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January 6, 2012

VIA ELECTRONIC FILING

The Honorable Kimberly D. Bose, Secretary
The Honorable Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 1st Street, NE
Washington, DC 20006

Re: Iberdrola Renewables, Inc. *et al.* v. Bonneville Power Administration
Docket No. EL11-44-000

Dear Secretary Bose and Deputy Secretary Davis:

Enclosed please find a copy of the *Request for Rehearing of the Joint Intervenors* for filing in the above-referenced docket. A copy of this pleading is being served on all parties listed on the official service list for this proceeding. If you have any questions, please do not hesitate to contact me immediately.

/s/ Sherry A. Quirk
Sherry A. Quirk, Esq.

Counsel for Joint Intervenors

Enclosure

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Iberdrola Renewables, Inc.; **PacifiCorp;** **NextEra Energy Resources, LLC;** **Invenergy Wind North America LLC;** **and** **Horizon Wind Energy LLC** **Petitioners,** **v.** **Bonneville Power Administration** **Respondent.**	**Docket No. EL11-44-000**

REQUEST FOR REHEARING OF THE JOINT INTERVENORS

Pursuant to Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. § 385.212 and § 385.713 (2011), and section 313(a) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(a), the Public Power Council ("PPC"), Pacific Northwest Generating Cooperative ("PNGC"), and Northwest Requirements Utilities ("NRU") (collectively "Joint Intervenors") hereby respectfully request rehearing of the Commission's December 7, 2011 Order Granting Petition in the above-captioned docket ("December 7 Order").[1] In the December 7 Order, the Commission invoked its authority under section 211A of the Federal Power Act ("FPA") and directed Bonneville Power Administration ("Bonneville") to file tariff revisions that provide for transmission service on

[1] *Iberdrola et al. v. Bonneville Power Administration,* 137 FERC ¶ 61,185 (2011) ("December 7 Order").

terms and conditions that are comparable to those under which Bonneville provides transmission services to itself and that are not unduly discriminatory or preferential.

The Joint Intervenors request that the Commission grant rehearing and deny the petition. In the alternative, the Joint Intervenors ask the Commission to order supplemental briefing and such further proceedings as necessary to establish a proper record for determining whether the Interim Environmental Redispatch and Negative Pricing Policies ("Interim ER") creates non-comparable transmission service that is unduly discriminatory and preferential.

I. BACKGROUND

This case concerns Bonneville's efforts to manage generation and load within its Balancing Authority Area ("BAA") while complying with multiple statutory requirements and Congressional mandates governing the operations of the Federal Columbia River Power System ("FCRPS") and the Federal Columbia River Transmission System ("FCRTS"). Petitioners have cast Bonneville's policy to address the limited instances of rare low load and excess generation, the Interim ER[2], as a transmission issue warranting the Commission's exercise of authority under sections 210, 212 and 211A of the FPA.

In the Record of Decision ("ROD") issued in connection with the Interim ER, Bonneville explained that high flow conditions caused by spring runoff create environmental protection issues. Specifically, spilling excess water could result in dangerous levels of Total Dissolved Gas ("TDG") that may be fatal to fish protected by the Endangered Species Act ("ESA")[3] and Clean Water Act ("CWA").[4] In order to meet its environmental and statutory responsibilities and maintain system reliability, Bonneville manages high flows by running water through FCRPS generators, which does not increase TDG levels. In the ROD, Bonneville adopted an interim policy establishing that in rare low load conditions when full use of federal generation is necessary to protect water quality pursuant to the ESA and the CWA, and when Bonneville has exhausted all reasonable means of spilling and storing water and otherwise disposing of excess federal power, it will dispatch federal hydropower at no cost to displace other generation within

[2] *Administrator's Final Record of Decision, Bonneville's Interim Environmental Redispatch and Negative Pricing Policies*, dated May 13, 2011, ("ROD") available at: http://www.bpa.gov/corporate/pubs/RODS/2011/ERandNegativePricing_FinalROD_web.pdf. The policies set forth in the ROD will remain in place until March 30, 2012.

[3] *Endangered Species Act of 1973*, 16 U.S.C. 1531 *et seq*. (1973).

[4] *Clean Water Act of 1977*, 33 U.S.C. 1251 *et seq*. (1977).

the BAA. The ROD also provides that Bonneville will not pay negative energy prices to induce entities to curtail their output and take the federal hydropower offered at no cost.

On June 13, 2011, Iberdrola Renewables, Inc. ("Iberdrola Renewables"); PacifiCorp; NextEra Energy Resources, LLC ("NextEra"); Invenergy Wind North America LLC; and EDP Renewables North America LLC[5] ("EDPR NA") (collectively "Petitioners") filed a Complaint and Petition initiating this proceeding, arguing that Bonneville is "using its transmission market power to curtail competing generators in an unduly discriminatory manner" to protect its "preferred" power customer base from the negative economic impacts of surplus power created under high flow conditions.[6] Petitioners alleged that Bonneville does not have the authority to curtail wind generators. Moreover, Petitioners argued that Bonneville's Interim ER unduly discriminates against wind generation by curtailing wind generation and, without compensation, replacing wind power with hydropower. Petitioners sought various forms of relief and requested that the Commission resolve the issues raised in the Petition using the Fast Track process.

Specifically, Petitioners asked the Commission to invoke its authority under section 211A of the FPA to direct Bonneville to revise its curtailment practices and to file a revised Open Access Transmission Tariff ("OATT") for Commission approval. Petitioners also requested the Commission, under FPA sections 210 and 212(i), to direct Bonneville to abide by the terms of its interconnection agreements with Petitioners by immediately ceasing curtailment practices.

On December 7, 2011, the Commission issued its order granting the petition. In the December 7 Order, the Commission invoked its authority under section 211A and directed

[5] EDP Renewables North America, LLC was known as Horizon Wind Energy LLC prior to July 1, 2011.

[6] Complaint And Petition For Order Under Federal Power Act Section 211A Against Bonneville Power Administration Requesting Fast Track Processing, Docket No. EL11-44-000 (filed June 13, 2011) ("Petition").

Bonneville to file tariff revisions addressing Petitioners' comparability concerns within 90 days from the date of the order. The Commission specifically directed Bonneville to file tariff revisions that provide for transmission service on terms and conditions that are comparable to those under which Bonneville provides transmission services to itself and that are not unduly discriminatory or preferential.

The Joint Intervenors request rehearing of the Commission's findings that support the exercise of the Commission's authority under section 211A. As explained below, the Commission has erred in the application of section 211A and in concluding that the Interim ER mandates transmission service that is non-comparable and unduly discriminatory and preferential. The record does not demonstrate that the Commission has properly evaluated whether the transmission service provided to Petitioners is or is not comparable to the transmission service Bonneville provides itself. Nor does the record in the instant proceeding establish that the Interim ER is unduly discriminatory and preferential. Furthermore, the Commission failed to reconcile its discretionary exercise of authority under section 211A with Bonneville's obligations under the ESA.

In issuing the December 7 Order, the Commission failed to develop a record that adequately explains its exercise of jurisdiction under section 211A. Missing from the record in this proceeding are essential findings needed to support the Commission's conclusions. Notably, where the Commission has drawn conclusions regarding Bonneville's provision of transmission service, the record fails to document the most basic factual findings necessary to issue an order remedying allegedly non-comparable and unduly discriminatory and preferential transmission service. Furthermore, the Commission's conclusion that the Interim ER was not allowed under

the terms and conditions of the Large Generator Interconnection Agreements ("LGIA") was arbitrary and capricious in the absence of the actual LGIAs in the record.[7]

Indeed, one error begot another error in the December 7 Order until the cascade of mistakes yielded a thoroughly arbitrary and capricious order. At the outset, when the Commission failed to require Petitioners to develop the necessary record to consider the basic elements of the Interim ER, it leaped to the conclusion that the Interim ER is solely a transmission issue that requires resolution without regard to Bonneville's multiple organic statutes. Viewed solely through a lens that distorted the Interim ER into a transmission issue that only affected wind generators, the Commission failed to use the standard of law set forth by Congress in section 211A of the FPA. In order to reverse engineer a result that would avoid due consideration of the basic facts of this case, the Commission brushed aside legally grounded and factually supported explanations of why Bonneville needed to adjust generation schedules in certain rare periods of low load. In doing so, the Commission issued an order with a remedy that has no rational connection to the issue actually before it.[8] The December 7 Order deserves rehearing so that the Commission can issue an order that is grounded in the law, based on the facts in the record, and tailored to the actual issue before it.

Finally, Joint Intervenors object to the Commission having issued an order in this proceeding in the midst of good faith settlement negotiations between Bonneville and many of the parties. These settlement discussions have the strong support of the Northwest Congressional

[7] *Administrative Procedure Act*, 5 U.S.C. § 706(2)(A).

[8] *See Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983)(to survive judicial review, the Commission must have "considered the relevant factors and articulated a rational connection between the facts found and the choice made"). *See also Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co. (Motor Vehicle Mfrs. Ass'n)*, 463 U.S. 29, 52 (1983)(*quoting Burlington Truck Lines, Inc. v. United States (Burlington)*, 371 U.S. 156, 168 (1962)).

delegation, as documented on the record in this proceeding.[9] Instead of issuing the December 7 Order, the Commission should have allowed the parties to reach a regional solution to the complex issues that have given rise to both this proceeding and the related proceeding in the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit"). Indeed, the Commission abused its discretion when it acted notwithstanding both the pending appeal of the Interim ER ***and*** the ongoing regional settlement discussions.

[9] *See* Correspondence from U.S. Senator Ron Wyden *et al*. to Bonneville Power Administration, Docket No. EL11-44-000 (filed Aug. 8, 2011).

II. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[10] the Joint Intervenors hereby list each issue on which they seek rehearing of the December 7 Order and provide representative precedent in support of their positions on these issues:

1. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making, and not supported by substantial evidence because the Commission failed to consider Bonneville's other statutory obligations in determining whether Bonneville is providing non-comparable service to the Petitioners.[11]

    a. The Commission failed to examine the transmission service that the transmitting utility, Bonneville, provides itself under its statutory mandates. Thus, the Commission failed to engage in proper analysis to establish what constitutes comparable service for purposes of section 211A.

2. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as the Commission, in exercising authority under section 211A, preempted Bonneville's statutory obligations. The Commission failed to give effect to both Bonneville's statutes and the Commission's FPA authorities.[12]

3. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as the Commission cited to the *pro forma* OATT, a standard that is not immediately applicable to Bonneville, as the baseline for determining whether Bonneville is providing comparable transmission service.[13]

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[10] 18 C.F.R. § 385.713(c)(2)(2011).

