

Docket No. 13-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST REQUIREMENTS UTILITIES,
PUBLIC POWER COUNCIL,
THE CITY OF SEATTLE,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

**JOINT PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL ENERGY REGULATORY COMMISSION**

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Pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b), Section 212(i)(3) of the Federal Power Act, 16 U.S.C. § 824k(i)(3), and Rule 15(a) of the Federal Rules of Appellate Procedure, Northwest Requirements Utilities (NRU), Public Power Council (PPC), and The City of Seattle, by and through its City Light Department (Seattle) (collectively referred to as Petitioners) hereby petition the Court for review of the following orders of the Federal Energy Regulatory Commission (FERC), which are included with this Petition as Attachment A:

Iberdrola Renewables, Inc., et al., v. Bonneville Power Administration, “Order Granting Petition,” FERC Docket No. EL11-44-000, 137 FERC ¶ 61,185 (December 7, 2011);

Iberdrola Renewables, Inc., et al., v. Bonneville Power Administration, “Order Denying Rehearing,” FERC Docket No. EL11-44-001, 141 FERC ¶ 61,233 (December 20, 2012).

Each of the Petitioners was a party to the proceedings before FERC in which FERC issued the orders challenged in this Petition for Review.

It is unclear whether FERC’s order in *Iberdrola Renewables, Inc., et al., v. Bonneville Power Administration*, “Order Denying Rehearing,” FERC Docket No. EL11-44-001, 141 FERC ¶ 61,233 (December 20, 2012) is final and ripe for the Court’s review at this time; therefore, out of an abundance of caution, Petitioners are including a request for review of the Order Denying Rehearing in this Petition for Review. *See* 16 U.S.C. § 825l(b).

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure,
Petitioners' Corporate Disclosure Statements are included with this Petition for
Review as Attachment B.

Petitioners state that they are not aware of any other petitions for review of
the FERC orders at issue in this proceeding.

Respectfully submitted this 31st day of January, 2013.

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**ATTACHMENT A TO
THE JOINT PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL ENERGY REGULATORY COMMISSION**

137 FERC ¶ 61,185
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Iberdrola Renewables, Inc.
PacifiCorp
NextEra Energy Resources, LLC
Invenergy Wind North America LLC
Horizon Wind Energy LLC

Docket No. EL11-44-000

v.

Bonneville Power Administration

ORDER GRANTING PETITION

(Issued December 7, 2011)

1. On June 13, 2011, under sections 210, 211A, 212, 307, 308, and 309 of the Federal Power Act (FPA), a group of owners of wind facilities in the Pacific Northwest (collectively, Petitioners) filed a petition against Bonneville Power Administration (Bonneville). Petitioners allege that Bonneville is using its transmission market power to curtail wind generators in an unduly discriminatory manner in order to protect its preferred power customer base from costs it does not consider socially optimal. Petitioners ask the Commission to invoke its authority under section 211A to direct Bonneville to revise its curtailment practices and to file a revised open access transmission tariff (OATT) with the Commission. Petitioners also ask the Commission, under sections 210 and 212(i), to direct Bonneville to abide by the terms of its interconnection agreements with Petitioners by immediately ceasing its curtailment practices. As discussed below, pursuant to section 211A of the FPA, the Commission directs Bonneville to file, within 90 days from the date of this order, tariff revisions to address the comparability concerns raised in this proceeding in a manner 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.

I. Background

A. Bonneville

2. Bonneville is not a public utility within the Commission's jurisdiction under sections 201, 205, and 206 of the FPA.¹ Bonneville is a federal power marketing agency within the United States Department of Energy established to market electric energy generated by the Bonneville Project.² Today, Bonneville markets power generated at hydroelectric projects operated by the U.S. Army Corps of Engineers and the Bureau of Reclamation, as well as energy generated at several non-Federal projects. Under various statutory provisions, Bonneville provides transmission to third parties if Bonneville's transmission "is not required for the transmission of Federal energy;"³ is in "excess of the capacity required to transmit electric power generated or acquired by the United States;"⁴ "is not in conflict with the Administrator's other marketing obligations;"⁵ and can be provided "without substantial interference with [the] power marketing program."⁶

3. In Order No. 888, the Commission introduced the *pro forma* OATT as a standard for providing transmission services that are just, reasonable, and not unduly discriminatory or preferential.⁷ The Commission also established a safe harbor procedure

¹ 16 U.S.C. §§ 824, 824d, 824e (2006). The Commission has limited jurisdiction under section 206(e) to order Bonneville to pay refunds for certain short term sales made at unjust and unreasonable rates. 16 U.S.C. § 824e(e) (2006).

² 16 U.S.C. § 832 (2006).

³ 16 U.S.C. § 837e (2006).

⁴ 16 U.S.C. § 838d (2006).

⁵ 16 U.S.C. § 839f(i)(1)(B) (2006).

⁶ 16 U.S.C. § 839f(1)(3) (2006).

⁷ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,696 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 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 relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

for the filing of reciprocity tariffs by non-public utilities.⁸ The Commission has found that Bonneville's Open Access Transmission Tariff (Bonneville OATT) does not substantially conform with the current *pro forma* OATT, as reformed in Order No. 890,⁹ and, on that basis, the Commission found that the Bonneville OATT would not be an acceptable reciprocity tariff until Bonneville made certain modifications.¹⁰

B. Bonneville's Environmental Redispatch and Negative Pricing Policy

4. On May 13, 2011, following an open decision-making process, Bonneville's Administrator issued a Final Record of Decision for Bonneville's Interim Environmental Redispatch and Negative Pricing Policy (Environmental Redispatch Policy).¹¹ Under this policy, Bonneville uses environmental redispatch to address excess water supply by temporarily substituting Federal hydropower, at no cost, for wind power or other generation in its Balancing Authority Area. Bonneville states that it uses environmental redispatch, when necessary, to ensure compliance with the Endangered Species Act,¹² Clean Water Act,¹³ and Bonneville's other statutory responsibilities. During environmental redispatch, utilities and consumers who purchase wind power or other energy continue to receive full energy deliveries consistent with their transmission schedules, but the energy would originate from the Federal Columbia River Power System, instead of other generating resources.

⁸ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,281-87.

⁹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

¹⁰ *United States Dep't of Energy – Bonneville Power Admin.*, 128 FERC ¶ 61,057, at P 11 (2009), *reh'g denied*, *United States Dep't of Energy – Bonneville Power Admin.*, 135 FERC ¶ 61,023 (2011).

¹¹ See *BPA's Interim Environmental Redispatch and Negative Pricing Policy* (May 2011) (Environmental Redispatch Policy), available at http://www.bpa.gov/corporate/pubs/RODS/2011/ERandNegativePricing_FinalROD_web.pdf.

¹² 16 U.S.C. § 1536 (2006).

¹³ 33 U.S.C. § 1341 (2006).

5. According to Bonneville, during high water periods (e.g., spring run-off during some years) Bonneville has two options: spill the excess water through the dam spillways, or run the excess water through the hydro facilities resulting in an over-generation of electricity. Because additional spill can result in an increase of total dissolved gas levels in the water, endangering salmon in potential violation of its Clean Water Act and Endangered Species Act obligations, Bonneville states that it must run the excess water through its hydro facilities, thereby increasing electricity production. Thus, Bonneville developed and implemented the Environmental Redispatch Policy to minimize spills by running excess water through its hydro facilities thereby increasing generation levels in Bonneville's Balancing Authority Area to amounts that exceed its load and export amounts. In order to ensure that its Balancing Authority Area does not face reliability problems associated with over-generation, Bonneville issues dispatch orders to curtail generation and substitutes energy from the hydro system to serve load.

6. Under the Environmental Redispatch Policy, Bonneville initially redispatches thermal generators to the lowest generating level possible without threatening reliability. If Bonneville determines that additional generation relief is needed, it redispatches variable energy resources, such as wind, on a pro rata basis, and this redispatch may result in such generators being moved completely off-line. Bonneville will not pay negative prices during environmental redispatch because it has determined that paying negative prices: (1) could result in opportunities to distort the market; and (2) presents an unreasonable cost shift from those generators that can operate profitably during times of negative prices (e.g., the Petitioners) to Bonneville's fish and wildlife program and to Bonneville's power service ratepayers.¹⁴ In addition, Bonneville determined that payment of negative prices in order to assure the value of a wind generator's Federal Production Tax Credits (PTCs) and/or Renewable Energy Credits (RECs) would impose an additional and unnecessary burden on Bonneville's fish and wildlife costs, as well as compromise Bonneville's cost recovery objectives and its need to maintain an economical power supply.¹⁵

7. Bonneville implemented its Environmental Redispatch Policy by unilaterally amending Appendix C of its existing Large Generator Interconnection Agreements (LGIA) to add a specific reference to the Environmental Redispatch Policy, noting that all generators with an interconnection agreement with Bonneville must follow Bonneville's redispatch orders and have the obligation to reduce generation when ordered

¹⁴ A negative energy price refers to the price offered or paid to a generator to lower the amount of energy it was originally designated to produce. To date, Bonneville has not paid negative energy prices during environmental redispatch.

¹⁵ *See supra* n. 11.

to do so by Bonneville. Bonneville has concluded, as reflected in the Record of Decision, that Article 9.7.2 of the LGIAs gives Bonneville the specific authority to interrupt interconnection service for reliability reasons and conditions interconnection service on Bonneville's compliance with Applicable Laws and Regulations.¹⁶

II. Petition

8. Petitioners argue that, in implementing the Environmental Redispatch Policy, Bonneville engages in undue discrimination by curtailing wind generation and then using the firm transmission rights that had been associated with the wind generation output to deliver Federal hydropower to the wind generators' customers. Petitioners argue that Bonneville's Environmental Redispatch Policy protects Bonneville's preference power customers from negative energy prices that Bonneville does not consider socially optimal. Petitioners argue that, by refusing to pay negative energy prices and its unilateral curtailments, Bonneville improperly places the entire burden of its over-generation situation on one class of customers, those subject to the Environmental Redispatch Policy.¹⁷ Petitioners allege that Bonneville's actions are not the result of reliability or environmental conditions, as Bonneville asserts in its Record of Decision; rather, the unilateral curtailment practices are a "no cost" option that allows Bonneville to address over-generation, and, in doing so, protect its preference power customers from increased costs. Petitioners argue that environmental redispatch provides for curtailment in a manner that violates Bonneville's OATT and Petitioners' respective LGIAs, and is discriminatory against wind generation, in particular, as a customer class.

9. Accordingly, Petitioners seek a Commission order that directs Bonneville to revise its curtailment practices to comport with the undue discrimination standards of FPA section 211A¹⁸ and submit them in a compliance filing for the Commission's approval.

¹⁶ The Record of Decision also reflects Bonneville's position that the situations described qualify as Force Majeure events under all interconnection agreements, because the need to comply with Bonneville's environmental responsibilities constitutes an "order, regulation or restriction imposed by governmental ... authorities[.]" See Bonneville's Record of Decision at 16-18 citing Bonneville's OATT, Attachment L, Article 1 of the Standard Large Generator Interconnection Agreement.

