall hereafter be entered into by any department or agency of the executive branch for performance in any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands shall, unless otherwise provided by law, contain a stipulation forbidding in the  
(continued . . .)

- e. Article 3.6.6 – Enforcement Authority: WAPA added new Article 3.6.6 providing that:

By entering into a Transaction under the SPP Tariff, [WAPA] shall not be construed as having or will be deemed to have consented to the jurisdiction of any enforcement authority (such as FERC, NERC, WECC, or similar entity), conceded that any enforcement authority may exercise authority over it or its operations, waived or conceded any defense it may have, including sovereign immunity, intergovernmental immunity, or lack of subject matter jurisdiction, accepted any liability, responsibility, or obligation to pay any penalty imposed by an enforcement authority to which it would not have been subject in the absence of the SPP Tariff, or accepted or assumed any obligation to act, or refrain from acting, in a manner that would violate, or exceed the authority conferred on it by, any applicable statute, regulation, or lawfully promulgated court or regulatory order.<sup>26</sup>

WAPA asserted that Article 3.6.6 is necessary because WAPA maintains that, as a federal agency, it is not subject to the jurisdiction of an enforcement authority unless it is found to have waived its sovereign immunity and/or intergovernmental immunity. While stating that similar language does not bind any party to any particular outcome, the Commission has accepted agreements containing similar language and stated the

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performance of such contracts, the employment of persons undergoing sentences of imprisonment which have been imposed by any court of a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.”).

<sup>24</sup> See *supra* note 15.

<sup>25</sup> WAPA General Power Contract at Article 45.

<sup>26</sup> Basin Electric Agreement at Article 3.6.6.



Commission's acceptance is not an endorsement of WAPA's position.<sup>27</sup>

## **B. Other non-conforming language**

In addition to the non-conforming language discussed above, non-conforming language has been added providing greater specificity to the Basin Electric Agreement. Specifically, the title page and first paragraph of the Basin Electric Agreement have been revised to specify the effective date and the date the Basin Electric Agreement was entered into, respectively. Section 2.1 of the Basin Electric Agreement has been modified to provide that the term will be from December 1, 2009 through January 31, 2010. This revision is necessary to state the term of the Basin Electric Agreement the Parties desire. These revisions are consistent with revisions previously accepted by the Commission.<sup>28</sup> Finally, minor typographical corrections have been incorporated into Articles 3.4 and 5.1.

These non-conforming changes described above reflect that WAPA is an agency of the federal government, and the changes provide additional clarity and specificity to the Basin Electric Agreement. WAPA insisted that many of the non-conforming provisions be added to comply with federal statute. Therefore, the Basin Electric Agreement is just and reasonable, and warrants Commission acceptance. SPP is serving a copy of this filing on the representatives of WAPA and Basin Electric specified in the Basin Electric Agreement.

### **Effective Date and Waiver**

SPP requests an effective date of December 1, 2009 for the Basin Electric Agreement. Pursuant to section 35.11 of the Commission's rules and regulations, 18 C.F.R. § 35.11, SPP requests a waiver of the Commission's 60-day notice requirement set forth at 18 C.F.R. § 35.3. Waiver is appropriate because the Basin Electric Agreement does not establish rates or charges for any jurisdictional services.<sup>29</sup> In addition, both the

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<sup>27</sup> See *Xcel Energy Operating Cos., et al.*, 129 FERC ¶ 61,203, at P 55 (2009) (The Commission accepted a Contract for Interconnection, Load Control Boundary and Maintenance, with WAPA as a party, that contained language indicating that WAPA maintains it is not subject to any monetary civil penalties that may arise from FERC, NERC, Midwest ISO, MRO or a successor Regional Entity's.).

<sup>28</sup> See *Sw. Power Pool, Inc.*, Letter Order, Docket No. ER09-493-000 (Feb. 23, 2009); *Sw. Power Pool, Inc.*, Letter Order, Docket No. ER08-1280-000 (Aug. 28, 2008).

<sup>29</sup> See *Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992) ("*Central Hudson*") (stating that the Commission will  
(continued . . .)