[11] *Koons Buick Pontiac GMC, Inc. v. Nigh (Koons Buick)*, 543 U.S. 50, 60 (2004); *FDA v. Brown & Williamson Tobacco Corp.(FDA)*, 529 U.S. 120, 132–33 (2000); *Green v. Bock Laundry, Mach. Co. (Green)*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring); *Morton v. Mancari (Morton)*, 417 U.S. 535, 551 (1974); *California Wilderness Coalition v. U.S. Dept. of Energy (California Wilderness)*, 631 F.3d 1072, 1085 (9th Cir. 2011); *Perroton v. Gray (In re Perroton)*, 958 F.2d 889, 894 (9th Cir. 1992).

[12] *Morton*, 417 U.S. at 551. *See also In re Perroton*, 958 F.2d 889 at 894.

[13] *See* United States Department of Energy - Bonneville Power Administration, 128 FERC ¶ 61,057 at P 2 (2009) (Declaratory Order), *order on reh'g*, 135 FERC ¶ 61,023 (2011). *See also, Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005).

4. As a result of neglecting to recognize Bonneville's reliability obligations and statutory requirements under the ESA and CWA in overgeneration conditions, the Commission erred in finding that Bonneville's actions were unduly discriminatory and preferential.[14]

5. The December 7 Order is contrary to the Commission's approval of overgeneration tariff provisions and protocols that include environmental must-run provisions for hydroelectric resources that are very similar to Bonneville's Interim ER.[15]

6. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as it concludes that Bonneville is providing unduly discriminatory and preferential transmission service to Petitioners.[16]

    a. The Commission's determination was not supported by facts and evidence that Bonneville has treated similarly-situated entities in a dissimilar manner.[17]

7. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as the Commission solely viewed the Interim ER as a transmission issue, as there is no evidence in the record indicating that Bonneville promulgated the Interim ER because of inadequate transmission capacity.[18]

8. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence because the record lacks the documentation or record evidence necessary to support the Commission's findings that Bonneville is providing unduly and preferential transmission service.[19]

    a. There is no evidence as to the transmission service that Bonneville provides itself for purposes of determining comparability.

        (i) The Commission erroneously relied on unsupported losses of Production Tax Credits ("PTCs") and Renewable Energy Credits ("RECs") to establish non-comparable transmission service.

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[14] *Transmission Agency of Northern California v. FERC (TANC)*, 628 F.3d 538, 549 (D.C. Cir. 2010); *Sacramento Municipal Utility District v. FERC (SMUD)*, 474 F.3d 797, 802 (D.C. Cir. 2007).

[15] *See* California ISO Tariff section 7.8 ("Management Of Overgeneration Conditions") and California ISO Operating Procedure No. 2390 ("Overgeneration").

[16] *TANC*, 628 F.3d at 549; *SMUD*, 474 F.3d 797 at 802.

[17] *See SMUD*, 474 F.3d 797 at 802 (in order for SMUD to demonstrate that there was undue discrimination, it had to demonstrate that it was similarly situated to Western – the entity receiving the allegedly preferential treatment).

[18] *Mo. Pub. Serv. Comm'n v. FERC (MPSC)*, 337 F.3d 1066, 1070 (D.C. Cir. 2003); *City of Centralia, Wash. v. FERC (Centralia)*, 213 F.3d 742, 749-50 (D.C. Cir. 2000); *Electricity Consumers Resource Council v. FERC (Electricity Consumers Resource Council)*, 747 F.2d 1511, 1518 (D.C. Cir. 1984); N.Y. Indep. Sys. Operator, Inc. (NYISO), 135 FERC ¶ 61,170 at P 86 (2011).

[19] *Id.*

(ii) The Commission failed to consider the financial impacts of the Interim ER to other Bonneville customers for purposes of considering comparable transmission service.

b. The Commission failed to develop a record containing the actual LGIAs that had a direct bearing on the Commission's conclusions.

c. The Commission failed to develop a record of evidence demonstrating harm suffered by the Petitioners that would support the Commission's exercise of authority under section 211A.

9. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as it failed to reconcile the exercise of the Commission's discretionary authority under section 211A with Bonneville's obligations to comply with the ESA.[20]

10. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as it failed to respond to objections and address contrary evidence in more than a cursory fashion.[21]

11. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as it provides a prospective remedy on the basis of an expiring policy.[22]

12. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as it is not tailored to the alleged harm.[23]

13. The December 7 Order is an abuse of the Commission's discretion because the Commission did not properly consider the appeals of the entire Interim ER pending before the Ninth Circuit.[24]

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[20] *See e.g., American Rivers v. U.S. Army Corps of Eng'rs (American Rivers)*, 271 F. Supp. 2d 230, 251 (D.D.C. 2003).

[21] *PSEG Energy Res. & Trade LLC v. FERC*, 10-1103, 2011 WL 6450762 (D.C. Cir. Dec. 23, 2011); *See also Canadian Ass'n of Petroleum Producers v. FERC (Canadian Ass'n)*, 254 F.3d 289, 299 (D.C.Cir. 2001).

[22] *See PPL Wallingford Energy LLC v. FERC (PPL Wallingford)*, 419 F.3d 1194, 1198 (D.C. Cir. 2005)(citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). *See also Electricity Consumers Resource Council*, 747 F.2d 1513-14, 1515 (citing *Burlington*, 371 U.S. 156 at 168).

[23] *See e.g., Entergy Servs., Inc.*, 134 FERC ¶ 61,075 at P 31 (2011).

[24] *See e.g., Town of Edinburgh, Indiana v. Indiana Mun. Power Agency*, 132 FERC ¶ 61,102 at P 21 (2010).

III. SPECIFICATION OF ERRORS

In accordance with 18 C.F.R. § 385.713(c)(1), Joint Intervenors specify the following errors:

1. The Commission erred in not considering Bonneville's other statutory obligations under the Northwest Power Act, the Transmission Act, the Preference Act, the Bonneville Project Act, the ESA and the CWA in determining whether Bonneville is providing non-comparable service to the Petitioners.

2. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as the Commission, in exercising authority under section 211A, preempted Bonneville's statutory obligations.

3. The Commission erred in citing to the *pro forma* OATT, a standard that is not immediately applicable to Bonneville, as an option available to Bonneville for providing transmission service on terms and conditions that are comparable and not unduly discriminatory, and using the *pro forma* OATT as the baseline for determining whether Bonneville is providing comparable transmission service.

4. The December 7 Order is arbitrary, capricious, not the product of reasoned decision-making and not supported by substantial evidence insofar as the Commission, in exercising authority under section 211A, did not reconcile Bonneville's obligations under the ESA.

5. The December 7 Order is contrary to the Commission's approval of overgeneration tariff provisions and protocols that include environmental must-run provisions for hydroelectric resources that are very similar to Bonneville's Interim ER.

6. The Commission erred in concluding that Bonneville is providing unduly discriminatory and preferential transmission service to Petitioners without supportive facts and evidence demonstrating that non-federal renewable or wind resources are similarly situated to federal hydroelectric resources in the circumstances set forth in the Interim ER.

7. The Commission erred in failing to analyze generation curtailment under Interim ER as a real time operations protocol to deal with overgeneration conditions as opposed to a transmission service issue; in viewing the Interim ER as a transmission issue, the Commission confused the curtailment of transmission service under the *pro forma* OATT with the curtailment of generation under an overgeneration or reliability coordination protocol like the Interim ER.

8. The Commission erred in issuing a decision based on an inadequate record. The Commission should grant rehearing and deny the petition or order supplemental briefing to establish an adequate record for determining whether the Interim ER creates non-comparable transmission service that is unduly discriminatory and preferential.

9. The Commission erred in the exercise of its discretion under section 211A without giving deference and due consideration to Bonneville's obligations under the ESA.

10. The Commission erred in failing to respond to objections and address contrary evidence in more than a cursory fashion.

11. The Commission erred in issuing an order based on an interim policy that will expire on March 30, 2012.

12. The Commission erred in concluding that losses of PTCs and RECs demonstrates harm to wind generators and justifies the exercise of section 211A to preserve the sanctity of potential PTCs or RECs.

13. The Commission erred in issuing an order prematurely while a court proceeding was ongoing and parties were still negotiating a settlement within the region.

IV. ARGUMENT

A. The December 7 Order Failed to Apply the Proper Standard to Determine Comparability.

In the December 7 Order, the Commission failed to apply the proper standard set forth in section 211A to address alleged instances of non-comparable transmission service. This error has led the Commission to provide relief where the record has not established that such relief is warranted, a decision that is arbitrary and capricious and in violation of the law. Such action provides the grounds for granting the rehearing request and revising the December 7 Order because it is well settled that the Commission's orders must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[25] Here, as in any other instance, the arbitrary and capricious standard requires the Commission to engage in reasoned decision-making in order to be upheld on review.[26] Indeed, had the Commission used the proper standard that Congress had prescribed in section 211A, due process would have been ensured and a more

[25] 5 U.S.C. § 706(2)(A).

[26] *See PPL Wallingford,* 419 F.3d 1194 at 1198 (citing *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43). *See also Electricity Consumers Resource Council,* 747 F.2d at 1513-14, 1515 (finding that "the record lacks substantial evidence to support the [chosen rate methodology], and that the Commission's stated reasons for its approval are almost wholly conclusory, largely short-sighted and patently unpersuasive")(citing *Burlington,* 371 U.S. at 168).

thorough evaluation would have led to the conclusion that the Interim ER comports with that standard.

1. The Commission Failed to Apply the Proper Standard for Section 211A.

The Commission's December 7 Order rests on the fundamentally flawed premise that the Commission may exercise its authority under section 211A in a vacuum, as if Bonneville's various statutory responsibilities do not exist and do not affect the transmission service that Bonneville provides itself and which forms the basis for the comparability analysis. Congress has mandated that the Commission may exercise its authority under section 211A to ensure transmission service on terms and conditions that are "comparable to those under which the unregulated transmitting utility provides transmission services to itself."[27] Before issuing an order under section 211A, therefore, the Commission must start with an inquiry into the transmission service that the transmitting utility provides itself. The Commission in the December 7 Order failed to do this when it stated that the Commission:

> acknowledges the difficulties facing all sides of this debate. *In particular, we recognize the dilemma that Bonneville faces in having to navigate among many competing obligations,* including the protection of endangered species, the provision of low cost power to its preference customers, and the integration of significant amounts of variable energy resources. *While we recognize Bonneville's efforts to balance these competing obligations through the Environmental Redispatch Policy, as explained below, we find based on the record before us that this policy significantly diminishes open access to transmission, and results in Bonneville providing transmission service to others on terms and conditions that are not comparable to those it provides itself.* For these reasons, we find it appropriate to act under FPA section 211A.[28]

The Commission's analysis is flawed and inconsistent with the terms of FPA section 211A. FPA section 211A provides in relevant part that:

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[27] 16 U.S.C. § 824j-1(b).