¹⁷ Petitioners recognize that, while thermal generators are also affected by the Environmental Redispatch Policy, thermal generators have an economic incentive to take the no-cost hydro power and voluntarily curtail their units. Therefore, they assert that wind generators are disproportionately affected and harmed by the policy.

¹⁸ 16 U.S.C. § 824j-1(b) (2006) ("the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services: (1) at rates that are

(continued...)

Petitioners also urge the Commission to use its section 211A authority to direct Bonneville to remedy its discriminatory practices by filing an open access transmission tariff for Commission approval. Petitioners argue that, to ensure comparable treatment, it would be appropriate to require Bonneville to pay negative prices in order to compensate generators that are curtailed as a result of environmental redispatch. If the Commission declines to grant the relief sought under section 211A, Petitioners ask the Commission to direct Bonneville under FPA sections 210 and 212(i) to adhere to the terms of its interconnection agreements with Petitioners by ceasing unduly discriminatory and preferential practices.¹⁹

10. Finally, Petitioners request that the Commission address this petition within 60 days under the Commission's regulations for fast track processing.²⁰

III. Notice of Filing and Responsive Pleadings

11. Notice of Petitioners' filing was published in the *Federal Register*, 76 Fed. Reg. 36,532 (2011), with interventions due on or before July 5, 2011. In early comments, the Public Power Council²¹ asserted that the Petition raises complex issues and requests tariff revisions that the Commission should decline to apply its fast track procedures.²² Several commenters supported Public Power Council's comments and requested extension of

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.”).

¹⁹ In this case where wind generators are already interconnected to the grid, the Petitioners argue that Commission action would entail “making effective” such interconnections by directing Bonneville to comply with the non-discriminatory curtailment terms of its LGIAs and other interconnection agreements with wind generators.

²⁰ Petition at 67 (citing 18 C.F.R. § 385.206(b)(11)).

²¹ Public Power Council is a non-profit trade organization that represents the common interests of approximately 100 consumer-owned electric utilities in the Pacific Northwest that are preference customers of Bonneville.

²² Public Power Council, June 15, 2011 Answer at 5 (citing *Amoco Energy Trading Corp.*, 89 FERC ¶ 61,165 (1999)).

time to file comments.²³ Given the complexity of issues presented in the petition, the Commission granted requests to allow all interested persons and parties an extension of time up to and including July 19, 2011, to file an answer to the petition. The Commission received 50 motions to intervene and answers from 29 entities, including Bonneville, as indicated in Appendix A. On August 3, 2011, Petitioners filed an answer. On August 15, 2011, Bonneville filed a reply to Petitioners' answer. On August 17, 2011, the Joint Intervenors filed a reply to Petitioners' answer.

12. On July 22, 2011, the Commission received a letter from Congressman Earl Blumenauer of Oregon urging the Commission to act in a timely manner to ensure that Bonneville's transmission practices do not discriminate against renewable energy generators and utilities in the Pacific Northwest. On August 9, 2011, the Public Power Council, Northwest Requirement Utilities²⁴ and Pacific Northwest Generating Cooperative responded to Rep. Blumenauer's letter urging him to consider that the matters in this proceeding are complex and that Bonneville's Environmental Redispatch Policy is not necessarily discriminatory. Chairman Wellinghoff acknowledged receipt of Congressman Blumenauer's request in a letter dated August 11, 2011.

13. On August 2, 2011, the Joint Intervenors filed a motion to lodge two petitions for review of Bonneville's Environmental Redispatch Policy in the U.S. Court of Appeals for the Ninth Circuit.²⁵ On August 8, 2011, Mr. Pace filed a motion to lodge an opinion issued by the U.S. District Court for the District of Oregon regarding the environmental analysis underlying Bonneville's spill limits.

²³ See, e.g., Bonneville, Pacific Northwest Generating Cooperative, Clark PUD, Western Public Agencies Group, and Mr. Pace.

²⁴ Northwest Requirements Utilities is a non-profit trade organization that represents the common interests of 50 consumer-owned electric utilities in the Pacific Northwest that are preference customers of Bonneville.

²⁵ Petitioners, along with several other entities, have filed petitions for review of Bonneville's Environmental Redispatch Policy in the Ninth Circuit. Those cases have been consolidated and a settlement assessment conference was held on September 21, 2011. However, the Commission's action in this proceeding does not affect the Ninth Circuit's jurisdiction to consider the dispute over Bonneville's Environmental Redispatch Policy.

14. On August 8, 2011, U.S. Senator Ron Wyden, joined by ten U.S. Senators and Congressmen from Oregon and Washington,²⁶ sent a letter to Bonneville and Chairman Wellinghoff urging Bonneville to resolve this dispute through a settlement.

15. On September 2, 2011, several intervenors filed a motion to hold this proceeding in abeyance pending the outcome of the case proceeding before the Ninth Circuit.²⁷ These intervenors contend that holding the case in abeyance would promote administrative and judicial economy, enable all parties to devote their resources to the Ninth Circuit, and will not harm any parties because Bonneville has not implemented environmental redispach since July 10, 2011. The motion also promises to update the Commission on the status of the Ninth Circuit proceeding every 60 days from the date the Commission grants this motion. On September 14, 2011, Petitioners filed an answer opposing the motion to hold the proceeding in abeyance, asserting that there is no overlap in the petition proceeding and the proceedings pending in the Ninth Circuit. On September 16, 2011, Turlock and NIPPC filed separate answers opposing the motion to hold the proceeding in abeyance, in which they state that the issues before the Ninth Circuit are substantially different than the major issued before the Commission in this proceeding. Caithness filed its answer opposing the motion to hold the proceeding in abeyance on September 19, 2011. On September 20, 2011, Mr. Pace filed an answer arguing that the Commission should deny the motion to hold the case in abeyance. Mr. Pace recommends that the Commission initiate a rulemaking proceeding to explore the record and possible remedies under section 211A. On September 27, 2011, the Joint Intervenors filed an answer arguing that the Commission should hold the case in abeyance pending resolution of the case in the Ninth Circuit. On September 29, 2011, the Joint Public Parties filed an answer supporting the motion to hold the case in abeyance.

²⁶ Sen. Ron Wyden (OR), Sen. Patty Murray (WA), Sen. Maria Cantwell (OR), Rep. Norman Dicks (WA), Rep. Rick Larsen (WA), Rep. Adam Smith (WA), Rep. Greg Walden (OR), Rep. Mike Simpson (ID), Rep. David Reichert (WA), Rep. Jay Inslee (WA), Rep. Jim McDermott (WA).

²⁷ These intervenors include: Clark County, Washington, Cowlitz County, Washington, Eugene Water and Elec. Board, Pacific Northwest Generating Cooperative, Pend Oreille, Public Power Council, Northwest Requirements Utilities, Snohomish, and the Western Public Agencies Group.

IV. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed because they have provided information that assisted us in our decision-making process.

18. The Commission denies the motion to hold the case in abeyance pending the outcome of the Ninth Circuit proceeding addressing several petitions for review of Bonneville's Environmental Redispatch Policy. The Commission has exclusive authority to order an unregulated transmission provider to comply with the provisions of section 211A. That is, any obligations flowing from the provisions of section 211A require findings and directives by the Commission.

B. Commission Authority under Section 211A

1. Petition

19. Petitioners state that the Commission has jurisdiction over Bonneville under section 211A of the FPA. Petitioners note that, while the Commission has had authority since 1992 to order non-jurisdictional utilities, including Bonneville, to provide interconnection and transmission services under sections 210, 211 and 212 of the FPA, Congress, by enacting EAct 2005, strengthened and clarified this authority by adding section 211A. They contend that, in adding section 211A, Congress granted the Commission the discretion to require unregulated transmission utilities to provide comparable, non-discriminatory, open access to their transmission systems similar to the requirements imposed on public utilities.²⁸

20. Petitioners contend that Bonneville's enabling statutes do not limit the Commission's authority under section 211A. Petitioners argue that, unlike sections 210 and 211, 211A is not subject to section 212(i) of the FPA, which requires the Commission to consider Bonneville's enabling statutes when issuing an order under section 210 or 211. Petitioners also contend that the Commission's authority under

²⁸ Petition at 19 (citing S. Rep. No. 109-78, at 49 (June 9, 2005)).

section 211A is not subordinate to Bonneville's other statutory obligations. In any event, Petitioners contend that there is no irreconcilable conflict between Commission action under section 211A and Bonneville's enabling statutes. Specifically, Petitioners state that nothing in the Commission's *pro forma* OATT prevents Bonneville from fully recovering its costs or continuing to establish its rates under the Northwest Power Act. According to Petitioners, a directive under section 211A would simply add another comparability standard for terms and conditions of Bonneville's transmission service. Recognizing that there is some disagreement regarding the nature and extent of Bonneville's fish and wildlife requirements, Petitioners also assert that the Commission can act under section 211A without interfering with Bonneville's environmental obligations.

21. In the event the Commission declines to order Bonneville to provide comparable and non-discriminatory transmission under section 211A, Petitioners request that the Commission direct Bonneville to provide interconnection service under sections 210 and 212(i) of the FPA. Petitioners point out that section 210 provides that, upon application of any electric utility, the Commission may issue an order requiring "the physical connection of ... transmission facilities of any electric utility, with the facilities of such applicant" and to take "such action as may be necessary to make effective any physical connection."²⁹ Petitioners argue that Commission action under section 210 would be appropriate to make effective the physical interconnections that have been made ineffective as a result of Bonneville's actions implementing its Environmental Redispatch Policy. Petitioners acknowledge that any order issued under section 210(c) must meet the requirement of section 212, which provides that, before issuing a final order under section 210, the Commission shall issue a proposed order setting a reasonable time for the parties to agree to terms and conditions for carrying out the order, including the apportionment of costs between them and compensation or reimbursement reasonably due to any of them.

2. Answers

22. In its answer, Bonneville argues, *inter alia*, that challenges to the Environmental Redispatch Policy are within the exclusive jurisdiction of the Ninth Circuit.³⁰ Bonneville explains that section 9(e)(3) of the Northwest Power Act vests the Court of Appeals for the Ninth Circuit with original jurisdiction to review challenges to final actions and decisions, or the implementation of such final actions or decisions, taken by Bonneville pursuant to statutory authority.³¹ Bonneville states that the Ninth Circuit has consistently

²⁹ Petition at 56 (citing 16 U.S.C. §§ 824i, 824j, 824l (2006)).

³⁰ Bonneville Answer at 58.