Parties have consented to the December 1, 2009 effective date. Further, consistent with *Central Hudson* the Commission granted waiver and accepted a Meter Agent Agreement, effective June 1, 2009, when SPP submitted that Meter Agent Agreement on October 5, 2009.<sup>30</sup>

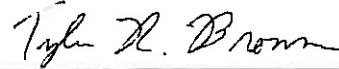
**Communications**

Correspondence and communications with respect to this filing should be sent to, and SPP requests that the Secretary include on the official service list, the following:

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Manager, Regulatory Policy  
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Respectfully submitted,



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Wendy N. Reed  
Tyler R. Brown

**Attorneys for Southwest Power  
Pool, Inc.**

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generally grant waiver of the 60-day prior notice requirement for uncontested filings that do not change rates).

# EXHIBIT I

**ATTACHMENT AM**

**METER AGENT SERVICES AGREEMENT**

**FOR**

**SPP MARKET**

**BETWEEN**

**MARKET PARTICIPANT**

**AND**

**THEIR DESIGNATED METER AGENT**

**December 1, 2009**

This Agreement made and entered this 28 day of December, 2009, is between Basin Electric Power Cooperative ("Market Participant") and Western Area Power Administration ("Meter Agent"). Market Participant and Meter Agent are each sometimes referred to in the Agreement as a "Party" and collectively as the "Parties."

WITNESSETH:

WHEREAS, for the initial year of the EIS market, the Balancing Authority will act as the Meter Agent for all Market Participant Resources and Load within the Transmission Owner's zone unless otherwise mutually agreed upon by the Balancing Authority and Market Participant.

WHEREAS, Market Participant and Meter Agent are registered entities of the Southwest Power Pool Market ("SPP").

NOW, THEREFORE, in consideration of the premises and mutual covenants and agreements hereinafter set forth, the parties hereto mutually agree as follows:

**ARTICLE I**  
**Responsibilities of the Parties**

**1.1 Market Participant Responsibilities:**

1. **Governing Documents:** In addition to this Agreement, Market Participant agrees that it will comply with the provisions of the SPP OATT and Market Protocols as they may be amended from time to time which relate to implementation of this Agreement. In the event there is a conflict between this agreement and the SPP Open Access Transmission Tariff ("OATT"), the OATT shall govern.
2. **Data Communications:** Market Participant shall provide or arrange for communication of meter data in a mutually acceptable format to the Meter Agent.
3. **Settlement Location Definition:** Exhibit A defines the meter(s) and calculations associated with each Settlement Location ("SL").
4. **Notice of Meter Changes:** Market Participant shall inform the Meter Agent of any additions, deletions, and modifications of metering that will impact the market data.
  - a. Market Participant shall provide full details of the meter information to the Meter Agent a minimum of 60 days prior to the implementation of the change, except when the meter equipment is changed or replaced due to equipment failure in which case notice of change will be provided as soon as possible. This information to be provided shall include the following:
    1. Information relating to retrieval of the meter data from the data source. This includes the method of doing so, communications, and full description of the meter.
    2. Information relating to the data and the processing of such data that will be applied for the new or modified SL and the impact to other existing SL or NAI calculations.
    3. Completing the SPP Market registration required, which includes real-time data exchange and modeling coordination with SPP.
    4. Updating of Exhibit A.
  - b. In addition, Market Participant shall be responsible for developing and testing a complete system for submission of data under this Agreement.
  - c. Market Participant shall notify Meter Agent of any significant metering issues related to the data provided to the Meter Agent within 24 hours after the issue is identified. This includes change out of a meter, meter failures, real-time data failures, etc.

5. **Settlement Location Notification:** Market Participant shall notify any other entity affected by the change in the SL (i.e. Other Market Participant, Balancing Authority) at least seven days prior to the change.
6. **Data Exchange and Data Quality:** Market Participant shall provide meter data for each Meter identified in Exhibit A to the Meter Agent in a timely manner.
  - a. Data shall be provided to the Meter Agent at least one (1) full business day prior to SPP's deadline for submission of meter data, as specified in Appendix E of the Market Protocols.
  - b. Upon notification to or upon discovery by the Market Participant that the data exchange has failed or data quality is questionable, the Market Participant will resolve the issue at its source.
  - c. In the absence of actual values for data required for settlement, it is the Market Participant's responsibility to provide estimated values for such data to the Meter Agent; however, if the Market Participant fails to provide the actual or estimated meter data in a timely manner, the Meter Agent will estimate the data for submission to SPP by the appropriate deadline. The Meter Agent will be held harmless as set forth in section 3.2.
7. **Submission Failures:** If the Meter Agent fails to submit the meter data or NAI data by the Final Settlement Statement data cutoff, the Market Participant is responsible for initiating and pursuing the SPP OATT Dispute process. The Meter Agent must provide to SPP any data it has available to help resolve the dispute.