[28] December 7 Order at P 33 (emphases added).

> the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services—
> **(1)** at rates that are comparable to those that the unregulated transmitting utility charges itself; and
> **(2)** on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.[29]

By its terms, the analysis under section 211A involves a comparison of the transmission services, rates, and terms and conditions that Bonneville provides to third parties *with* the transmission services, rates, and terms and conditions that Bonneville provides to "itself." The comparison to Bonneville "itself" must include recognition of the legal and statutory context in which Bonneville (a) operates the federal hydroelectric resources and (b) provides service over its transmission system.

Instead, with a seemingly cursory review, the Commission exercises its authority under section 211A without ever establishing the proper baseline for comparison of transmission service. Notably, the Commission's December 7 Order assumes that the comparability standard is based not on the terms and conditions that Bonneville provides transmission service to itself, but on comparability terms that would be applicable to a utility that does not bear Bonneville's varied statutory responsibilities and that does not operate under the specific statutes that govern Bonneville's operations, including the use of its transmission system.

Before exercising authority under section 211A, the Commission had an obligation to review Bonneville's statutory responsibilities for providing transmission service to determine a baseline for comparability. These statutory responsibilities place burdens on Bonneville's provision of transmission service to itself and to others. Indeed, it is axiomatic that before issuing an order requiring a transmitting utility to take action to provide comparable service, the

[29] 16 U.S.C. § 824j-1(b) (2006).

Commission must first find that non-comparable terms and conditions for transmission service exist.[30] This required the Commission to look beyond the transmission of hydropower and consider the full range of resources for which Bonneville provides transmission service. The Commission erred in failing to consider the statutory mandates that dictate how Bonneville must provide transmission service. That error then tainted the Commission's follow-up analysis of the standards of comparability that are applicable to "itself."[31]

Bonneville's statutory mandates are numerous, far reaching and, therefore, differentiate the agency from any other power generator and transmission provider in the United States. Congress has addressed Bonneville's transmission obligations in several statutory mandates including the Federal Columbia River Transmission System Act ("Transmission Act"),[32] the Pacific Northwest Electric Power and Conservation Act ("Northwest Power Act"),[33] the Bonneville Project Act[34], and the Northwest Consumer Preference Act ("Preference Act").[35] To determine the comparability of terms and conditions of transmission service, the Commission should have first examined how Congress has required Bonneville to operate the FCRTS to meet explicit Congressional mandates. Specifically, the Commission should have started its inquiry

[30] As discussed *infra*, such finding must also relate to conditions that will persist in the future. The expiration of the Interim ER raises a question whether the Commission's action is warranted prospectively in light of the limited duration of the Interim ER.

[31] Joint Intervenors note that the errors discussed in this section regarding the Commission's section 211A analysis are in addition to the Commission's error in finding that the curtailment under the Interim ER is curtailment of transmission service. *See* Section IV.C., *infra*. As explained in more detail in that section, the record indicates that there is no curtailment of transmission service as that term is defined in the *pro forma* OATT. In addition, the Commission's finding that curtailment under the Interim ER is curtailment of transmission service is inconsistent with the approved overgeneration protocols of other regional transmission providers which provide for curtailing generation consistent with environmental must-run requirements. *See* Section IV.D., *infra*.

[32] *Transmission Act*, 16 U.S.C. §§ 838, 838h (1974).

[33] *Northwest Power Act*, 16 U.S.C. § 839.

[34] *Bonneville Project Act of 1937*, 16 U.S.C. § 832.

[35] *Preference Act*, 16 U.S.C. § 837(e).

with a review of the statutory provisions of the Transmission Act to determine the baseline conditions upon which Bonneville provides transmission service to itself.[36] For example, in section 6 of the Transmission Act, the Administrator is required to make transmission capacity available to all utilities on a fair and non-discriminatory basis.[37] Similar provisions are also found in section 6 of the Preference Act.[38] The standard for comparability purposes is therefore grounded in how Congress has instructed the Administrator to operate the federal transmission system.

Had the Commission used the proper section 211A standard and considered the fundamental obligations that Bonneville must meet pursuant to Congressional mandates, a different follow-up analysis would have ensued. After establishing the proper baseline, the focus would have then shifted to whether the Interim ER results in transmission service that is fair and non-discriminatory. The ROD is abundantly clear that the Petitioners and other similarly situated wind generators are treated fairly, if not afforded preferential transmission service, because they are the last non-federal resource that Bonneville interrupts when rare low load conditions are present. In fact, the record, as supplemented by Bonneville, reveals that Bonneville's own (*federal*) non-hydropower resources are to be interrupted before the wind generation resources' schedules are interrupted.[39]

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[36] The inquiry should not end with the Transmission Act. Other organic statutes including the Preference Act, the Northwest Power Act, and the Bonneville Project Act should have been consulted to develop a more comprehensive view of Bonneville's responsibilities.

[37] *Transmission Act*, 16 U.S.C. § 838d.

[38] *Preference Act*, 16 U.S.C. § 837h.

[39] Conceivably, the Commission's order could be read to require Bonneville to develop tariff provisions that would interrupt the wind generator's schedules more frequently than what is currently provided under the Interim ER.

Bonneville's organic statutes impose numerous requirements and from these requirements emerges its responsibility as a Balancing Authority ("BA") to establish a hierarchy for dispatching resources. Yet, without considering the organic statutes the Commission essentially concluded that a 24 MW wind farm[40] is similarly situated to the 1,189 MW Bonneville dam and the responsibilities that Bonneville may have to manage its own resources is irrelevant in the exercise of its authority under section 211A.[41]

As a general matter, comparability in the framework of transmission service must recognize different operational aspects and requirements as a foundation for operational reliability before determining whether treatment is fair or discriminatory. Indeed, in determining comparability for purposes of issuing an order under section 211A, the context of a transmission provider's operations is of paramount importance and clearly what Congress intended when it restricted the Commission in issuing an order that prescribes terms and conditions on comparable terms to what the transmitting utility provides ***itself***. For Bonneville, the analysis is even more complex because of the extensive reach of its organic statutes. Nonetheless, the ***starting*** point for this analysis should begin with an inquiry into Bonneville's organic statutes and consideration of its operational mandates pursuant to Federal environmental laws. Had the Commission started from this position in its analysis, it would have arrived at a decision that denied the Petitioners' request.

The Commission instead seeks to pound a square peg into a round hole by indicating that Bonneville could meet the requirements the Commission is imposing under section 211A by adopting the *pro forma* OATT that the Commission promulgated pursuant to authority that does

[40] *See* http://www.iberdrolarenewables.us/cs_klondike.html. The Klondike wind farm is one of the projects referenced in Attachment A of the underlying Petition.

[41] December 7 Order at P 62.

not directly regulate transmitting utilities.[42] Notably, in footnote 101 of the December 7 Order, the Commission explains that filing the Commission's *pro forma* OATT would ensure conditions that are comparable and not unduly discriminatory:

> One option available to Bonneville is the Commission's *pro forma* OATT, which the Commission has already found provides transmission service on terms and conditions that are comparable and not unduly discriminatory. *See*, *e.g.*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30, 281-87; Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 191. In the safe harbor context, the Commission has established procedures to consider whether variations to the *pro forma* OATT substantially conform with or are superior to the requirements of Order Nos. 888 and 890. However, under section 211A, the Commission would consider only whether variations from the *pro forma* OATT result in the transmitting utility providing transmission services on terms and conditions that are comparable to those under which it provides service to itself and that are not unduly discriminatory or preferential.[43]

Here, the Commission erred by suggesting a standard that is not immediately applicable to transmitting utilities as the baseline for determining whether Bonneville is providing comparable transmission service. If, as an initial matter, Bonneville is not required to file a *pro forma* OATT, then the remedy for ensuring comparable terms and conditions for transmission service to a third party cannot be this inapplicable standard. Furthermore, if section 211A allows the Commission to issue an order to a transmitting utility to provide transmission service on terms that are comparable to the terms and conditions it provides itself, it does not follow that ordering a transmitting utility without a *pro forma* OATT on file to file a *pro forma* OATT

[42] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. [Regs. Preambles 1996-2000] ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part, sub nom., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002) ("Order No. 888"). Petitioners cite to Order No. 888 at p. 31,676, where the Commission concluded that its "discretion is at its zenith in fashioning remedies for undue discrimination." In their Petition, the Petitioners concede that FERC in Order No. 888 "did not have the authority to directly require non-public utilities to comply with its open access rules." Petition at 22.

[43] December 7 Order at P 65, n.101.

would ensure that the transmitting utility is providing transmission service on the same terms and conditions it is providing itself. To do so, as in this case, is arbitrary and capricious.[44]

The Commission's suggestion that Bonneville file a *pro forma* OATT reveals that the Commission has missed the fundamental obligation to consider the terms and conditions under which Bonneville provides transmission service to itself.[45] Indeed, by leaping to the conclusion that filing the Commission's approved *pro forma* OATT would remedy the concerns of the wind generators, the Commission confirms that it did not consider the statutory obligation in section 211A to consider the terms and conditions upon which Bonneville provides transmission service to itself.

2. The Commission Could Not Preempt Bonneville's Statutory Obligations in Exercising Authority under Section 211A.

By failing to use the proper standard for determining the baseline for comparable service, the Commission essentially read section 211A to trump or repeal any other statutory requirements that govern Bonneville's operations. However, nothing in section 211A suggests that the Commission can preempt Bonneville's other statutory obligations with a section 211A order. There is no evidence either in the statutory language of section 211A or the accompanying legislative history that Congress intended for section 211A to preempt other authorities or that section 211A may be read in isolation from all other statutory mandates.