³¹ *Id.* (citing 16 U.S.C. § 839f(e)(5) (2006)).

held that its jurisdiction over such final actions is broad and exclusive.³² Moreover, Bonneville asserts that the Ninth Circuit has reviewed claims that Bonneville's actions constitute undue discrimination in violation of the FPA.³³

23. Bonneville states that its Environmental Redispatch Policy represents a final action under section 9(e)(3) of the Northwest Power Act.³⁴ Although the Northwest Power Act does not define a "final action," for purposes of establishing its jurisdictional authority, Bonneville explains that the Ninth Circuit has applied the Supreme Court standard for defining the term.³⁵ Bonneville also notes that the Ninth Circuit has interpreted its jurisdiction under section 9(e)(3) "to extend only to actions based on the record developed before the agency, and expressly to exclude any causes of action arising from actions divorced from and unrelated to an administrative record."³⁶

24. Bonneville also states that the Environmental Redispatch Policy represents a final action taken pursuant to statutory authority. Bonneville explains that, to determine whether an action is within the scope of the Ninth Circuit's exclusive jurisdiction, the court applies the "true nature" test. That is, the court looks "to the nature of the conduct challenged rather than the label given the cause of action."³⁷ Bonneville contends that the petition challenges Bonneville's Environmental Redispatch Policy, which is a final

³² *Id.* (citing *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 925-26 (9th Cir. 2002), *cert. denied*, 539 U.S. 914 (2003); *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843, 852 (9th Cir. 2001); *CP Nat'l Corp. v. Jura*, 876 F.2d 745, 747-78 (9th Cir. 1989); *Cent. Mont. Electric Coop., Inc. v. Bonneville Power Admin.*, 840 F.2d 1472, 1476 (9th Cir. 1988)).

³³ *Id.* (citing *Ass'n of Pub. Agency Customers, et al. v. Bonneville Power Admin.*, 126 F.3d 1158, 1172 (9th Cir. 1997)).

³⁴ *Id.* at 59.

³⁵ *Id.* (citing *Bennett v. Spears*, 520 U.S. 154 (1997) (holding that in, evaluating whether an agency determination constitutes a final action, "the core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties"))).

³⁶ *Id.* (citing *Pub. Util. No. 1 of Snohomish Cnty. v. Bonneville Power Admin.*, 506 F.3d 1145, 1151 (9th Cir. 2007)).

³⁷ *Id.* at 61 (citing *M-S-R Pub. Power Agency v. Bonneville Power Admin.*, 297 F.3d 833, 840 (9th Cir. 2002)).

action taken pursuant to statutory authority under multiple statutes including the Clean Water Act, the Endangered Species Act, as well as Bonneville's legal obligations under its enabling statutes, such as the Northwest Power Act,³⁸ the Federal Columbia River Transmission System Act,³⁹ the Pacific Northwest Power Preference Act,⁴⁰ and the Bonneville Project Act.⁴¹

25. Several commenters filed comments in support of the Petitioners' request for Commission intervention under the authority granted pursuant to section 211A of the FPA.⁴² AWEA argues that, in section 211A, Congress provided the Commission with the jurisdiction to eliminate undue discrimination by any entity, including federal marketing agencies. According to AWEA, section 211A applies an analog of the undue discrimination standard that applies to public utilities in section 205 of the FPA for non-jurisdictional entities and, as such, it requires transmission service offered by non-jurisdictional entities to be on terms and conditions that are comparable to those under which they provide transmission service to themselves and that are not unduly discriminatory and preferential.⁴³ The Oregon Commission stresses that it is imperative for the Commission to exercise its discretion under FPA section 211A to stop Bonneville's discriminatory practices in order to maintain a competitive power market in the Pacific Northwest.⁴⁴

26. Other commenters filed comments in support of Bonneville's actions, stating that the Environmental Redispatch Policy is a reasonable and non-discriminatory means for Bonneville to maintain reliability while complying with its environmental responsibilities.⁴⁵ Joint Intervenors argue that sections 211A and 212 of the FPA do not provide a basis for relief because Petitioners have failed to establish that the

³⁸ 16 U.S.C. §§ 839(b) *et seq.* (2006).

³⁹ 16 U.S.C. § 838d (2006).

⁴⁰ 16 U.S.C. § 837 (2006).

⁴¹ 16 U.S.C. § 832 (2006).

⁴² *See, e.g.*, NIPPC/EPISA, Caithness, PGE, BP Wind, M-S-R, TransAlta, PPL, Northwest Wind Group, and Eurus.

⁴³ AWEA at 4.

⁴⁴ Oregon Commission at 2-3.

⁴⁵ *See, e.g.*, Pacific Northwest Generating Cooperative, Industrial Customers of

Environmental Redispatch Policy involves the rates, terms or conditions of transmission service.⁴⁶ In addition, Joint Intervenors argue that the petition fails to meet the elements required by the Commission's Rule 206(b), which requires a complainant to set forth the statutory or regulatory requirements that have been violated. Specifically, they argue that Petitioners failed to include documents supporting the facts alleged in the petition, including contracts and affidavits, required by section 206(b)(8). Joint Intervenors also state that Petitioners provide no documentation demonstrating the harm they allegedly suffered as a result of Bonneville's actions. In light of such deficiencies, Joint Intervenors contend that the Commission should find that the petition is procedurally defective and dismiss it.⁴⁷

27. NRECA, Joint Public Parties, APPA and Joint Intervenors agree with Bonneville's position that the Ninth Circuit Court of Appeals has jurisdiction over instances in which Bonneville takes a final action based upon an administrative record, and that the Record of Decision on Environmental Redispatch and Negative Pricing represents such an action.⁴⁸ NRECA asserts that Congress did not limit the Court of Appeals' jurisdiction when it enacted section 211A, and notes that the Commission has previously declined to exercise its section 211A authority when a matter is more appropriately handled by another entity (in *Town of Edinburgh*).⁴⁹

28. Joint Intervenors state that to the extent that the Commission finds some jurisdiction over matters raised in the petition, the Commission should not review or take any action on the petition until it is clear the Petitioners are not contesting the Record of Decision in multiple venues. In the event that a filing is made before the Ninth Circuit,

Northwest Utilities, Mr. Pace, APPA, Western Public Agencies Group, NRECA, Utah Associated, Public Power Council, Large Public Power Council, Industrial Customers of Northwest Utilities, and Joint Public Parties.

⁴⁶ Joint Intervenors at 4.

⁴⁷ Joint Intervenors at 7-8, 49-54.

⁴⁸ NRECA at 2-4, Joint Public Parties at 6-8, APPA at 6, Joint Intervenors at 46-48.

⁴⁹ NRECA at 2-4 (citing *Town of Edinburgh, Indiana v. Indiana Municipal Power Agency*, 132 FERC ¶ 61,102, at P 20 (2010)).

Joint Intervenors argue that the Commission should dismiss the petition without prejudice.⁵⁰

29. In its response, Petitioners argue that the Commission has jurisdiction to act on their petition under the FPA regardless of Ninth Circuit's jurisdiction to resolve disputes related to final actions under the Northwest Power Act. Petitioners note that they are not seeking relief under any of Bonneville's statutes and, instead, are seeking Commission action under the FPA. Petitioners argue that Bonneville cannot divest the Commission of its jurisdiction under the FPA by placing unduly discriminatory practices in a final action. Petitioners further argue that, contrary to Bonneville's assertions, Bonneville's Environmental Redispatch Policy does not satisfy the *Burbank* test⁵¹ for final actions under the Northwest Power Act. That is, Petitioners argue, Bonneville's Environmental Redispatch Policy is not mandated by the Northwest Power Act nor do they constitute a rate under section 7(i)(3) of the Northwest Power Act. Petitioners also allege that the true nature of their grievance is not rooted in Bonneville's final action implementing environmental redispatch but in the unduly discriminatory nature of Bonneville's provision of transmission service.

3. Commission Determination

30. The Commission concludes that it has the authority under section 211A of the FPA to require Bonneville, as further discussed below, to file a tariff providing for transmission service on terms and conditions that are comparable to those under which Bonneville provides to itself and that are not unduly discriminatory or preferential. Section 211A of the FPA states that:

⁵⁰ Joint Intervenors at 48.

⁵¹ Petitioners Answer at 22. The Court of Appeals for the Federal Circuit determined that Northwest Power Act's delegation of jurisdiction to the Ninth Circuit for final actions is valid when the:

alleged breach challenges an action taken 'pursuant to' the Northwest Power Act in one of two instances: (1) when the contractual provision is mandated by the Act, or (2) when the contractual provision is a rate [Bonneville] set by following the procedural requirements of [section 7(i) of the Northwest Power Act], including notice and comment and the generation of an administrative record. *City of Burbank v. United States*, 273 F.3d 1370, 1379 (2001).

Subject to section 212(h), 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 utility provides transmission services to itself and that are not unduly discriminatory or preferential.⁵²

Consistent with this statutory language, the Commission is taking prospective action in this proceeding, requiring the filing of a tariff that will govern service provided by Bonneville in the future.⁵³ As a result, the Commission is making no determinations as to whether actions taken by Bonneville in the past, whether pursuant to the Environmental Redispatch Policy or otherwise, were prohibited under Bonneville's statutory authorities. To the extent Bonneville's past actions are subject to judicial review by the Ninth Circuit Court of Appeals, such review does not limit the Commission's prospective exercise of authority in this proceeding under section 211A of the FPA.⁵⁴

31. Additionally, the Commission notes that the Petitioners only seek Commission action pursuant to sections 210 and 212 of the FPA if the Commission declines to act pursuant to section 211A. Because the Commission finds that it has the jurisdictional

⁵² 16 U.S.C. § 824j-1 (2006). Section 212(h) of the FPA provides that no order issued under the FPA shall be conditioned upon or require the transmission of electric energy directly to an ultimate consumer or to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless certain conditions are met. 16 U.S.C. § 824k(h) (2006).

⁵³ Section 211A(f) the FPA provides that the rate changing procedures applicable to public utilities under sections 205(c) and 205(d) of the FPA are applicable to unregulated transmission utilities for purposes of this section. *See* 16 U.S.C § 824j(f) (2006). Sections 205(c) and 205(d) of the FPA, in turn, require the filing of schedules showing all rates and charges for transmission service and the classification, practices, and regulations affecting such rates and charges, and changes to such rates, charges, classification, or service. *See* 16 U.S.C. § 824d(c)-(d) (2006).

⁵⁴ With regard to the prospective application of section 211A of the FPA, the Commission disagrees with Joint Intervenors that the requirements of Rule 206 of the Commission's Rules of Practice and Procedure apply to petitions for Commission action under section 211A. In any event, the record in this proceeding adequately supports the use of the Commission's authority under section 211A.

authority to grant relief under section 211A, the Commission declines to address the Petitioners' claims under sections 210 and 212 of the FPA in this case.

32. The Commission does not take the exercise of our authority under FPA section 211A lightly. As discussed in further detail below, we find a compelling case here to exercise that authority to ensure open access to transmission service at comparable terms, and conditions. As Congress has recognized, open access is a fundamental tenet of electricity markets. Clear and firm principles on open access give industry the confidence to invest in new generation resources and support the construction of associated transmission necessary to meet future needs. FPA section 211A is one statutory tool that Congress provided to ensure open access to transmission service at comparable and not unduly discriminatory or preferential rates, terms, and conditions. However, we expect that the need to use this statutory authority would be rare.