#### 1.2 **Meter Agent Responsibilities:**

1. **Governing Documents:** In addition to complying with this Agreement, Meter Agent shall provide services on behalf of the Market Participant in accordance with SPP's OATT and Market Protocols as they may be amended from time to time related to implementation of this Agreement, subject to Provision 3.6. In the event there is a conflict between this agreement and the SPP OATT, the OATT shall govern, subject to Provision 3.6 below.
2. **Meter Agent Registration:** Meter Agent shall be a registered Meter Agent with the SPP Market.
3. **Settlement Location Development:** Meter Agent shall provide all settlement data required for the SLs designated by the Market Participant in Exhibit A.
4. **Data Communications:** Meter Agent and the Market Participant shall conclude a mutually agreeable format and method of exchange of settlement data required to be provided by the Market Participant.
5. **Settlement Location Values:** Meter Agent shall determine the Meter Value for each of the Settlement Locations identified in Exhibit A by applying all parameters as identified therein.

**6. Data Issue Notifications:**

- a. Meter Agent will notify the Market Participant, as soon as practicable, of any data exchange issues with the meter data source.
- b. Upon failure to receive meter data from the Market Participant by the data submission deadline, the Meter Agent will notify the Market Participant as soon as practicable and, if necessary, the Meter Agent will estimate the data pursuant to 1.1 6. c. of this agreement.

7. **Data Submission:** Meter Agent shall submit Settlement Location Meter Values to SPP and the appropriate Balancing Authority by the deadlines outlined in Appendix E of the Market Protocols.

**ARTICLE II**

**Term and Termination**

- 2.1 **Initial Term:** This Agreement shall become effective on December 1, 2009, and shall continue until January 31 of the following year.
- 2.2 **Extended Term:** This Agreement shall continue on a year to year basis at the conclusion of its Initial Term, unless terminated as specified in the Agreement. Provided however, such term shall not extend beyond January 31, 2030.
- 2.3 **Termination:** This Agreement may be terminated at any time by mutual agreement of the Market Participant and Meter Agent. Either the Market Participant or the Meter Agent may terminate the Agreement after the Initial Term, upon giving 60 days written notice to the other Party.

**ARTICLE III**

**Miscellaneous**

- 3.1 **Force Majeure:** Neither Party to the Agreement shall be considered to be in default in performance of any of its obligations under the Agreement when a failure of performance shall be due to an uncontrollable force (Force Majeure). An event of Force Majeure means any cause beyond the control of the party affected, including but not restricted to, labor disturbance, labor or material shortage, sabotage, war, civil disturbance or disobedience, fire, storm, earthquake, lightning, epidemic, flood, failure or threat of failure of facilities, restraint by court order or public authority and action or nonaction by, or failure to obtain the necessary authorization or approvals from, any governmental agency or authority, which by exercise of due diligence such Party could not reasonably have been expected to avoid and which by exercise of due diligence it shall be unable to overcome. A Party whose performance under this Agreement is prevented or delayed by Force Majeure shall make all reasonable efforts to perform its obligations under this Agreement, and shall exercise due diligence to eliminate the cause with all reasonable dispatch; however, neither Party shall be required to settle or resolve labor disturbances or strikes. The affected Party, as soon as reasonably possible, shall give notice of Force Majeure to the other Party.