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[44] Indeed, as an indication of the numerous fundamental errors in the Commission's analysis, even if Bonneville were to adopt all of the provisions of the Commission's *pro forma* OATT, this would *not* address the curtailment issue the Commission criticized with respect to the Interim ER. *See* Section IV.C., *infra*.

[45] It is of no consequence that the Commission highlights the "option" of filing a *pro forma* OATT; the remainder of the footnote clearly requires Bonneville to explain *variations* from the *pro forma* OATT. In other words, the baseline for comparison purposes is the *pro forma* OATT.

It is well settled that statutory construction is a "holistic endeavor."[46] Principles of statutory interpretation dictate that statutory language must be read in its proper context, not viewed in isolation.[47] Thus, statutes should be read in concert, not in conflict with other statutes, so as to give full effect to each, unless there is a "clearly expressed congressional intention to the contrary."[48] Moreover, rather than focus only on the statutory text itself, it is appropriate to examine the statute's relationship to other statutes. The United States Supreme Court has held that a court should choose a method of statutory interpretation that is "most compatible with the surrounding body of law into which the provision must be integrated …."[49]

In meeting its responsibilities under the FPA, the Commission must respect other federal laws and statutes. Indeed, in circumstances where the provisions of the FPA clearly implicate other federal laws and statutes, the FPA explicitly provides that its provisions are not intended to affect or supersede, *e.g.*, the antitrust laws[50] or the requirements of an environmental law of the United States.[51] As the Petitioners themselves have recognized, "Bonneville's statutes and the Commission's FPA authorities can and should be implemented in a manner that gives effect to each."[52] The Commission's obligation to give effect to other statutory requirements applicable to Bonneville while implementing it jurisdictional responsibilities also is reflected in the judicial review of Commission orders. For example the United States Supreme Court has stated that:

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[46] *Koons Buick*, 543 U.S. at 60.

[47] *Id. See also FDA*, 529 U.S. at 132–33; *California Wilderness*, 631 F.3d at 1085.

[48] *Morton*, 417 U.S. at 551. *See also In re Perroton*, 958 F.2d at 894, 896.

[49] *Green*, 490 U.S. at 528 (Scalia, J., concurring).

[50] *See* 16 U.S.C. § 824k(e) (2006). Section 824k is § 212 of the FPA.

[51] *See* 16 U.S.C. § 824p(j) (2006). Section 824p is § 216 of the FPA (regarding the siting of interstate transmission facilities).

[52] *See* Petitioners' Motion for Leave to Answer and Answer, Docket No. EL11-44-000, (filed August 3, 2011) at 17.

> [t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . . The intention of the legislature to repeal 'must be clear and manifest.'"[53]

Despite this precedent, the Commission ignored Bonneville's long-standing statutory obligations in its December 7 Order. This is particularly alarming given the Commission's instruction to Bonneville to reconcile the Commission's exercise of its authority with Bonneville's statutory obligations after it had refused to do so itself.[54] The Commission clearly overreached its authority in this case, and, even if the Commission's authority had been sufficient, it should have used its discretion to decline to exercise it.[55] Fundamentally, comparability for Bonneville cannot be determined or established unless the Commission fully examines how Bonneville must operate the FCRTS. The obligation to reconcile existing statutory obligations with ungrounded Commission orders should fall not to Bonneville, but to the Commission to determine comparability in the context of those statutory obligations *before* it exercises its section 211A authority. The Commission simply does not have the authority to ignore, with just a fleeting acknowledgement, Bonneville's statutory obligations.

[53] *Morton*, 417 U.S. at 551 (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

[54] December 7 Order at P 65.

[55] Congress has given the Commission the ability and discretion not to act when a petition is filed by substituting the more permissive "may" in section 211A(b) instead of the mandatory "shall" that Congress has used when it imposes a mandatory obligation on an agency.

Unfortunately, that is precisely what happened here. The Commission inappropriately viewed section 211A of the FPA in isolation, without discussing in any meaningful way, the other statutes that are relevant to reaching a sound decision in this case.[56] Moreover, the Commission failed to analyze Bonneville's statutory authorities and give deference to the Administrator's determinations pursuant to those statutory obligations in order to give full effect to the obligations of section 211A to determine comparability.[57] This oversight further magnified what was already a critical error in the Commission's analysis that yielded an arbitrary and capricious decision. The mere mention of Bonneville's organic statutes is not sufficient. Furthermore, deference to the Commission's interpretation of section 211A does not immunize the December 7 Order.

B. The Commission Failed to Establish that Bonneville's Actions Were Unduly Discriminatory and Preferential.

In exercising its jurisdiction under FPA section 211A, the Commission must recognize Bonneville's reliability obligations as well as Bonneville's statutory requirements under the ESA and CWA in overgeneration conditions. Specifically, the Commission's analysis is flawed because it ignores that in certain overgeneration or low load conditions (and after taking all reasonable means to alleviate the overgeneration condition) federal hydroelectric generation is "environmental must-run" generation. The central purpose of the Interim ER is to lay out the steps Bonneville will take in addressing overgeneration (or minimum generation emergency) conditions and to explain that in certain extreme conditions and after all other reasonable steps

[56] Rather than interpret section 211A in concert with the other relevant statutes, the Commission effectively trumped those other statutes under section 211A's requirement that service may not be discriminatory, without explaining how or why the objectives of 211A override the objectives of the other statutes.

[57] Nothing in the plain text of section 211A or the legislative history accompanying it suggests that the Commission was empowered to second-guess the Administrator's interpretation of the organic statutes that govern Bonneville's operations.

have been taken to alleviate the condition, the federal hydroelectric generation on the FCRPS is environmental must-run generation. Bonneville's federal hydroelectric generation must run in order to avoid violating Bonneville's requirements and responsibilities under the ESA and CWA.

Referencing the Interim ER and other precedent, Joint Intervenors explained Bonneville's responsibilities under the ESA and CWA throughout their comments on the Petition.[58] There can be no doubt that Bonneville's responsibilities under the ESA and CWA are clearly established in the record in this proceeding. The Interim ER provides, in relevant part, that:

> The Administrator and other Federal agencies responsible for managing, operating, or regulating hydroelectric projects on the Columbia River and its tributaries must exercise their responsibilities "in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated." The Administrator must act "consistent with" the Pacific Northwest Electric Power Planning and Conservation Council's ("Council") Fish and Wildlife Program ("the program"). The Administrator and Federal water managers must take the program "into account . . . to the fullest extent practicable" at each relevant stage of decision making.
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> High flows create specific fish-protection needs. When water is spilled over a spillway at a dam, it creates bubbles of air in the water. As the water plunges into the deep pool at the base of the dam, the air bubbles carried to a certain depth are subjected to hydrostatic pressure that forces them to dissolve into the water. The amount of Total Dissolved Gas ("TDG") generated varies with water temperature, spill volumes, and spillway plunge depth.
>
> TDG is a serious concern in the Columbia River because excessive TDG levels threaten the health of the aquatic ecosystem, and salmonids in particular. Excessive TDG produces physiological problems known as gas bubble trauma that in extreme cases can be fatal to fish. *The states of Washington and Oregon have delegated authority to set TDG levels under the CWA. Currently, the water quality standard for TDG levels is 110% for both states based on biological considerations.*
>
> *The water management offices of the Corps, Bureau, and BPA plan and operate the hydroelectric facilities. These agencies determine the volume and pathway (generator, spillway, removable spillway weir, etc.) of water released at hydroelectric projects, with the goal of operating FCRPS projects consistent with state TDG standards.*

[58] Comments of Joint Intervenors, Docket No. EL11-44-000 (filed July 19, 2011) at pp. 16-20.

> For a number of years, the FCRPS Biological Opinions ("BiOps") have included flow augmentation and spill operations for fish passage to benefit ESA listed fish at the Corps' mainstem Columbia and Snake River projects. The spill operations can sometimes generate TDG levels in excess of the 110% TDG level. Consequently, Oregon and Washington provide "waivers" with criteria for generating TDG for a 12 hour average up to 120% at the project tailrace. Washington has an additional limit of 115% at the project forebay when conducting operations to benefit ESA listed fish during the months of April to August. These waiver levels are designed to allow some spill flexibility for fish passage while limiting biological harm. TDG constraints remain at 110% outside the fish migration period.
>
> *In considering the ecological objectives of the ESA and CWA, operations are planned to comply with the ESA Biological Opinions ("BiOps") and applicable state and tribal water quality standards, to the extent practicable.* For Spring 2011, these spill and water quality constraints have also been adopted by court order. On March 24, 2011, Judge James A. Redden issued a Court Order in the on-going BiOp litigation mandating that 2011 spring fish operations be conducted as set forth in the 2011 Spring Fish Operation Plan ("FOP").[59]

The Commission offers no advice or guidance on how Bonneville can comply with the December 7 Order while not also violating the requirements of the ESA and CWA in overgeneration conditions.[60] If Bonneville were to curtail all generation regardless of fuel source on a pro-rata basis under the Interim ER, under certain low-load or emergency overgeneration conditions Bonneville would be forced to violate its ESA and CWA requirements (*i.e.*, Bonneville would have to spill water over the federal dams and violate TDG requirements). The Commission completely ignores the environmental must-run nature of the federal hydroelectric resources under certain overgeneration conditions as specified in the Interim ER. The Commission never contemplates that the need for Bonneville to meet its environmental

[59] ROD at 5-7 (citations omitted, emphases added).

[60] *See* December 7 Order at P 65. As discussed in Section IV.D., *infra*, the Interim ER appropriately is characterized as a minimum generation emergency protocol (or an emergency reliability coordination protocol) as opposed to a term and condition of transmission service under the Commission's *pro forma* OATT. Contrary to the December 7 Order, the Interim ER does not involve curtailment of transmission service under the Commission's *pro forma* OATT. Consequently, the Commission is in error when it suggests that the alleged discriminatory and non-comparable terms and conditions of service under the Interim ER would be remedied by Bonneville filing a *pro forma* OATT with the Commission. *See* December 7 Order at P 65, n.101.

requirements reasonably supports the difference in curtailment priorities such that the Interim ER is not "unduly discriminatory or preferential."[61]

In order to demonstrate that Bonneville's Interim ER is unduly discriminatory or preferential under section 211A, the determination must be supported by facts and evidence that Bonneville has treated similarly situated entities in a dissimilar manner without due cause.[62] In other words, the Commission must do more than merely point out that there is a difference in treatment. The Commission must demonstrate based on record evidence that the difference in treatment is unreasonable or arbitrary. There is no undue discrimination if the renewable generators are not similarly situated to Bonneville's federal hydroelectric resources during overgeneration conditions.[63] In the December 7 Order, the Commission found that "non-Federal renewable resources are similarly-situated to Federal hydroelectric and thermal resources for purposes of transmission curtailments *because they all take firm transmission service*."[64] There are multiple errors and deficiencies in the Commission's statement (*e.g.*, the curtailment of generation under the Interim ER is not curtailment of transmission service under the Commission's *pro forma* OATT, and the Commission's finding is inconsistent with its own precedent). However, for the purposes of this section, the important error is the Commission's failure to recognize Bonneville's need to meet its environmental obligations under the ESA and CWA in overgeneration conditions.