33. 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.

34. Going forward, we encourage parties to work together to solve these difficult issues. We stand ready to provide resources to help facilitate a solution that is consistent with FPA section 211A and that would be acceptable to all parties in this proceeding.⁵⁵

35. 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.

⁵⁵ To that end, given the extraordinary circumstances present here, the Commission will, upon request by the parties, designate members of its staff as non-decisional in this proceeding to assist in developing tariff provisions to respond to this order.

C. Comparable and Not Unduly Discriminatory Transmission Service

1. Petition

36. Petitioners allege that, during environmental redispatch, Bonneville curtails competing non-federal generators and uses such generators' firm transmission rights to deliver energy produced by federally-owned hydroelectric facilities to load. Petitioners refute Bonneville's claims that its Environmental Redispatch Policy "does not affect" transmission rights and is only a limitation on the ability of a generator interconnected to the Federal Columbia River Power System to generate.⁵⁶ Petitioners allege that, by its actions, Bonneville is forcing competing generators off the system and using such generators' firm transmission rights to deliver Bonneville's own energy. According to Petitioners, Bonneville's actions are inconsistent with section 13 of Bonneville's OATT, which specifies the terms and conditions of point-to-point transmission service. Petitioners further state that Bonneville does not compensate curtailed wind generators for its appropriation of their right to serve their customers or for the use of the firm transmission rights reserved for curtailed wind generators' output.

37. Petitioners request that the Commission order Bonneville to immediately revise its curtailment practices to comport with the undue discrimination standards of FPA section 211A, and that the Commission direct Bonneville to file an OATT that satisfies the provisions of section 211A. Petitioners point out that the Commission has consistently described the *pro forma* OATT as the "minimum terms and conditions of non-discriminatory service."⁵⁷ Petitioners contend that nothing in Bonneville's statutes inhibits the Commission's authority to direct Bonneville to file a revised OATT under section 211A or prohibits Bonneville from complying. Petitioners note that, if Bonneville believes a provision in the *pro forma* OATT conflicts with its other statutory obligations, it can request that the Commission permit a deviation just as it has done before.

⁵⁶ Petition at 14 (citing Bonneville's Record of Decision at 43 "Environmental Redispatch is a limitation on the ability of a generator interconnected to the [Federal Columbia River Transmission System] to generate and does not affect a transmission customer's transmission rights. If [Bonneville] curtailed transmission service, the transmission customer would not receive the energy that was curtailed.")

⁵⁷ Petitioners' Reply Answer at 37 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,655; Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 14; *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at P 16 (2011)).

38. As further proof that the Commission's open access policies are not at odds with Bonneville's other statutory obligations, Petitioners point out that Bonneville provided voluntary open access transmission services for over 10 years through a reciprocal OATT. Petitioners state that, since Order No. 890, Bonneville has moved further away from the *pro forma* OATT. Petitioners also point out that Bonneville has admitted that it is not complying with 19 provisions of its current, non-reciprocal, tariff.⁵⁸ Petitioners assert that Commission oversight through application of section 211A standards going forward is necessary to ensure that Bonneville will continue to provide transmission service that meets the Commission's minimum standards and to prevent Bonneville from implementing business practices, operational protocols, and unilateral contract amendments that substantially erode open access transmission service.⁵⁹ By issuing a section 211A order and directing Bonneville to file an OATT with the Commission, the Commission leaves it to Bonneville to determine what, if any, OATT deviations it will seek in the first instance.

39. Petitioners disagree with Bonneville's assertion that it is required to implement the Environmental Redispatch Policy in order to comply with its environmental compliance obligations, because Bonneville has several other options available to ensure compliance with these obligations without invoking curtailments under the Environmental Redispatch Policy.⁶⁰ Specifically, Petitioners argue that Bonneville could take a number of actions to alleviate over-generation during high water periods including: entering into storage arrangements with entities in British Columbia, entering into agreements with regional investor-owned utilities for displacement of thermal and non-thermal generation outside Bonneville's balancing authority area and paying some degree of negative prices to

⁵⁸ Petitioners' Reply Answer at 6, 37-38 (citing Att. C of Petition). Petitioners assert that Bonneville has engaged in systematic undue discrimination in transmission service by: implementing curtailment practices related to Environmental Redispatch and Dispatch Standing Order 216, its unilateral attempts to amend transmission customer LGIAs, its unilateral and uncompensated taking of firm transmission service and transmission customer loads in violation of the OATT, its failure to incorporate the OATT changes required by Order No. 890, its failure to incorporate OATT changes required by Order No. 739 regarding the elimination of the price cap for resales, and its failure to comply with numerous provisions of its current tariff. Petitioners allege that these provide ample evidence of Bonneville's failure to provide transmission service that is comparable and not unduly discriminatory or preferential.

⁵⁹ Petitioners' Reply Answer at 37-38.

⁶⁰ Petition at 15-16.

induce owners of generators in the area, including wind generators, to back down generation.

40. Petitioners also state that if Bonneville offers power at negative prices, it can allow wind generators to make their own decisions regarding when to curtail, which decisions will be based in part on each generator's PTC and REC revenue stream. According to Petitioners, Bonneville's Environmental Redispatch Policy forces all wind resources off-line and ignores the fact that there may be wind energy generators that are more willing to curtail than others because of their respective PTC or REC revenues. In such circumstances, Petitions argue the laws of supply and demand should be followed.⁶¹

2. Answers

41. Bonneville maintains that the Environmental Redispatch Policy does not violate comparability and is not unduly discriminatory. Bonneville states that, when it invokes environmental redispatch, it does not take Petitioners' transmission for its own use; rather the hydropower it substitutes for wind power serves Petitioners' loads. Bonneville states that it has no need to "confiscate" any customer's transmission capacity and does not do so under environmental redispatch. To the contrary, Bonneville asserts that it honors the customer's transmission schedule by delivering the scheduled amount of power to the point of delivery. Bonneville states that the substitution of hydro power for non-Federal power is consistent with the day-to-day management of the transmission system. According to Bonneville, the fact that Petitioners may lose some revenue from tax credits does not make Bonneville's policy non-comparable. Bonneville contends that the Commission has held that the economic effect of a term and condition of transmission service is not relevant to comparability, as long as the term and condition is applied equally to affiliated and non-affiliated generators.⁶²

42. Bonneville argues that the issuance of a directive under section 211A would interfere with Bonneville's compliance with its statutory environmental obligations. Bonneville asserts that its Environmental Redispatch Policy is driven by environmental and reliability responsibilities. Bonneville explains that curtailments are necessary for Bonneville to manage its hydro facilities during high water events, to ensure reliability, and to ensure that Bonneville meets its Clean Water Act and Endangered Species Act obligations and other statutory responsibilities under the Northwest Power Act. Bonneville claims that curtailments are performed as a last resort, after all other

⁶¹ Petition at 44.

⁶² Bonneville Answer at 100 (citing *Bonneville Power Admin.. v. Puget Sound Energy*, 125 FERC ¶ 61,273 (2008)).

mitigating measures have been implemented, to avoid harm to salmon and other aquatic species during high water periods.⁶³

43. Moreover, Bonneville asserts that section 211A does not authorize the Commission to order unregulated utilities to adopt the *pro forma* OATT. Bonneville points out that the Commission relied on sections 205 and 206 of the FPA in requiring public utilities to adopt the *pro forma* OATT and, other than the undue discrimination standard of section 206, no part of these statutes has a counterpart in section 211A. Moreover, Bonneville contends that the legislative history of section 211A demonstrates that Congress did not intend to authorize the Commission to order unregulated transmitting utilities to adopt the *pro forma* tariff.

44. Bonneville also argues that payment of negative prices would jeopardize its statutory obligations to repay the U.S. Treasury for the Federal investment in Bonneville's transmission system and to provide power at the lowest possible rates. Bonneville asserts that payment of negative prices is unreasonable, as a matter of law and policy. Bonneville argues that the real issue is whether Bonneville or any of its ratepayers should bear the costs of the PTCs and REC's that Federal and State governments have established for wind generators. Bonneville argues that fulfillment of its statutory responsibilities and achievement of the Northwest Power Act's objectives would be at risk if Bonneville paid negative prices in order to ensure compliance with environmental responsibilities. With almost all the wind in Bonneville's Balancing Authority Area being exported, Bonneville explains that paying negative prices to redispatch generation would inappropriately transfer the costs of wind development

⁶³ Under the Environmental Redispatch Policy, before Bonneville implements environmental redispatch, it will take all reasonable actions to reduce excess spill, including: sales through bilateral marketing, including offering to sell at zero cost; cutting prescheduled Pacific Northwest Coordination Agreement Storage; deferring scheduled generation maintenance activities; increase pumping into Banks Lake at Grand Coulee; seek flow reductions with BC Hydro; seek additional load under hourly coordination with Mid-Columbia Hydro Projects; seek access to additional reservoir storage space at Federal Projects; generation reductions at Columbia Generating Station; request adjustments to mutually agreeable transactions; operating hydro projects inefficiently and at speed-no-load, within BiOp parameters; implement additional spill at Federal Columbia River Power System projects per the Army Corps of Engineers' spill priority list within prevailing water quality standards; and, reduce available balancing reserves to maximize turbine flows. Bonneville Answer at Exhibit A at 14-15.

incentives to Bonneville's power sales ratepayers who do not benefit from them. According to Bonneville, this result is inconsistent with cost causation principles.⁶⁴

45. Joint Public Parties and NRECA assert that the petition challenges a reliability-based generation curtailment. They argue that Bonneville's actions during environmental redispatch do not affect a customer's transmission contracts because the curtailment is a limitation on generation. They further assert that, because the non-Federal energy scheduled is delivered by substituting non-Federal generation with Federal hydropower and the transmission schedules are honored, there is no basis for a petition under section 211A and the petition should be dismissed.⁶⁵

46. Caithness, TransAlta, NIPPC/EPSC, and Eurus argue that Bonneville's Environmental Redispatch Policy does affect transmission, is unduly discriminatory, and is non-comparable with the transmission service that Bonneville provides to itself.⁶⁶ Caithness and TransAlta argue that Bonneville's actions serve to confiscate the firm transmission capacity rights of wind generators under their respective transmission agreements together with the wholesale power loads.⁶⁷ PPL points out that, using dispatch orders, Bonneville restricts the ability of non-Federal generation facilities to transmit power on Bonneville's transmission system in favor of the delivery of hydropower generated by the Federal Columbia River Power System, which constitutes discriminatory treatment.⁶⁸ PGE expresses concern that Bonneville has asserted authority to appropriate for its own benefit contracted firm transmission capacity.⁶⁹ NIPPC/EPSC argue that the Environmental Redispatch Policy is part of a larger pattern of discriminatory and preferential transmission service as evidenced by the fact that Bonneville no longer has a reciprocity tariff on file with the Commission.⁷⁰

⁶⁴ Bonneville Answer at 68-69.

⁶⁵ NRECA Comments at 4-5; Joint Public Parties at 11.