3.2 **Liability:**

3.2.1 The Market Participant hereby agrees to indemnify and hold harmless the Meter Agent, its officers, directors, agents and employees from and against any and all claims for death or injury to persons or destruction of or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorneys fees, and all other obligations by or to third parties (collectively "liabilities"), arising out of or resulting directly or indirectly from the Meter Agent's performance of its obligations under this Agreement on behalf of the Market Participant, except to the extent any such liability arises, directly or indirectly, from the Meter Agent's gross negligence or intentional wrongdoing. For example, the provisions of this section 3.2 could apply in circumstances where equipment malfunction (or other inadvertent error not involving gross negligence or intentional wrongdoing) causes imbalance information to be inaccurately reported, resulting in billing errors.

3.2.2 The United States is liable only for negligence on the part of its officers, and employees in accordance with the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1346(c), 2401(b), 2402, 2671, 2672, 2674-2680, as amended or supplemented.

3.3 **Successors and Assignment:** This Agreement shall be binding upon the Parties and their respective successors and assigns. This Agreement shall not be assignable by either Party except with the prior written consent of the other Party which shall not be unreasonably withheld.

3.4 **Good Utility Practices:** The Parties shall conduct their affairs under this Agreement in accordance with Good Utility Practices. Good Utility Practices shall mean any of the practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, safety, and expedition. Good Utility Practices is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be acceptable practices, methods or acts, generally accepted by the region.

3.5 **No third party beneficiaries.** There shall be no third party beneficiaries to this Agreement.

3.6 **Participation by the United States.** The participation by the United States through the Western Area Power Administration, or other Federal entity, in the SPP Tariff is subject in all respects to acts of Congress and to regulations of the Secretary of Energy established thereunder, and to rate schedules promulgated by the Secretary of Energy. This reservation includes, but is not limited to, the statutory limitations upon the authority of the Secretary of Energy to submit disputes arising under the SPP Tariff to arbitration. In the event of a conflict between these Federal participation provisions and any other provision of the SPP Tariff, these Federal participation provisions shall have precedence with respect to the application of the SPP Tariff to the United States.

3.6.1 **Contingent Upon Appropriations and Authorization.**

3.6.1.1 Where activities provided for in the Agreement extend beyond the current fiscal year, continued expenditures by the United States are contingent upon

Congress making the necessary appropriations required for the continued performance of the United States' obligations under the Agreement. In case such appropriation is not made, the Market Participant hereby releases the United States from its contractual obligations and from all liability due to the failure of Congress to make such appropriation.

3.6.1.2 In order to receive and expend funds advanced from the Market Participant necessary for the continued performance of the obligations of the United States under the Agreement, additional authorization may be required. In case such authorization is not received, the Market Participant hereby releases the United States from those contractual obligations and from all liability due to the lack of such authorization.

3.6.2 **Covenant Against Contingent Fees.** The Market Participant warrants that no person or selling agency has been employed or retained to solicit or secure the Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Market Participant for the purpose of securing business. For breach or violation of this warranty, Western shall have the right to annul the Agreement without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

3.6.3 **Contract Work Hours and Safety Standards.** The Agreement, to the extent that it is of a character specified in Section 103 of the Contract Work Hours and Safety Standards Act (Act), 40 U.S.C. § 3701, as amended or supplemented, is subject to the provisions of the Act, 40 U.S.C. §§ 3701-3708, as amended or supplemented, and to regulations promulgated by the Secretary of Labor pursuant to the Act.

3.6.4 **Equal Opportunity Employment Practices.** Section 202 of Executive Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order No. 12086, 43 Fed. Reg. 46501 (1978), as amended or supplemented, which provides, among other things, that the Market Participant will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin, is incorporated herein by reference the same as if the specific language had been written into the contract, except that Indian Tribes and tribal organizations may apply Indian preference to the extent permitted by Federal law.

3.6.5 **Use of Convict Labor.** The Market Participant agrees not to employ any person undergoing sentence of imprisonment in performing the contract except as provided by 18 U.S.C. § 3622(c), as amended or supplemented, and Executive Order No. 11755, 39 Fed. Reg. 779 (1973), as amended or supplemented.

3.6.6 **Enforcement Authority:** By entering into a Transaction under the SPP Tariff, the Western Area Power Administration shall not be construed as having or will be deemed to have consented to the jurisdiction of any enforcement authority (such as FERC, NERC, WECC, or similar entity), conceded that any enforcement authority may exercise authority over it or its operations, waived or conceded any defense it may have, including sovereign immunity, intergovernmental immunity, or lack of