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[61] *See* 16 U.S.C. § 824j-1(b)(2) (2006).

[62] *See SMUD*, 474 F.3d at 802 (in order for SMUD to demonstrate that there was undue discrimination, it had to demonstrate that it was similarly situated to Western – the entity receiving the allegedly preferential treatment).

[63] *See TANC*, 628 F.3d at 549 (indicating that "[t]he court will not find a Commission determination to be unduly discriminatory if the entity claiming discrimination is not similarly situated to others" (citing to *SMUD*, 474 F.3d at 802)).

[64] December 7 Order at P 62 (emphasis added).

The record clearly indicates that in certain emergency overgeneration (or minimum generation emergency) conditions, federal hydroelectric generation must run in order to comply with ESA and CWA requirements. This is the relevant distinction that supports the difference in curtailment priorities under the Interim ER. This difference in treatment is reasonable, justified and not unduly discriminatory.

While the Commission is correct that the wind generators and federal hydroelectric resources are both transmission customers on Bonneville's transmission system, they are not similarly situated when it comes to meeting Bonneville's environmental responsibilities. Even with a dearth of evidence in the record, it was abundantly clear that the federal hydroelectric resources in Bonneville's BAA are subject to the environmental and reliability responsibilities that are not applicable to the wind generators.

The Interim ER plainly indicates that after exhausting all reasonable means of reducing generation in Bonneville's BAA to manage overgeneration conditions, there still are limited periods in which generation must be curtailed to maintain the load and generation balance in the BAA. As noted previously, the record is also clear that *only* Bonneville's federal hydroelectric resources can comply with the applicable CWA and ESA requirements for TDG; such units must run in order to not violate the CWA and ESA requirements.

Consequently, after exhausting all other means to reduce generation, it is not unduly discriminatory or preferential for Bonneville to develop an overgeneration protocol that is consistent with environmental must-run requirements. This is precisely what Bonneville has done in promulgating the Interim ER protocol. It is a reasonable means of meeting the reliability or balancing obligations in Bonneville's BAA while also meeting Bonneville's environmental

requirements under the CWA and ESA.[65] To do otherwise, is to require Bonneville to violate the CWA and ESA in circumstances where it is unreasonable to do so (*i.e.*, when it is possible to further reduce non-hydropower generation that is not subject to environmental must-run obligations).[66]

The Commission's failure to understand the foundation of the Interim ER compounds the errors in the December 7 Order. In paragraph 35, the Commission demonstrates that it solely views the Interim ER as a transmission issue, alluding to an unsupported conclusion that inadequate transmission capacity led to the injury alleged by the Petitioners. Specifically, the Commission writes:

> Finally, we note that the instant proceeding presents a clear example of the importance of transmission. Adequate transmission capacity is necessary to relieve constraints and reliably integrate new generation resources. With additional transmission or comparable alternatives, Bonneville may have the flexibility necessary to meet all of its obligations, including open access, and fully integrate the variable energy resources seeking to access its transmission system.[67]

This statement simply misses a basic and essential fact that lies at the heart of the Interim ER; it is a policy that is invoked when there is ***low load*** and an abundance of generation. Indeed, the only affidavit that was submitted by the Petitioners explained that transmission capacity was available when the Interim ER was invoked on May 18th.[68] There is simply no evidence in the

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[65] It also is consistent with overgeneration provisions approved by the Commission for other regional transmission providers. *See* Section IV.D., *infra*.

[66] Joint Intervenors note that the Interim ER does not insulate federal hydroelectric resources from curtailment. It is possible that an overgeneration condition could be so severe that reducing all non-federal generation to the specified minimum generation levels does not reduce the overgeneration condition and that curtailment of federal hydroelectric resources is required in order to maintain system reliability. The Interim ER provides, for example, that "system reliability is paramount and [that Bonneville] will not enact Environmental Redispatch if a determination is made that there will be negative impacts to reliability." ROD at 74.

[67] December 7 Order at P 35.

[68] *See* Affidavit of Stephen Swain, Attachment B, Petition.

record indicating that Bonneville promulgated the Interim ER because of inadequate transmission capacity.

In terms of an undue discrimination analysis under FPA section 211A, the non-federal renewable or wind resources cannot be used to meet Bonneville's environmental requirements regarding TDG under the CWA and ESA during overgeneration. Consequently, the difference in curtailment priorities as described in the Interim ER in overgeneration conditions is not unduly discriminatory or preferential under FPA section 211A. In other words, it is not unduly discriminatory or preferential for Bonneville to develop an overgeneration protocol that acknowledges Bonneville's environmental and reliability responsibilities during overgeneration conditions and that reflects the environmental must-run nature of Bonneville's federal hydroelectric resources in certain conditions.

As noted below, even if curtailment under the Interim ER were a transmission service or transmission constraint issue (it is not) and even if the transmission curtailment provisions of the Commission's *pro forma* OATT were applicable (they are not), reasonable distinctions in curtailment priorities exist under the *pro forma* OATT (*i.e.*, a transmission provider is allowed to distinguish between curtailing transmission transactions that are effective in relieving the constraint). In short, the Commission erred in finding that non-federal renewable or wind resources are similarly situated to federal hydroelectric resources in the circumstances set forth in the Interim ER. Specifically, Joint Intervenors respectfully ask that the Commission reverse its findings in the December 7 Order that non-federal renewable resources are similarly situated to Federal hydroelectric resources in meeting Bonneville's environmental and reliability responsibilities during overgeneration conditions.

C. The Commission Erred in Finding That the Curtailment Under the Interim ER is the Curtailment of Transmission Service.

Although the preponderance of the evidence that is present in this docket illustrates that Bonneville is endeavoring to address environmental and reliability concerns within its BAA, the Commission has narrowed its focus nonetheless to portray this issue as a transmission matter.[69] Shockingly, in the December 7 Order, the Commission finds that "non-Federal renewable resources are similarly-situated to Federal hydroelectric and thermal resources *for purposes of transmission curtailments* because they all take firm transmission service."[70] The Commission's finding is in error; the curtailment under the Interim ER is not curtailment of transmission service. Presumably, the Commission's directive is using the term "transmission curtailment" as set forth in the Commission's *pro forma* OATT. For example, the Commission states that:

> While we will not specify *the precise terms and conditions that must be set forth in Bonneville's OATT* in order to remedy the noncomparable service that results from its Environmental Redispatch Policy, pursuant to section 211A Bonneville must address the comparability concerns raised here with respect to this policy in a manner that provides for transmission service on terms and conditions that are comparable to those under which Bonneville provides transmission service to itself and that are not unduly discriminatory or preferential.[71]

The Commission goes on to note that "one option" for Bonneville to comply with the Commission's December 7 Order is the *pro forma* OATT.[72]

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[69] As discussed *supra*, even if this case could be considered solely a transmission case, the Commission has misapplied the standard set forth in section 211A.

[70] December 7 Order at P 62 (emphasis added).

[71] December 7 Order at P 65 (emphasis added).

[72] *Id*. at P 65, n.101. As discussed, *supra*, the Commission's suggestion of using the *pro forma* OATT underscores that the wrong standard was used in determining comparability of transmission service Bonneville provides itself.

Under the Commission's Order No. 890[73] *pro forma* OATT, "curtailment" is defined as "[a] reduction in firm or non-firm transmission service in response to a transfer capability shortage as a result of system reliability conditions."[74] Bonneville's action under the Interim ER (*i.e.*, curtailing renewable generating resources as a last resort in emergency overgeneration conditions and meeting scheduled deliveries with Federal hydropower at zero cost to non-federal renewable generators), does not involve reducing "firm or non-firm transmission service in response to a transfer capability shortage as a result of system reliability conditions." Overgeneration conditions often occur in low-load periods when there is ample transmission transfer capability. Moreover, the evidence in the record before the Commission clearly indicates that Bonneville does not reduce transmission service or schedules under the Interim ER.[75] The Commission's finding that Bonneville curtails "transmission service" under the Interim ER is, therefore, in error.

The Commission's error also demonstrates the unreasonableness of the Commission's suggestion that Bonneville could remedy its purported non-comparable and unduly discriminatory behavior by using (or filing) the Commission's *pro-forma* OATT.[76] The

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[73] Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 FR 12266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, 73 FR 2984 (January 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) ("Order No. 890").

[74] *See* section 1.8 of the Commission's *pro-forma* OATT. *See also* section 1.8 of Bonneville's OATT.

[75] *See* Interim ER at 43 (explaining that: (i) Environmental Redispatch is not a curtailment of transmission service; (ii) transmission schedules are met; and (iii) Environmental Redispatch is a limitation on the ability of a generator interconnected to the FCRTS to generate and does not affect a transmission customer's transmission rights).

[76] December 7 Order at P 65, n.101. As discussed *supra*, the suggested remedy of filing a *pro forma* OATT reveals how the Commission has missed its most elementary responsibilities under section 211A to consider the terms and conditions under which the transmitting utility provides transmission service to itself.

provisions regarding transmission "curtailment" as defined in the Commission's *pro forma* OATT have no bearing upon the generation curtailment in emergency overgeneration conditions as set forth in the Interim ER, again highlighting the error in turning to the *pro forma* OATT as the remedy. In other words, the Commission's suggestion of a remedy that does not address the defined problem is unreasonable and is arbitrary and capricious. Stated another way, even if Bonneville were to adopt all of the provisions of the Commission's *pro forma* OATT it would *not* address the curtailment issue as set forth in the Interim ER. This is an indication of the fundamental errors contained in the Commission's analysis in the December 7 Order.