⁶⁶ Caithness at 36-7; TransAlta at 5-7; NIPPC/EPSC at 5; Eurus at 9-10.

⁶⁷ Caithness at 5-7; TransAlta at 11-13.

⁶⁸ PPL at 19-20.

⁶⁹ PGE at 4-5.

⁷⁰ NIPPC/EPSC at 6-8. According to NIPPC/EPSC, Bonneville does not abide by 19 provisions of its current tariff.

47. Caithness also presents a constitutional argument that Bonneville's Environmental Redispatch Policy results in an unconstitutional taking of contractual transmission rights by Bonneville for the use of Bonneville's own merchant-power purposes when the transmission system is not even in distress. In addition, Caithness argues that Bonneville expropriates the generators' right to deliver power and receive RECs under agreement with the power purchaser.⁷¹

48. PPL asserts that, by implementing its Environmental Redispatch Policy, Bonneville seeks to use its market power over transmission to prevent negative prices and to avoid costs to its preference customers associated with its compliance with spill and water constraint requirements.⁷² Northwest Wind Group agrees, arguing that Bonneville is using its authority as a Control Area Operator to order wind generators in its balancing authority area to limit output, so that Bonneville's power marketing function can use the transmission capacity associated with the curtailed wind energy to dispose of excess Federal hydropower energy.⁷³ They argue that Bonneville's Environmental Redispatch Policy is discriminatory.

49. M-S-R also points out that, although energy is delivered from Bonneville's system to match the generator's original schedule, the product is no longer eligible to meet California's Renewable Portfolio Standard requirements, which do not recognize large hydroelectric generation as a qualified renewable resource. M-S-R explains that the curtailment prevents generators from recovering PTCs; therefore, Bonneville's curtailment of wind generation and substitution of hydropower results in economic losses.

50. NIPPC/EPSCA claims that Bonneville can provide comparable and not unduly discriminatory transmission service without violating its other statutory obligations and has done so in the past when Bonneville maintained a reciprocity tariff with the Commission.⁷⁴

51. Some commenters argue that Bonneville's actions under the Environmental Redispatch Policy do not amount to undue discrimination because: (1) wind generators are affected only after Bonneville takes reasonable actions with regard to Federal

⁷¹ Caithness at 22-25.

⁷² PPL at 11-12.

⁷³ Northwest Wind Group at 2-3.

⁷⁴ NIPPC/EPSCA at 11-14.

generation and after curtailment of all non-Federal thermal generation;⁷⁵ (2) the petition does not demonstrate a pervasive and historical pattern of preferential and discriminatory behavior by Bonneville, which is necessary before the Commission tailors a remedy for a claim like the Petitioners seek;⁷⁶ and (3) Petitioners have transmission access comparable to access Bonneville provides to other resources connected to the Bonneville transmission system.⁷⁷ Moreover, the list of actions that Bonneville has pursued prior to curtailing non-Federal wind is extensive and is evidence of the fact that Bonneville is making every effort to avoid curtailment of wind generators within the constraints under which it must operate.⁷⁸

52. Joint Intervenors and Western Public Agencies Group assert that Bonneville's Environmental Redispatch Policy reasonably reflects Bonneville's balancing of statutory and contractual duties, reliability responsibilities, and environmental duties in a manner that is authorized under Bonneville's interconnection agreements and its OATT.⁷⁹ Joint Intervenors assert that Bonneville has implemented the Environmental Redispatch Policy in a non-discriminatory manner to all generators in its balancing authority area including the output of wind resources under contract with Bonneville, thermal resources, and non-Federal hydroelectric generation.⁸⁰

53. NRECA and Joint Intervenors also argue that hydro resources are differently-situated from other generators due to Bonneville's hydro-related statutory and judicial mandates, and therefore the implementation of Bonneville's Environmental Redispatch Policy is not unduly discriminatory or preferential.⁸¹ NRECA argues that Bonneville is instead treating wind generators preferentially during environmental redispatch by

⁷⁵ Western Public Agencies Group at 6-7.

⁷⁶ Large Public Power Council at 4-5.

⁷⁷ Utah Associated at 2.

⁷⁸ Joint Intervenors at 5.

⁷⁹ *Id.* at 15-27; Western Public Agencies Group at 9-14.

⁸⁰ Joint Intervenors at 36.

⁸¹ NRECA explains that because Bonneville must generate hydroelectric energy rather than spilling excess water in order to meet statutory obligations, and must also operate its system reliably, Bonneville must require non-hydro generators to ramp down or curtail in potential overload situations. NRECA Comments at 7-8.

assigning them a higher curtailment priority than thermal generators.⁸² Mr. Pace argues that Petitioners have not demonstrated that they are similarly situated and that there was disparate treatment for the same service; therefore, their allegation of discrimination should be denied.⁸³

54. Some commenters agree that the Commission should require Bonneville to file an OATT under section 211A to ensure Bonneville is providing transmission service under terms and conditions comparable to those that it provides itself and that are not unduly discriminatory or preferential. Specifically, TransAlta and Caithness request that the Commission order Bonneville to file a fully conforming OATT because they state that requiring Bonneville to provide non-discriminatory service does not violate any of its statutory requirements.⁸⁴ NIPPC/EPISA argue that filing a safe harbor tariff with the Commission is consistent with Bonneville's contracting powers and its legislative requirement to act in a businesslike manner.⁸⁵

55. Joint Public Parties argue that the Commission does not have the authority to require Bonneville to file an OATT. Joint Public Parties states that section 211A allows the Commission only to require unregulated transmitting utilities to provide service at comparable rates and on comparable terms and conditions. Joint Public Parties argue that requiring Bonneville to file an entire OATT is beyond the scope of the relief the Commission can provide under section 211A.⁸⁶ In addition, Joint Public Parties state that Bonneville and regional entities, including Petitioners, are engaged in good faith efforts to revise Bonneville's OATT and the Commission should refrain from interrupting the regional efforts on this matter.

56. As noted above, some commenters assert that Bonneville has implemented its Environmental Redispatch Policy to avoid paying negative prices to generators during high water events so as to avoid increased costs to its preference customers and, in doing so, Bonneville has shifted the costs of complying with the environmental regulations from its power customers to its transmission and interconnecting customers.⁸⁷

⁸² NRECA at 9; Joint Intervenors Reply Answer at 7-8.

⁸³ Mr. Pace at 16.

⁸⁴ TransAlta at 5-6; Caithness at 38-39.

⁸⁵ NIPPC/EPISA at 17-18.

⁸⁶ Joint Public Parties at 21-22.

⁸⁷ *See, e.g.*, PPL at 14.

Accordingly, many support negative prices as a means to induce generators to curtail during high water events.⁸⁸ According to PPL, negative prices are a proper recognition of oversupply and they send a signal to the marketplace to react in an appropriate manner.⁸⁹ NIPPC/EPISA argues that paying negative prices rather than invoking environmental redispatch to mitigate Bonneville's oversupply of generation in order to provide comparable and not unduly discriminatory and preferential transmission service is consistent with sound business principles.⁹⁰ The Oregon Commission states that negative pricing is and can be part of a functioning competitive power market in the Pacific Northwest.⁹¹

57. In addition, Northwest Wind Group argues that Bonneville has not demonstrated that the occasional sale of excess Federal hydropower at negative prices would jeopardize Bonneville's ability to meet its statutory obligations. Northwest Wind Group asserts that Bonneville's overall revenue impact from the payment of negative prices to dispose of excess federal hydropower would be small in comparison to its overall revenues from power marketing activities.⁹²

58. NRECA argues that it would be inappropriate for the Commission to initiate a policy requiring the adoption of market mechanisms as alternatives to curtailments of transmission service in this proceeding. NRECA argues that the Commission has never required an entity to undertake such measures, and that requiring market reforms to address curtailment in this proceeding would be outside the scope of section 211A.⁹³

59. Many commenters agree with Petitioners that Bonneville has additional alternatives available to alleviate the over-generation issue including, among other things: (1) entering into arrangements with entities in British Columbia to take excess generation; (2) entering into agreements with neighboring utilities to take excess generation to displace their own generation; (3) paying negative prices to induce wind

⁸⁸ M-S-R at 15; AWEA at 10; PPL at 10-11.

⁸⁹ PPL at 13-14.

⁹⁰ NIPPC/EPISA at 18-19.

⁹¹ Oregon Commission at 2-3.

⁹² NWG states that Bonneville's expected net profits from power marketing are \$670 million in 2012 and \$727 million in 2013.

⁹³ NRECA at 11-13.

and other generator to back down generation and/or (4) providing fair compensation to generators within its Balancing Authority Area for the temporary shut down of units.⁹⁴ These commenters assert that Bonneville should further explore alternatives.

60. Joint Intervenors respond that the Commission has no authority to instruct Bonneville on how, as an initial matter, the agency should develop its power and transmission rates.⁹⁵ Joint Intervenors state that the Commission cannot order Bonneville to institute a new rate component pursuant to a request under sections 210 and 212(i) or 211A. They also assert that Bonneville's Environmental Redispatch Policy is reasonable because it provides a sound business reason not to use negative pricing that deserves considerable deference from the Commission. Joint Public Parties state that paying negative prices is inconsistent with Bonneville's obligations under its organic statutes to recover its costs and be fiscally self-supporting. They contend that paying negative prices is inconsistent with Bonneville's obligation to provide the lowest possible rates consistent with sound business practices.⁹⁶

61. In their response, Petitioners argue Bonneville seeks to avoid Commission jurisdiction by claiming that its actions under Environmental Redispatch do not affect transmission service. Petitioners state that arguments set forth by Bonneville and other commenters ignore the fact that, when Bonneville invokes environmental redispatch, all of the affected customer's rights under the OATT are suspended, including the right to deliver power along the transmission path for which it has contracted. Petitioners argue that Bonneville fails to recognize that, regardless of who is served, the Environmental Redispatch Policy permits Bonneville's hydropower to replace wind and other non-Federal generation when Bonneville so desires. Such action is not comparable because it results in preferential treatment in favor of Federal generation and because Bonneville does not subject its own generation or its own transmission to similar treatment.⁹⁷ Contrary to Bonneville's assertions that it applies environmental redispatch equally to all of its customers, Petitioners argue that, by forcing competing generators off the system and using such generators' firm transmission rights to deliver Bonneville's own energy, Bonneville is treating all other customers in an unduly discriminatory manner to favor its own generation.

⁹⁴ See, e.g., AWEA at 10; Save Our Wild Salmon at 4; NIPPC/EPSC at 22-23; Northwest Wind Group at 11-13.

⁹⁵ Joint Intervenors at 5 and 39.

⁹⁶ Joint Public Parties at 15-16.

⁹⁷ Petitioners' Reply Answer at 24.

3. Commission Determination

62. We find that Bonneville's Environmental Redispatch Policy results in noncomparable transmission service that unfairly treats non-Federal generating resources connected to Bonneville's transmission system. Contrary to arguments raised by some commenters, we find 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. By directing non-Federal generators under their respective interconnection agreements "to reduce generation in accordance with Transmission Provider's ... Environmental Redispatch Business Practices,"⁹⁸ 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. Through its use of dispatch orders, Bonneville's Environmental Redispatch Policy thereby impinges on the transmission service obtained by non-Federal generation, such as generation facilities owned by Petitioners, in order to deliver Federal hydropower from Bonneville's system. Thus, we disagree with commenters who assert that the record does not support use of the Commission's authority under section 211A.

63. In addition, Petitioners have submitted numerous exhibits that set forth business, commercial, and economic impacts associated with Bonneville's Environmental Redispatch Policy. Bonneville's own preliminary estimate associated with lost PTCs and RECs for 2011 was approximately \$50 million.⁹⁹ Bonneville's Environmental

⁹⁸ See Petition, Attachment E, Appendix C at 1.

⁹⁹ Other evidence suggests that the actual loss in 2011 may have been much lower. Bonneville has indicated that the value of applicable RECs is \$16/MWh and the value of PTCs is \$37/MWh and that, because only 29 percent of the wind fleet receives PTCs, the weighted average value of PTCs and RECs is \$22/MWh. See Bonneville Power Administration, *Northwest Overgeneration: An assessment of potential magnitude and cost* (Summer 2011) available at: http://www.bpa.gov/corporate/AgencyTopics/ColumbiaRiverHighWaterMgmt/BPA_Ovrgeneration_Analysis.pdf.

Since the Petition was filed, we have learned that, between May 18 and July 10, 2011, Bonneville invoked its Environmental Redispatch Policy to redispatch a total of 97,557 MWh of wind generation, which equals 5.4 percent of the 1,760,905 MWh of power produced by wind generators in the Bonneville Balancing Authority Area during this same period. Based on this information, we estimate that Bonneville's Environmental Redispatch Policy resulted in, for 2011, a \$2.15 million loss in RECs and PTCs to wind resources.

Redispatch Policy also harms load-serving entities by curtailing generation from renewable resources that would have been eligible to help satisfy state renewable portfolio standard requirements. Regardless of the magnitude of the loss, however, Petitioners have demonstrated that Bonneville's Environmental Redispatch Policy 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.

64. Because we find that Bonneville's Environmental Redispatch Policy results in noncomparable transmission service, pursuant to section 211A of FPA, we direct Bonneville to file, within 90 days from the date of this order, tariff revisions that address the comparability concerns raised in this proceeding in a manner that provides 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. Although Petitioners ask the Commission to direct Bonneville to file a revised tariff within 60 days of this order, we find that such a compressed timeline is not necessary since the high water season has ended. Moreover, allowing additional time for Bonneville to prepare its compliance filing will provide further opportunity for parties to develop, consistent with this order, mutually-agreeable alternatives that provide fair and equitable solutions to address temporary over-generation during high water periods.¹⁰⁰

65. 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. As we noted above, the Commission appreciates that Bonneville must reconcile the obligations set forth in its organic statutes with numerous rules and regulations, including those under the Endangered Species Act and the Clean Water Act. As directed in this order, Bonneville also must reconcile the provision of

¹⁰⁰ We remind intervenors that the Commission's Dispute Resolution Service (DRS) is available for the purpose of exploring the alternative dispute resolution process and/or to facilitate agreement on the matters in dispute. DRS can be reached at 1-877-337-2237. In addition, as noted above, given the extraordinary circumstances present here, the Commission will, upon request by the parties, designate members of its staff as non-decisional in this proceeding to assist in developing tariff provisions to respond to this order. *See supra* n. 55.

comparable service that is not unduly discriminatory or preferential with its organic statutes.¹⁰¹

66. Petitioners and other commenters suggest that Bonneville could have paid negative pricing to curtail generation, rather than impose the Environmental Redispatch Policy. The Commission declines to address whether Bonneville should pay negative prices as a means of resolving its over-generation problem. The Commission finds that directing Bonneville to file a revised OATT that complies with the requirements set forth in this order is the appropriate action to take at this time. The Commission declines to reach a determination regarding Caithness' contract claims, as their concerns fall outside the scope of this proceeding.

D. Implementation of the Environmental Redispatch Policy Through Unilateral Modification to Existing LGIAs

1. Petition

67. Petitioners argue that Bonneville does not have the right to enforce its Environmental Redispatch Policy based on Article 4.3, Performance Standards of the LGIA, which states:

Each Party shall perform all of its obligations under this LGIA in accordance with applicable Laws and Regulations, Applicable Reliability Standards, and Good Utility Practice, and to the extent a Party is required or prevented or limited in taking any action by such regulations and standards, such Party shall not be deemed to be in Breach of this LGIA for its compliance herewith.

¹⁰¹ 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.

2. Answers

68. Some commenters argue that Bonneville's actions are inconsistent with its executed LGIAs because Bonneville does not have a unilateral right to amend the LGIAs to grant itself the authority to implement environmental redispatch.¹⁰² Because the LGIAs do not permit curtailment consistent with Bonneville's actions, some commenters assert that Bonneville has violated the terms and conditions of its LGIAs. NIPPC/EPSC argue that Bonneville cannot use dispatch orders to unilaterally modify its interconnection agreements because dispatch orders are meant to apply only in emergency situations, which Bonneville has failed to demonstrate.¹⁰³ M-S-R recognizes the difficult issues Bonneville faces, but asserts that Bonneville should honor its obligations under its LGIAs with wind generators.¹⁰⁴

69. Several commenters support Bonneville's implementation of environmental redispatch and argue that the LGIAs empower Bonneville, as the balancing authority, to comply with mandatory reliability standards, which include maintaining the generation and load balance and frequency within Bonneville's balancing authority area. They argue that section 4.3 effectively incorporates all of the statutory requirements Bonneville is required to follow.¹⁰⁵

70. Joint Intervenors argue that the Environmental Redispatch Policy is a Bonneville "operating protocol and procedure" and a "Control Area Requirement" with which interconnection customers agreed to comply under the LGIAs. Joint Intervenors argue that Petitioners' arguments are at odds with the provisions of their own LGIAs and therefore their arguments should be rejected by the Commission.¹⁰⁶ Western Public Agencies Group states that the phrase "Applicable Laws and Regulations" referenced in section 4.3 includes both Bonneville's statutory and environmental responsibilities, as they are well established in statute and case law.¹⁰⁷

¹⁰² See AWEA at 9; NIPPC/EPSC at 19-22; TransAlta at 15-16; Caithness at 25-28; Northwest Wind Group at 7-10; Eurus at 14-18.

¹⁰³ NIPPC/EPSC at 18-19.

¹⁰⁴ M-S-R at 12-15.

¹⁰⁵ Joint Intervenors at 20-24; Western Public Agencies Group at 20-24.

¹⁰⁶ Joint Intervenors at 22.

¹⁰⁷ Western Public Agencies Group at 20-24.

71. Joint Public Parties assert that the Environmental Redispatch Policy constitutes a “Force Majeure” under Article 16.1.1 of the LGIA because the provision allows Bonneville to take any action to comply with applicable laws, regulations or restrictions imposed by governmental authorities, or any other cause beyond a party’s control. Joint Public Parties state that the Environmental Redispatch Policy is necessary to comply with environmental requirements, such as preventing excess spilling from the Federal Columbia River Power System.¹⁰⁸

72. Western Public Agencies Group states that the actions under the protocol do not constitute a breach of the LGIA. It explains that Article 9.7.2 of the LGIA authorized Bonneville to order interconnection customers “to interrupt or reduce deliveries if such delivery of electricity could adversely affect [Bonneville’s] ability to perform such activities as are necessary to safely and reliably operate and maintain the Transmission System” and where required by “Good Utility Practice.”¹⁰⁹

3. Commission Determination

73. Having determined, in accordance with section 211A, that Bonneville must provide comparable transmission service that is not unduly discriminatory or preferential, we reject Bonneville’s assertion that certain provisions of its LGIA support environmental redispatch because of Bonneville’s statutory obligations under its organic and applicable environmental statutes. 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. Similarly, on a prospective basis, Bonneville is required under section 4.3 of its LGIA to perform all of its obligations in accordance with applicable laws and regulations, including the requirements set forth in this order under section 211A. Bonneville also argues that environmental redispatch constitutes a force majeure under section 16, but Article 1 of the LGIA defines force majeure as “any order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities, or any other cause beyond a Party’s control.” The Commission recognizes that Bonneville may have implemented environmental redispatch this past summer in an effort to satisfy the requirements of certain enabling and environmental statutes, but, as discussed above, Bonneville must also prospectively

¹⁰⁸ Joint Public Parties at 14.

¹⁰⁹ Western Public Agencies Group at 20.

provide comparable transmission service that is not unduly discriminatory or preferential. Thus, Bonneville cannot rely on force majeure as support for environmental redispatch unless it can demonstrate that such redispatch does not interfere with the obligation we impose here under section 211A to provide comparable transmission service that is not unduly discriminatory.¹¹⁰

E. Miscellaneous Issues

1. Protests

74. PGE and Xcel express concern that because Bonneville does not change original e-tags when it substitutes hydropower for wind power, this could lead to false signals about flow patterns on the grid that could implicate system reliability and affect proper accounting for environmental credits.¹¹¹

75. M-S-R requests that the Commission provide an opportunity for an informal exchange of views, ideas and suggestions to develop a constructive resolution; specifically, M-S-R recommends that the Commission take the following procedural approach: (1) extend the period of fact finding; (2) allow for sufficient time for the exchange of views regarding possible solutions recognizing that finding acceptable markets for extremely high generation conditions may take time and require relaxation of traditional constraints; and (3) provide an opportunity to respond to the proposed draft solutions.¹¹² Mr. Pace claims that the best way for the Commission to resolve these issues is to initiate a rulemaking, or in the alternative, provide all the parties an opportunity to conduct discovery and fully develop the evidence concerning the legal, policy and technical issues raised in the petition, prior to disposition.¹¹³ Industrial Customers of Northwest Utilities states that the Commission should exercise its

¹¹⁰ Moreover, Bonneville states in its Environmental Redispatch Policy that “[high] flows in the Columbia River system are not rare; there is a one-in-three chance of flows at least as high as those of early June 2010 occurring in any year and lasting for one month or more.” Bonneville Answer at Exhibit A at 10.

¹¹¹ PGE at 4-5; Xcel at 8-9.

¹¹² M-S-R at 17-18.

¹¹³ Mr. Pace at 20.

discretion to not review the Petition at this time, noting that Bonneville is “actively exploring” the cost and feasibility of taking more aggressive actions in the future.¹¹⁴

2. Commission Determination

76. With regard to PGE's concern about e-tags, we note that, to the extent that Bonneville changes the source of a point-to-point transaction (e.g., substituting hydropower for wind power), it should update e-tags in accordance with applicable North American Electric Reliability Corporation and North American Energy Standards Board standards.