Joint Intervenors note that the regional transmission and reliability responsibilities in Bonneville's tariff are far more similar to the regional tariffs (or OATTs) of the Commission-approved Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") than they are to the *pro forma* OATT. The provisions of the *pro forma* OATT are best suited for individual transmission-owning utilities as opposed to a large regional transmission provider like Bonneville. In contrast to the *pro forma* OATT, the regional tariffs of ISOs and RTO's contain detailed provisions involving transmission, balancing, and emergency operations and reliability requirements in accordance with NERC reliability standards.[77] Moreover, the regional, Commission-approved ISO and RTO tariffs contain overgeneration protocols (similar to the Interim ER) in which environmental must-run requirements are recognized.[78] The Commission-approved operating procedures or protocols regarding overgeneration conditions have never been held to be curtailments of transmission service or unduly discriminatory or

[77] *See, e.g.*, the tariffs, operating procedures and business practice manuals of any of the Commission-approved ISOs and RTOs dealing with, *e.g.*, reliability requirements, transmission operations, and real time balancing operations. Most of the Commission-approved RTOs and ISOs have overgeneration protocols like Bonneville's Interim ER.

[78] *See* Section IV.D., *infra*.

preferential. Rather, overgeneration protocols like the Interim ER involve the curtailment of generation in real time to manage reliability and are consistent with, or appropriately recognize, the environmental must-run status of certain generating resources.[79]

Joint Intervenors also note that while the curtailment of transmission service under the *pro forma* OATT is not similar to the curtailment of generation under an overgeneration or reliability coordination protocol like the Interim ER, the Commission's *pro forma* OATT does illustrate that even under the transmission curtailment provisions of the *pro forma* OATT, one can distinguish or discriminate among transactions in a not unduly discriminatory manner. For example, the curtailment provisions for firm point-to-point service and network service both contain the notion of curtailing transactions that "effectively relieve the [transmission] constraint."[80]

Distinguishing between curtailing transactions that are effective in relieving the constraint and those that are not effective in relieving the constraint is a reasonable and not unduly discriminatory distinction to be made. With the Interim ER, the constraining obligation is not a transmission constraint; rather, the constraining obligation is Bonneville's dual need to manage reliability in overgeneration conditions and having federal hydroelectric resources comply with CWA and ESA requirements (*i.e.*, to avoid having federal hydroelectric resources reduce generation output by spilling water over dams). As noted previously, distinguishing between federal hydroelectric resources and renewable wind generating resources in meeting Bonneville's CWA and ESA responsibilities in overgeneration conditions is not, contrary to the December 7 Order, an unduly discriminatory or preferential distinction under FPA section 211A.

[79] *Id.*

[80] *See* sections 13.6 (point-to-point service) and 33.5 (network service) of the Commission's *pro-forma* OATT.

Finally, even if the Commission were to contend that it was using the term "transmission curtailment" in a manner somehow different from how that term is used in the *pro forma* OATT, the Commission's actions would still be in error and unreasonable. Any such new meaning of the term "transmission curtailment" would be: (i) entirely unexplained in the December 7 Order, (ii) inconsistent with other aspects of the December 7 Order mentioning the *pro forma* OATT, and (iii) inconsistent with the Commission's own precedent. As set forth in the next section, the Commission has allowed for differences from the Order No. 890 *pro forma* OATT when it involves an independent, regional transmission provider. While Bonneville is not a Commission-approved ISO or RTO, it is the regional transmission provider in the Northwest and has reliability responsibilities as a BA. Bonneville's Interim ER is similar to overgeneration protocols that are in existence for the Commission-approved ISOs and RTOs. These overgeneration protocols, just like the Interim ER, provide for the managed curtailment of *generation* in overgeneration conditions (also referred to as minimum generation conditions). Such protocols establish the manner and order in which generation will be curtailed in overgeneration conditions and have never been considered "transmission curtailments" or unduly discriminatory or preferential even though curtailing generation obviously reduces the amount of electricity delivered to the transmission grid.

In summary, the Commission erred in finding that the curtailment under the Interim ER is curtailment of transmission service. Such a finding is contrary to the *pro forma* OATT and, as explained in more detail in the next section, is inconsistent with other overgeneration protocols approved by the Commission for regional transmission providers. The Commission then compounds its error by ordering a transmission remedy for an issue that fundamentally does not involve transmission service. As an indication of the Commission's errors, even if Bonneville

were to adopt all of the provisions of the Commission's *pro forma* OATT it would not address the curtailment issue as set forth in the Interim ER.

D. The Commission's December 7 Order Is Inconsistent With Its Own Precedent.

As explained in the previous section, the Commission's suggestion of having Bonneville file the Commission's *pro forma* OATT is gratuitous in that transmission "curtailment", as that term is defined, does not include curtailment of generation pursuant to an overgeneration or minimum generation emergency protocol like the Interim ER. However, the Commission is well aware that overgeneration or minimum generation conditions can lead to serious reliability issues (*e.g.*, transmission stability issues and transmission outages) if left unaddressed.

Indeed, the Commission's finding in the December 7 Order is inconsistent with Commission-approved tariff provisions dealing with overgeneration or minimum generation emergency provisions. For example, the California ISO's Commission-approved Tariff has provisions for managing overgeneration conditions and overgeneration operating procedures.[81] These procedures are similar in approach to Bonneville's Interim ER. In particular, the California ISO tariff uses the term "Regulatory Must-Run Generation" which is defined as:

> Hydro Spill Generation and Generation which is required to run by applicable federal or California laws, regulations, or other governing jurisdictional authority. Such requirements include but are not limited to hydrological flow requirements, environmental requirements, such as minimum fish releases, fish pulse releases and water quality requirements, irrigation and water supply requirements of solid waste Generation, or other Generation contracts specified or designated by the jurisdictional regulatory authority as it existed on December 20, 1995, or as revised by federal or California law or Local Regulatory Authority.[82]

[81] *See* California ISO Tariff section 7.8 ("Management Of Overgeneration Conditions") and California ISO Operating Procedure No. 2390 ("Overgeneration").

[82] *See* California ISO Tariff, Appendix A, Master Definition Supplement.

In addition, California ISO Operating Procedure No. 2390 ("Overgeneration") provides that when mandatory reductions are necessary, the ISO is to ensure that certain actions are taken if time permits and one of those actions is ensuring that "[h]ydro generation is reduced to minimum possible *consistent with regulatory must-run requirements*."[83]

In short, the Commission has approved overgeneration tariff provisions and protocols that include environmental must-run provisions for hydroelectric resources that are very similar to Bonneville's Interim ER. The varying curtailment steps and priorities in the California ISO Tariff have not been found to be unduly discriminatory or preferential *vis-à-vis* other transmission customers. The presence of such Commission-approved overgeneration provisions is simply another indication that the Commission's analysis and characterization of the Interim ER in the December 7 Order is incorrect. Similar to the California ISO Tariff, Bonneville's Interim ER is characterized more appropriately as an overgeneration or minimum generation emergency protocol (or an emergency reliability protocol) as opposed to a term and condition regarding curtailment of transmission service under the Commission's *pro forma* OATT. The Commission has approved of provisions that preserve environmental must-run priorities in overgeneration conditions similar to those contained in Bonneville's Interim ER and the Commission's December 7 Order is an unexplained departure from this precedent. As noted by the Court of Appeals for the District of Columbia,

> An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or

[83] California ISO Operating Procedure No. 2390 at § 3.1.2.4 Mandatory Reductions, Step 2 – Generation Dispatcher Actions (emphasis added).

> swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.[84]

The Commission has failed to explain why it analyzed the Interim ER as a transmission issue as opposed to a reliability overgeneration protocol, and it has failed to explain why it has approved of the inclusion of environmental must-run provisions in the overgeneration protocols of other regional transmission providers but fails to approve of Bonneville's Interim ER.

E. The December 7 Order Failed to Accord the Necessary Deference to Bonneville's Obligations under the ESA.

While the Commission recognized that Bonneville has many competing obligations which led to the promulgation of the Interim ER,[85] it failed to reconcile the exercise of its discretion under section 211A with Bonneville's obligations to protect endangered species. In particular, the Commission required Bonneville to reconcile "comparable" transmission service with its organic statutes.[86] As explained *supra*, the Commission needed to consider as a base matter Bonneville's organic statutes to determine comparability. In addition, the Commission was required to consider Bonneville's obligations under the ESA and reconcile its exercise of authority with Bonneville's ESA requirements. As case law shows, the Commission, as an agency that is itself subject to the ESA, cannot escape the strictures of the act by claiming that ESA compliance could adversely affect private parties' contractual rights.

There is a robust body of law governing a Federal agency's obligations to comply with the ESA. As stated clearly in *American Rivers v. U.S. Army Corps of Engineers*,[87] if any agency has any statutory discretion over the action in question, that agency has the authority, and thus

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[84] *Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[85] December 7 Order at P 33.

[86] *Id*. at P 65.

[87] *American Rivers*, 271 F. Supp. 2d at 251.

the responsibility, to comply with the ESA. As a consequence, an agency with such discretion has a substantive statutory requirement not only to comply[88] but also to "take such actions as are necessary to insure that species are not extirpated as a result of the Federal activities."[89] The record in this proceeding, as augmented by Bonneville, shows (and the ROD explains in detail) that Bonneville's Interim ER is driven by an obligation to dispatch power in a way that ensures compliance with the ESA.

Nonetheless, the December 7 Order seems to elevate the contractual rights to transmission service over Bonneville's obligations under its organic statutes and the CWA and ESA. Indeed, the Commission's entire December 7 Order essentially hinges on a finding that Petitioners have contractual rights to "firm transmission service" that is interrupted under the Interim ER.[90] In other words, without the rights to transmission service, Petitioners are not similarly situated to Bonneville. On this basis, the Commission instructs Bonneville to file tariff provisions that will insure that Bonneville will not impinge on the transmission service obtained by the Petitioners.[91] According to the Commission's December 7 Order, Bonneville must reconcile this obligation with its organic statutes and by implication the ESA.[92]

However, the Commission greatly oversteps its authority in exercising *its discretion* under section 211A by directing Bonneville to abide by the Commission's directive at the expense of the other statutes. It is well settled that where Congress has vested an agency with discretion on how to carry forth its mission, the agency must yield to the requirements and

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[88] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666-67 (2007).

[89] *Tennessee Valley Authority v. Hill*¸ 437 U.S. 153, 188 (1978).

[90] December 7 Order at P 62.