77. We note that M-S-R, Mr. Pace, and Industrial Customers of Northwest Utilities support additional time for the parties to exchange views regarding possible solutions to issues facing Bonneville and the region prior to our issuance of this order. Our decision to issue the order without delay is based on our conclusion that we have sufficient evidence in the current record to reach a decision and serves to provide notice that Bonneville must comply with a variety of statutory obligations, including Commission directives under section 211A. We encourage parties to continue to work together toward development of alternatives that are fair and equitable to market participants in addressing temporary over-generation during high water periods.

78. In sum, the Commission finds that Bonneville's Environmental Redispatch Policy results in non-comparable transmission service that is unduly discriminatory and preferential. Accordingly, Bonneville may not extend its current environmental redispatch policies or implement new environmental redispatch policies that result in noncomparable transmission service. In addition, as discussed above, Bonneville must file an OATT within 90 days from the date of this order that satisfies our directive under section 211A to address the comparability concerns raised in this proceeding in a manner that provides comparable transmission service that is not unduly discriminatory or preferential. Thus, Bonneville may no longer rely on the terms of its LGIA as support for environmental redispatch. We find that this remedy is appropriate because the Commission's authority under section 211A is broad and not limited by Bonneville's enabling and applicable environmental statutes.

The Commission orders:

Bonneville must submit a revised OATT, pursuant to section 211A, that addresses the comparability concerns raised in this proceeding in a manner that provides

¹¹⁴ Industrial Customers of Northwest Utilities at 3-4.

comparable transmission service that is not unduly discriminatory or preferential within 90 days from the date of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix A: Intervenor and Commenter Acronyms

Intervenor	Commenter Abbreviation
American Public Power Association ¹¹⁵	APPA
American Wind Energy Association	AWEA
Avista Corp.	
BP Wind Energy North America Inc.	BP Wind
Caithness Shepherds Flat, LLC	Caithness
California Dept. of Water Resources, State Water Project	
California Municipal Utilities Ass'n ¹¹⁶	
Calpine Corp.	
Cannon Power Group	
Charles Pace, Individual	Mr. Pace
Cities of Santa Clara and Redding, California	
City and County of San Francisco, CA	
City of Seattle, WA	
Electric Power Supply Association	EPSA
Eugene Water and Electric Board	
Eurus Combine Hills II LLC	Eurus
Exelon Corp.	
Industrial Customers of Northwest Utilities ¹¹⁷	
Joint Intervenor (Public Power Council, Pacific Northwest	Joint Intervenor

¹¹⁵ APPA is the national service organization representing the interests of not-for-profit, publicly-owned electric utilities throughout the United States.

¹¹⁶ California Municipal Utilities Ass'n is a statewide organization of local public agencies in California that provide water, gas, and electricity service to California consumers. Its membership includes electric distribution systems and other public agencies directly involved in the electricity industry.

¹¹⁷ Industrial Customers of Northwest Utilities is an incorporated, non-profit association of large industrial electric customers in the Pacific Northwest. Its members are large consumers of electricity and many members take retail electric service from both Northwest publicly owned utilities that purchase all or a portion of their power from Bonneville and from investor owned utilities.

Intervenors	Commenter Abbreviation
Generating Coop. and Northwest Requirement Utilities	
Joint Public Parties ¹¹⁸ (Pub. Util. Dist. No. 1 of Clark County, Washington, Pub. Util. Dist. No. 1 of Cowlitz County, Washington, Eugene Water and Electric Board, Pend Oreille Pub. Util. Dist. No. 1, and Pub. Util. Dist. No. 1 of Snohomish County, Washington)	Joint Public Parties
Klickitat County, Washington	
Large Public Power Council ¹¹⁹	
Modesto Irrigation District	
M-S-R Public Power Agency	M-S-R
National Rural Electric Cooperative Ass'n	NRECA
Northwest & Intermountain Power Producers Association ¹²⁰	NIPPC
Northwest Requirements Utilities ¹²¹	
Northwest Wind Group ¹²²	
Pacific Gas & Electric Co.	
Pacific Northwest Generating Cooperative	
Pend Oreille Public Utility District	

¹¹⁸ Joint Public Parties are not-for-profit distribution utilities located in Washington and Oregon that are preference customers of Bonneville.

¹¹⁹ Large Public Power Council members are non-public utilities representing 25 percent of the largest state and municipal utilities in the United States.

¹²⁰ NIPPC is an association of independent power producers operating in the Northwestern and Intermountain United States.

¹²¹ Northwest Requirements Utilities is a non-profit trade organization that represents the common interests of 50 consumer-owned electric utilities in the Pacific Northwest that are preference customers of Bonneville.

¹²² Northwest Wind Group is an unincorporated Bonneville customer group composed of wind turbine manufacturers, trade and advocacy organizations, and wind energy project developers with significant operations in the Pacific Northwest.

Intervenors	Commenter Abbreviation
Portland General Electric	PGE
Powerex Corp.	
PPL Companies (PPL EnergyPlus, LLC and PPL Energy Montana, LLC)	PPL
Public Power Council	
Public Utility Commission of Oregon	Oregon Commission
Public Utility District No. 1 of Clark County, WA	Clark PUD
Public Utility District No. 1 of Cowlitz County, WA	
Public Utility District No. 1 of Snohomish County, WA	
Public Utility District No. 2 of Grant County, WA	Grant PUD
Puget Sound Energy, Inc.	
Sacramento Municipal Utility District	
Save Our Wild Salmon, Pacific Coast Federation of Fishermen's Associations, Institute For Fisheries Resources, Idaho Rivers United and American Rivers	Save Our Wild Salmon
Southern California Edison Co.	
Tacoma Power	
TransAlta Energy Marketing (U.S.) Inc.	TransAlta
Turlock Irrigation District	
United States Representative Earl Blumenauer	
United States Senator Ron Wyden (on behalf of Northwest delegation)	
Utah Associated Municipal Power Systems	Utah Associated
Western Public Agencies Group ¹²³	
Xcel Energy Services Inc.	Xcel

¹²³ The Western Public Agencies Group is comprised of rural electric associations, rural power companies and various public utility districts located in Washington.

141 FERC ¶ 61,233
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Iberdrola Renewables, Inc.
PacifiCorp
NextEra Energy Resources, LLC
Invenergy Wind North America LLC
Horizon Wind Energy LLC

Docket No. EL11-44-001

v.

Bonneville Power Administration

ORDER DENYING REHEARING

(Issued December 20, 2012)

1. On December 7, 2011, the Commission issued an order granting a petition filed by owners of wind facilities in the Pacific Northwest: Iberdrola Renewables, Inc., PacifiCorp, NextEra Energy Resources, LLC, Invenergy Wind North America LLC, and Horizon Wind Energy LLC (collectively, Petitioners). The petition alleged, among other things, that Bonneville Power Administration's (Bonneville) Interim Environmental Redispatch and Negative Pricing Policy (Environmental Redispatch Policy or Policy) resulted in noncomparable transmission service for certain resources connected to Bonneville's transmission system.¹ In the December Order, pursuant to section 211A of the Federal Power Act (FPA),² the Commission directed Bonneville to submit tariff revisions that address the Commission's comparability concerns by providing transmission service for such resources prospectively under terms and conditions that are comparable to those under which Bonneville provides transmission service to

¹ *Iberdrola Renewables, Inc., v. Bonneville Power Administration*, 137 FERC ¶ 61,185 (2011) (December Order).

² 16 U.S.C. § 824j-1 (2006).

itself and that are not unduly discriminatory or preferential. Parties filed requests for rehearing challenging various aspects of the December Order. In this order, the Commission denies rehearing as set forth below.

I. Background

A. Bonneville

2. Bonneville is a federal power marketing agency within the United States Department of Energy established to market electric energy generated by the Bonneville Project.³ As such, Bonneville is not a public utility within the Commission's jurisdiction under sections 201, 205, and 206 of the FPA.⁴ Currently, Bonneville markets power generated at hydroelectric projects operated by the U.S. Army Corps of Engineers and the Bureau of Reclamation, as well as energy generated at several non-federal projects. Under various statutory provisions, Bonneville provides transmission to third parties if Bonneville's transmission "is not required for the transmission of federal energy;"⁵ is in "excess of the capacity required to transmit electric power generated or acquired by the United States;"⁶ "is not in conflict with the Administrator's other marketing obligations;"⁷ and can be provided "without substantial interference with [the] power marketing program."⁸

3. In Order No. 888, the Commission introduced the *pro forma* Open Access Transmission Tariff (OATT) as a standard for providing transmission services that

³ 16 U.S.C. § 832 (2006).

⁴ 16 U.S.C. §§ 824, 824d, 824e (2006). The Commission has limited jurisdiction under section 206(e) to order Bonneville to pay refunds for certain short term sales made at unjust and unreasonable rates. 16 U.S.C. § 824e(e) (2006).

⁵ 16 U.S.C. § 837e (2006).

⁶ 16 U.S.C. § 838d (2006).

⁷ 16 U.S.C. § 839f(i)(1)(B) (2006).

⁸ 16 U.S.C. § 839f(1)(3) (2006).

are just, reasonable, and not unduly discriminatory or preferential,⁹ and the Commission established a safe harbor procedure for the filing of reciprocity tariffs by non-public utilities.¹⁰ The Commission has found that Bonneville's Open Access Transmission Tariff (Bonneville OATT) does not substantially conform with the current *pro forma* OATT, as reformed in Order No. 890,¹¹ and, on that basis, the Commission found that the Bonneville OATT would not be an acceptable reciprocity tariff until Bonneville made certain modifications.¹²

4. On March 29, 2012, in Docket No. NJ12-7-000, Bonneville submitted amendments to its OATT and requested that the Commission find that the OATT, as amended, substantially conforms or is superior to the Commission's *pro forma* tariff, and that the Commission find that Bonneville satisfies the requirements for reciprocity status. The Commission has not yet acted on this filing.

5. On March 7, 2012, Bonneville submitted a separate compliance filing in response to the December Order (March Compliance Filing). The Commission is addressing the March Compliance Filing in a separate order being issued

⁹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,696 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁰ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,281-87.

¹¹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

¹² *United States Dep't of Energy – Bonneville Power Admin.*, 128 FERC ¶ 61,057, at P 11 (2009), *reh'g denied*, *United States Dep't of Energy – Bonneville Power Admin.*, 135 FERC ¶ 61,023 (2011).

concurrently with this order, where we conditionally accept Bonneville's approach as complying with our December Order.

B. Bonneville's Environmental Redispatch Policy

6. On May 13, 2011, Bonneville's Administrator issued a Final Record of Decision for Bonneville's Environmental Redispatch Policy.¹³ Under this Policy, Bonneville used environmental redispatch to address excess water supply¹⁴ by temporarily substituting federal hydropower, at no cost, for wind power or other generation in its Balancing Authority Area. Bonneville explained that it used environmental redispatch, when necessary, to ensure compliance with the Endangered Species Act,¹⁵ Clean Water Act,¹⁶ and Bonneville's other statutory responsibilities. During environmental redispatch, Bonneville issued dispatch orders to curtail non-federal generation in order to substitute energy from the hydroelectric system as a replacement to the curtailed non-federal generation, to serve load. Thus, utilities and consumers who purchased wind power or other non-hydroelectric power continued to receive their scheduled energy, but the energy originated from the Federal Columbia River Power System (FCPRS), instead of the curtailed non-federal resources.