[91] *Id.*

[92] *Id.* at P 65.

restrictions of the ESA.[93] In the context of the current proceeding and the discretion within section 211A, the Commission must abide by the ESA requirements that are imposed upon Bonneville in determining whether to issue an Order under Section 211A. Indeed, for one Federal agency to issue an order that requires another Federal agency to violate the ESA offends the fundamental underpinnings of the ESA.

Contractual rights to firm transmission service cannot support the Commission's finding that ESA compliance obligations are of no consequence. The Ninth Circuit has previously held that weather-related events such as a drought do not excuse an agency's obligations to comply with the ESA. In a closely analogous case, water rights held by irrigators were modified under drought conditions when the Bureau of Reclamation took control of a dam to meet ESA requirements.[94] If the ESA can require an agency to modify contractual rights to receive water in unusually dry meteorological conditions, it can certainly support rare interruptions of firm transmission service when there is an overabundance of water during low-load conditions.

In the context of the long reach and strict requirements of the ESA, the Commission should have denied the Petition in the first instance. Bonneville documented quite thoroughly how the Interim ER was a mitigation measure to comply with ESA requirements. For the Commission to ignore these requirements and issue the directive in the December 7 Order in order to preserve firm transmission rights without any potential for modification or interruption was arbitrary and capricious.

F. The Commission Made Findings Not Supported by the Record.

The United States Court of Appeals for the D.C. Circuit has underscored that the

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[93] *TVA v. Hill*, 437 U.S. 153, 185 (1978)(Congressional enactment revealed "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies.").

[94] *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1130 (9th Cir. 1998); *see also O'Neil v. U.S.*, 50 F.3d 677 (9th Cir. 1995).

Commission's decisions must be supported by substantial evidence in the record.[95] Although the arbitrary and capricious standard of review is "highly deferential," the Commission must, at a minimum, "provide a coherent and adequate explanation of its decisions."[96] The Commission must address objections that were raised during the proceeding, and its "failure to respond meaningfully to the evidence renders its decisions arbitrary and capricious."[97] Thus, "[u]nless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned."[98]

In failing to apply the correct standard by which to measure whether terms and conditions for transmission service provided others were comparable to the terms and conditions provided itself, the Commission also failed to develop a record by which it identified how Bonneville's Interim ER was inconsistent with the terms and conditions for transmission service it provided itself. This error is not surprising in light of the erroneous application of the legal standard discussed above and further reveals where the Commission has erred in issuing the December 7 Order. The Commission's actions do not comport with orders issued by the Court of Appeals

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[95] *Electricity Consumers Resource Council*, 747 F.2d at 1518 ("We are concerned … with the total lack of record support for [the Commission's] position and with the absence of reasoned decision-making on the part of [the Commission]."). *See also MPSC*, 337 F.3d at 1070; *Centralia*, 213 F.3d at 749-50; NYISO, 135 FERC ¶ 61,170 at P 86. In *Electricity Consumers Resource Council*, the Court declined to defer to the Commission's expertise given the lack of record support for its decision:

> Although we strongly prefer to defer to the expertise of the agency with regard to rate design, we cannot do so where [the Commission] has failed to consider relevant factors and to articulate a reasonable basis for its decision, and where FERC has not complied with its statutory mandate to set rates at a just, reasonable, non-discriminatory and non-preferential level. 747 F.2d 1511 at 1518.

[96] *East Texas Elec. Coop. v. FERC*, 331 F.3d 131, 136 (D.C. Cir. 2003)(citing *Fla. Power & Light Co. v. FERC*, 88 F.3d 1239, 1243 (D.C.Cir. 1996); *City of Vernon v. FERC*, 845 F.2d 1042, 1046 (D.C.Cir. 1988)).

[97] *PPL Wallingford*, 429 F.3d at 1198 (*citing Canadian Ass'n*, 254 F.3d at 299).

[98] *Id.*

requiring the Commission to develop a record supported by substantial evidence.[99] The Commission has failed to do so in this proceeding.

The Petitioners and several intervenors attach great significance to the fact that Bonneville no longer maintains a *pro forma* OATT on file with the Commission as *prima facie* evidence that the Agency is no longer providing comparable service.[100] However, this fact says nothing about whether Bonneville has met the standard for comparability in section 211A and cannot provide the foundation for the Commission's issuance of an order under that section. The fact that Bonneville does not maintain some provisions of the Commission's *pro forma* OATT in its transmission tariff reveals little in terms of the evidentiary requirement to establish a finding of non-comparability to justify the exercise of section 211A.

In Paragraph 63, the Commission claims that documented losses of PTCs and RECs demonstrates harm to wind generators and that "[r]egardless of the magnitude of the loss, however, Petitioners have demonstrated that Bonneville's [Interim ER] results in transmission service that is not comparable to the service it provides itself, justifying the Commission's exercise of its authority under section 211A."[101] The errors associated with this conclusion are several-fold.

Nothing in the legislative history of section 211A revealed an intent by Congress that this section would be used to preserve the sanctity of potential PTCs or RECs. No amount of deference to the Commission's reading of section 211A supports an interpretation that Congress intended for the Commission to exercise this authority to preserve financial benefits that are

[99] *Electricity Consumers Resource Council*, 747 F.2d at 1518 ("We are concerned … with the total lack of record support for FERC's position and with the absence of reasoned decision-making on the part of FERC."). *See also MPSC*, 337 F.3d at 1070; *Centralia*, 213 F.3d at 749-50; NYISO, 135 FERC ¶ 61,170 at P 86.

[100] *See* December 7 Order at P 38.

[101] December 7 Order at P 63.

tangential to the actual sale of electricity. Moreover, under no permissible reading of section 211A could the Commission conclude that the loss of PTCs and RECs confirms that Bonneville is providing transmission service on terms and conditions to itself that are not comparable to the terms it is providing Petitioners.

Indeed, the record is completely silent on the question of how the Interim ER has a financial cost and impact on Bonneville and the customers who support the program in the rates for power and transmission service. The Commission's December 7 Order fails to discuss the fact that Bonneville is providing hydropower at no cost to customers when rare low load conditions are present and the Interim ER is invoked. Indeed, the no-cost hydropower is delivered to the wind generators' customers who pay the wind generators for the power delivered, albeit without the attached benefit of the RECs. However, the "no-cost" hydropower is produced at facilities paid for by preference customers throughout the Pacific Northwest. The financial benefits purportedly lost by one customer class, *i.e.*, diminished RECs and/or PTCs, are offset by subsidized power deliveries paid for by another customer class. Yet, to the extent that the Commission considers financial harm a determinant in issuing an order under section 211A, it has taken an entirely one-sided approach to calculating the alleged harm. Thus, the Commission's findings of non-comparable transmission service in the context of the potential loss of PTCs and RECs is arbitrary and capricious.

Further compounding this error is the Commission's puzzling statement that "[p]etitioners have submitted numerous exhibits that set forth business, commercial, and economic impacts associated with Bonneville's Environmental Redispatch Policy."[102] Not only does the December 7 Order fail to provide a citation to these materials, the record simply does

[102] *Id.*

not contain these submissions. As noted on multiple occasions by the Joint Intervenors, the record of harm suffered by the Petitioners contained virtually no documentation that would support the Commission's exercise of authority under section 211A, let alone a finding of non-comparable transmission service.[103] The Petitioners' complaint included sparingly few attachments[104] including:

Attachment A: A list of interconnection agreements that were allegedly affected by the Interim ER;

Attachment B: A lone affidavit of Stephen Swain documenting one day in May 2011 when the Interim ER was implemented;

Attachment C: A public handout prepared by Bonneville discussing efforts to address regional tariff issues;

Attachment E: A draft letter to revise the LGIAs; and

Attachment F: Responses provided to questions raised at a June 9, 2008 meeting of the Transmission Issues Policy Steering Committee.

None of these documents contained information that the Commission would need to arrive at a well-reasoned conclusion regarding the question of whether the terms and conditions for transmission service provided to the third parties was comparable to the terms and conditions that Bonneville provided itself. Simply put, there was a dearth of evidence presented by Petitioners to support an order under section 211A.

The lack of foundation to support the Commission's reasoning was carried through in several other conclusions. At the outset, the Petitioners failed to include actual executed LGIAs,

[103] *See e.g.*, Comments of Joint Intervenors, Docket No. EL11-44-000 (filed July 19, 2011) at p. 7.

[104] A privileged version of the Petition that was filed with the Commission included an Appendix D with the title DSO 216. However, the December 7 Order makes no reference to Appendix D or DSO 216, suggesting that the material contained therein had no bearing on the Commission's decision making. An Appendix G contained the notice required by the Commission's rules of procedure.

choosing instead to provide references to Bonneville's *pro forma* OATT language. While there are references to section 9.7.2 of the Standard LGIA in the Petition[105], Petitioners already conceded that the section 9.7.2 language in the LGIAs referenced in Appendix A is not completely identical to the *pro forma* tariff.[106] So, the substantial evidence that the Court of Appeals has required of the Commission in prior proceedings is missing in this case.

The absence of the actual LGIAs has a direct bearing on the Commission's conclusions. For example, in Paragraph 73, the Commission cites to the language of section 9.7.2 of the LGIAs and notes:

> Bonneville argues that section 9.7.2 of its LGIA authorizes Bonneville to interrupt or reduce deliveries of electricity from generating facilities in order to maintain system reliability. However, service interruptions under section 9.7.2 must be performed according to Good Utility Practice, which includes compliance with statutory obligations such as the requirement set forth in this order to provide comparable transmission service that is not unduly discriminatory or preferential, consistent with the provisions of section 211A.[107]

Yet, nowhere in the record had the Petitioners placed the LGIAs or the definition of "Good Utility Practice" that the Commission relies upon in rejecting Bonneville's argument. Instead, the Commission appears to draw from some unknown resource a definition of Good Utility Practice because the definition of Good Utility Practice that is present in the LGIA was referenced in the ROD and submitted by Bonneville. As specifically cited in the ROD, the term Good Utility Practice means:

> [A]ny of the practices, methods and acts engaged in or approved by a significant portion of the electric industry during the relevant time period, or any of the practices, methods and acts which, in the 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

[105] Petition at 55.

[106] "Petitioners contracts, as listed below, contain curtailment language that is identical or substantially the same as the language found in the Bonneville *pro forma* tariff." Petition at Appendix A.

[107] December 7 Order at P 73.

> practices, reliability, safety and expedition. Good Utility Practice 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 in the region.[108]

Nowhere in this definition is the purported obligation to comply with statutory mandates that the Commission relies upon in Paragraph 73 in rejecting Bonneville's assertion that it retains the right to interrupt interconnection service for reliability purposes. Moreover, even if there is an obligation to comply with statutory obligations that the Commission has read into the above noted definition, the Commission's construction of this definition does not include the Congressional mandates that have been placed on Bonneville through the Northwest Power Act, the Transmission Act, the Preference Act, the Clean Water Act, and the Endangered Species Act.

Instead, the Commission has fabricated a convenient tautology that allows it to sidestep a legitimate inquiry into the question of whether the Interim ER is permitted pursuant to the terms of the LGIAs. If the Commission reads into the definition of Good Utility Practice an obligation to comply with statutory obligations and the ***only*** applicable obligation in this instance is the requirement under section 211A to provide transmission service, the Commission disregards its obligation to consider the legitimate explanation of the Interim ER. In other words, because the Commission summarily determined it can exercise its authority under section 211A, it gives no weight to rational explanations or mitigating factors.

This result is not surprising given that the Commission acted without a fully developed record or in consideration of the evidence (or lack thereof) before it. Yet, the Commission "must respond to objections and address contrary evidence in more than a cursory fashion."[109]

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[108] ROD at 41.

[109] *TANC*, 628 F.3d at 543-44 (citing *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1163–65 (D.C.Cir. 1998)).

In a larger context, due process requires the development of a factual record and clear delineation of standards by which statutory authority shall be applied. The Commission did not have record evidence available with which to reach its conclusions.[110] Furthermore, the Commission failed to respond meaningfully to the evidence that was presented in the record. Accordingly, the Commission has made arbitrary and capricious findings not supported by the record and should grant rehearing for further consideration of the issues.

The record provides clear support for the Interim ER under Bonneville's statutes and generator interconnection agreements; however, the record lacks the most basic and fundamental facts necessary for the Commission to determine that relief is warranted. Notably, there is no evidence in the record as to the precise type of transmission service that Petitioners are taking. In fact, the record is entirely devoid of any evidence specifying whether the Petitioners are network or point to point customers. While this oversight may have little bearing on the remedy ordered by the Commission, it underscores that the Commission has issued an order that is not adequately supported by the record.

Indeed, the Commission appears to have made an assumption on the type of transmission service that each and every Petitioner in this case is taking from each and every project that is noted on Appendix A, when it declared that "Bonneville affects the non-Federal generator's ability to inject energy at the point of receipt and interrupts non-Federal customer's firm *point-to-point transmission service*, without causing similar interruptions to firm transmission service held by Federal resources."[111] Moreover, the Commission also appears to have concluded that

[110] *Williston Basin Interstate Pipeline Co. v. FERC,* 358 F.3d 45, 48-50 (D.C. Cir. 2004).

[111] December 7 Order at P 62.

Bonneville, the BAA, is also taking point to point transmission service from its own projects.[112]

The type of transmission service subscribed to by Petitioners has a direct bearing on the type of inquiry that the Commission should have commenced at the outset. If Bonneville is providing network transmission service to itself, and the Petitioners are taking point to point transmission service, the Commission cannot conclude that Bonneville and the Petitioners are similarly situated, as noted *supra*. However, the evidence on the type of transmission service at issue was never before the Commission, nor was it considered when the Commission issued the December 7 Order. As a consequence, the deficient record, lacking many key and essential facts from the Petitioners, led to not only an arbitrary and capricious decision as discussed *supra*, but one that was not based on substantial evidence that should have been in the record.

As explained *infra*, the lack of a complete record and an erroneous application of section 211A led to an order that mandates action by Bonneville that has no rational relationship to the loss of PTCs and RECs that form the basis of the Petitioners' alleged harm.

G. The Commission Erred in Providing a Remedy That Is Not Specifically Tailored to the Harm Documented in the Record.

The challenge to the Interim ER has served as a proxy argument for the wind generators' general dissatisfaction with the fact the Bonneville has Congressionally mandated obligations that dictate operations that are not present in other parts of the United States. The generalized lament over the Administrator's refusal to implement negative pricing has very little to do with the loss of PTCs because, as the Commission observed in footnote 99, only twenty-nine percent of the wind generators receive PTCs.[113] Rather, the challenge to the Interim ER appeared to

[112] While this conclusion is not explicitly stated, the Commission cannot conclude that Bonneville is providing non-comparable transmission service to a point-to-point customer unless Bonneville is also taking point-to-point transmission service from its own generation resources.

[113] The Commission does not specify whether the Petitioners fall within the twenty nine percent of those wind generators receiving the PTC.

provide a possible vehicle by which the Petitioners could convince the Commission to order Bonneville to behave more like an investor owned utility and less like an agency of the Federal government with statutory obligations.

However, there was a key problem with the vehicle that the Petitioners chose to attack Bonneville. The Interim ER, an interim policy that will expire on March 30, 2012, does not provide the factual or legal foundation for the Commission to order Bonneville to file tariff amendments to address the alleged non-comparable and unduly discriminatory and preferential treatment. The very basis for the findings that have prompted the Commission to act under section 211A will expire only weeks after Bonneville is due to file its tariff amendments. To issue a prospective order on the basis of an expiring policy is arbitrary and capricious.

The Commission has an obligation to structure its orders to address harm that has been documented before it. As the record shows, the documented harm to the Petitioners is speculative at best. Moreover, there is no clearly articulated rationale why filing the Commission's *pro forma* OATT (or revisions to Bonneville's OATT) provides a remedy when Bonneville must interrupt generation schedules when there is inadequate load.

Bonneville has pledged to work with the stakeholders in the region, including the Petitioners, to develop a *pro forma* transmission tariff that could be voluntarily filed with the Commission. This collaborative effort, which is also known as the BOATT process, is a direct result of the discussions and deliberations that occurred before the Commission in Docket No. NJ09-1-001. While the development of a universally acceptable document eluded the stakeholders in that docket, it remained clear that the Commission supported a collaborative process and recognized that it could not order the filing of a *pro forma* OATT that public utilities

must maintain with the Commission. Yet, in the current proceeding, the Commission has asserted authority to mandate the filing of tariff provisions because of the Interim ER.

When considered together, *i.e.*, the expiration of the Interim ER and the Commission's prior rulings in Docket No. NJ09-1-001 in which the Commission did not require Bonneville to file the *pro forma* OATT,[114] the Commission's December 7 Order is arbitrary and capricious. The factual and legal basis for the prospective tariff filings cannot be reconciled with the fast approaching expiration date. In the absence of an ongoing and enduring policy that would warrant the Commission's exercise of authority under section 211A, the legal foundation for Commission action remains as it stood in the NJ docket. In this light, the Commission's departure from its decisions on Bonneville's filing obligations is arbitrary and capricious and not based on the evidence in the record of this proceeding.

[114] *See* United States Department of Energy - Bonneville Power Administration, 128 FERC ¶ 61,057 at P 2 (2009) (Declaratory Order), *order on reh'g*, 135 FERC ¶ 61,023 (2011).

H. The Commission Abused Its Discretion by Exercising Its Authority Over a Matter Currently Under Appeal

As seen with many of the issues raised in response to the Petition, the Commission dismisses the concerns regarding the pending appeals in the Ninth Circuit despite its obligation to answer legitimate objections. This is hardly "reasoned" decision-making.[115] The Joint Intervenors have repeatedly urged the Commission to deny the Petition, or in the alternative refrain from acting on it because of litigation that will ensue in the Ninth circuit.[116] The rationale for this argument was quite simple: the Commission could address only a limited aspect of the alleged harm under section 211A while the Ninth Circuit could consider the entire Interim ER. The Commission should, therefore, have refrained from acting. Indeed, a Commission order to invalidate the Interim ER would infringe upon the jurisdiction vested in the Ninth Circuit to review the Administrator's actions taken pursuant to the Northwest Power Act.[117]

In addressing this issue in several of the comments raised by multiple parties regarding the jurisdiction of the Ninth Circuit, the Commission glosses over the concerns noting the "Commission's action in this proceeding does not affect the Ninth Circuit's jurisdiction to consider the dispute over [the Interim ER]."[118] Here, the Commission inverts the appropriate inquiry. The question the Commission should have asked was to what extent it has jurisdiction over a matter that is otherwise reserved for consideration by the Ninth Circuit. Instead, the Commission simply presumed it was not preempting the authority of a U.S. Court of Appeals and therefore had a basis to act.

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[115] *PPL Wallingford,* 429 F.3d at 1198 (*citing Canadian Ass'n,* 254 F.3d at 299).

[116] *See e.g.,* Comments of Joint Intervenors, Docket No. EL11-44-000 (filed July 19, 2011) at pp. 46-48.

[117] *Pacific Power & Light v. Bonneville Power Administration,* 795 F.2d 810 (9th Cir. 1986).

[118] December 7 Order at P 13, n.25.

If the Commission had stopped to consider the true reach of its authority, rather than the degree to which it may be preempting the Ninth Circuit, it would have also developed a record that explained how exercising its authority (or more appropriately not exercising its authority) under section 211A was consistent with the reservation of jurisdiction provided under the Northwest Power Act. Instead, the Commission claimed that its "obligations flowing from the provisions of section 211A require findings and directives by the Commission."[119] However, as discussed *supra*, the factual findings necessary to issue an order pursuant to section 211A were virtually absent from this proceeding.

The Commission had no "obligation" to act. Even had there been sufficient grounds to do so, the Commission retained discretion with respect to issuing an order. There were abundant reasons not to act including the fact that the Interim ER was due to expire in March of 2012, regional settlement discussions were underway, and the BOATT process was making progress towards addressing some of the Petitioners' concerns. Any of these rationales would have sufficed for the Commission to delay acting even had there otherwise been an adequate basis.[120] Issuing an order in the face of the explicit jurisdiction of the Ninth Circuit was an abuse of the Commission's discretion and reversible error.

[119] December 7 Order at P 18.

[120] In fact, as explained *supra*, the Commission should have declined to act because the Interim ER is due to expire in March of this year.

V. CONCLUSION

For the foregoing reasons, the Commission should grant rehearing of the December 7 Order. On rehearing, the Commission should find that the Petitioners are not entitled to relief under section 211A of the FPA. In the alternative, the Joint Intervenors ask the Commission to order supplemental briefing and such proceedings as would be appropriate to determine whether the Interim ER creates non-comparable transmission service that is unduly discriminatory and preferential.

Respectfully submitted,

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January 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 6th day of January, 2012.

/s/ E-filed
Sherry A. Quirk
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