¹³See *BPA's Interim Environmental Redispatch and Negative Pricing Policy* (May 2011) (Environmental Redispatch Policy), available at http://www.bpa.gov/corporate/pubs/RODS/2011/ERandNegativePricing_FinalROD_web.pdf.

¹⁴ During periods of high water flow, Bonneville's hydroelectric reservoirs are filled above capacity and Bonneville must either pass the excess water through turbines to generate electricity or "spill" the excess water over dams without passing it through the turbines. Because additional spill can result in an increase of total dissolved gas levels in the water (in potential violation of Clean Water Act and Endangered Species Act obligations) Bonneville explains that it runs the excess water through its hydroelectric facilities, thereby increasing generation levels in Bonneville's Balancing Authority Area to amounts that exceed its load and exports amounts.

¹⁵ 16 U.S.C. § 1536 (2006).

¹⁶ 33 U.S.C. § 1341 (2006).

7. On June 13, 2011, Petitioners submitted a petition under sections 210, 211A, 212, 307, 308, and 309 of the FPA¹⁷ alleging that, under its Environmental Redispatch Policy, Bonneville engaged in undue discrimination by directing the curtailment of wind generators and then using the wind generators' firm transmission rights to deliver federal hydropower to the wind generators' customers. Petitioners sought Commission action under section 211A to direct Bonneville to revise its curtailment practices and to file a revised OATT with the Commission. Petitioners also requested that the Commission order Bonneville to cease the curtailment practices immediately and direct Bonneville to abide by the terms of its interconnection agreements with Petitioners.

C. The December Order

8. On December 7, 2011, the Commission issued an order finding that Bonneville's Environmental Redispatch Policy resulted in non-comparable transmission service for non-federal resources. The Commission directed Bonneville to file tariff revisions that address the Commission's comparability concerns by providing for transmission service prospectively under terms and conditions that are comparable to those under which Bonneville provides transmission service to itself and that are not unduly discriminatory or preferential.¹⁸ The Commission concluded that directing this prospective relief was consistent with its jurisdictional authority under section 211A.

9. In reaching this determination, the Commission explained that non-federal resources and federal hydroelectric facilities are similarly situated for purposes of transmission curtailments under the Environmental Redispatch Policy because both take firm transmission service. Under the Environmental Redispatch Policy, Bonneville directs non-federal generators under their respective interconnection agreements "to reduce generation in accordance with Transmission Provider's ... Environmental Redispatch Business Practices," thereby hindering their ability to inject energy at the point of receipt. As a result, the Commission determined that when Bonneville invokes the Policy, it interrupts non-federal transmission customers' firm point-to-point transmission service, without similarly interrupting federal resources' transmission service. Thus, the Commission found that Bonneville's Environmental Redispatch Policy impinges on the transmission service obtained by non-federal generation, such as the generation facilities owned

¹⁷ 16 U.S.C. §§ 824i, 824j-1, 824k, 825f, 825g, 825h (2006).

¹⁸ December Order, 137 FERC ¶ 61,185 at P 78.

by Petitioners, in order to deliver federal hydropower from Bonneville's system.¹⁹ Based on these circumstances, the Commission concluded it was appropriate to act under section 211A.

10. In directing Bonneville to file tariff revisions that prospectively provide comparable transmission service for non-federal resources, the Commission acknowledged that Bonneville must reconcile the obligation to provide comparable transmission service under section 211A with a number of competing statutory obligations.²⁰ The Commission also rejected Bonneville's assertion that certain provisions of its Large Generator Interconnection Agreement (LGIA) support implementation of environmental redispatch to account for Bonneville's statutory obligations under its organic and applicable statutes.²¹

II. Procedural Matters

11. On January 6, 2012, the following parties sought clarification and/or rehearing of various portions of the December Order: Bonneville, Joint Intervenors,²² National Rural Electric Cooperative Association (NRECA), Western Public Agencies Group (Western Agencies), Joint Public Parties,²³ City of Seattle, Washington, Large Public Power Council (LPPC), and American Public Power Association (APPA) (collectively, Requests for Rehearing). Northwest & Intermountain Power Produces Coalition and Transalta Energy Marketing, Inc. (Coalition) and Petitioners filed answers to the Requests for Rehearing on January 23, 2012. Bonneville filed an answer to the Requests for Rehearing on January 27, 2012. Mid-West Electric Consumers Association, Inc. (Mid-West) filed a motion to intervene out-of-time and request for rehearing on January 6, 2012.

¹⁹ *Id.* P 62

²⁰ *Id.* P 65.

²¹ *Id.* P 73.

²² Joint Intervenors include: Public Policy Counsel; Pacific Northwest Generating Cooperative; and Northwest Requirements Utilities.

²³ Joint Public Parties are: Public Utility District No. 1 of Clark County, Washington; Public Utility District No. 1 of Cowlitz County, Washington; Eugene Water and Electric Board; Public Utility District No. 1 of Pend Oreille County, Washington; and Public Utility No. of Snohomish County, Washington.

Charles Pace filed an opposition to Mid-West's motion and request for rehearing on January 23, 2012.²⁴

12. Commission regulations do not permit answers to requests for rehearing.²⁵ Thus, the Commission rejects the answers filed by Petitioners, Coalition, and Bonneville. With respect to Mid-West's motion to intervene out-of-time, when a late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, the movant bears a higher burden to demonstrate good cause for granting such a late intervention. Mid-West has not met this higher burden for justifying late intervention. Accordingly, we reject Mid-West's untimely motion to intervene. Because Mid-West is not a party to this proceeding, it lacks standing to seek rehearing of the December Order under the FPA and the Commission's regulations.

III. Substantive Matters

A. Jurisdictional Concerns

13. On rehearing, a number of parties allege that the Commission erred in reviewing the Environmental Redispatch Policy, asserting that review of the policy falls exclusively within the jurisdiction of U.S. Court of Appeals for the Ninth Circuit.²⁶ They argue that the Record of Decision that contained the Environmental Redispatch Policy represents a final action, which under the Northwest Power Act falls within the broad and exclusive jurisdiction of that court.²⁷

²⁴ On January 24, 2012, Nineteen United States Senators and members of Congress filed comments in response to December Order. On February 9, 2012, Granella Thompson (a private citizen) also filed comments in response to the December Order.

²⁵ 18 C.F.R. § 385.713(d).

²⁶ Bonneville Rehearing at 6, 16-21; Joint Public Parties Rehearing at 6 (citing *Public Utilities Commission of Oregon v. Bonneville*, 767 F.2d 622, 626 (9th Cir. 2005)); Western Agencies Rehearing at 11; NRECA Rehearing at 12.

²⁷ *Id.*

14. Bonneville and Western Agencies argue that the Ninth Circuit has found that whether its exclusive jurisdiction is invoked is a “function of [Bonneville’s] action ... being challenged rather than a function of the cause of action which petition asserts.”²⁸ Bonneville argues that the question of whether the Commission has jurisdiction depends on the “true nature” test.²⁹ Bonneville states that, under this test, if the true nature of the action under review is a final action pursuant to Bonneville’s statutory authority, then jurisdiction to review that final action rests with the Ninth Circuit. Bonneville argues that its final action in this case was based on its statutory responsibilities to manage and operate FCRPS to protect endangered species and to produce power and maintain a reliable power system. Bonneville notes that, regardless of how Petitioners frame the legal theory for their complaint, jurisdiction is determined by the root cause of the alleged violation.³⁰

15. Western Agencies states that the Ninth Circuit has identified two conditions that must be met to determine whether an action taken by Bonneville is a final action subject to its exclusive jurisdiction: (1) the action must mark the “consummation of the agency’s decision-making process;” and (2) the action must be one by which “rights or obligations have been determined or from which legal consequences will flow.”³¹ Western Agencies argues that Bonneville’s Environmental Redispatch Policy, as a final Record of Decision, satisfies this test for exclusive jurisdiction.

16. Joint Public Parties and Bonneville assert that the Commission erred by bifurcating jurisdiction over Bonneville’s past and future actions under the Policy. In particular, Bonneville states that the Commission inappropriately determined that the Ninth Circuit had jurisdiction only over past actions under the Environmental Redispatch Policy, while the Commission has jurisdiction over future actions; rather, Bonneville argues that the Commission does not have

²⁸ Western Agencies Rehearing at 12 (citing *Kaiser Aluminum*, 261 F.3d 843, 852 (9th Cir. 2001) quoting *CP Nat’l Corp.*, 876 F.2d 745, 747 (9th Cir. 1989)).

²⁹ Bonneville Rehearing at 19-20.

³⁰ Bonneville Rehearing at 18.

³¹ Western Agencies Rehearing at 12, citing *Indus. Customers of NW Utils. v. Bonneville*, 408 F.3d 638, 645-46 (9th Cir. 2005). See also Joint Intervenors Rehearing at 5.

jurisdiction over the Environmental Redispatch Policy to provide prospective relief.³²

17. NRECA similarly contends that the prospective effect of the Commission's order does not legitimize the Commission's assertion of jurisdiction. NRECA argues that, if the Commission intends that the revised tariff will take effect before the Environmental Redispatch Policy terminates, the order interferes with the jurisdiction of the Ninth Circuit. NRECA argues that, if, on the contrary, the Commission does not intend the tariff to take effect until after the termination of the Environmental Redispatch Policy on March 30, 2012, then the Commission has no basis for ordering Bonneville to file the tariff, because the allegedly non-comparable and unduly discriminatory transmission service will have terminated before the Commission's order takes effect.³³

18. NRECA further argues that section 211A does not grant the Commission concurrent jurisdiction to review a final action.³⁴ It states that Congress did not limit or otherwise affect the Ninth Circuit's exclusive jurisdiction to review final agency actions of Bonneville under the Northwest Power Act when it enacted section 211A of the FPA. It notes that the Supreme Court has held that, "absent a clearly expressed intention, repeals by implication are not favored."³⁵ NRECA argues that, in light of the Ninth Circuit's repeated and long-standing assertion of exclusive authority concerning Bonneville final actions, the Commission should have held that it does not have the authority to issue an order that affects the Environmental Redispatch Policy.³⁶

Commission Determination

19. We will deny rehearing and affirm our prior determination that the Commission has authority under section 211A to direct Bonneville to provide transmission service prospectively under terms and conditions that are comparable to those under which it provides transmission service to itself, and are not unduly

³² Bonneville Rehearing at 21.

³³ NRECA Rehearing at 14.

³⁴ *Id.* at 12.

³⁵ *Id.*, (citing *Branch v. Smith*, 538 U.S. 270, 273 (2003)).

³⁶ NRECA Rehearing at 13.

discriminatory or preferential. We find that the arguments challenging our authority are unpersuasive.

20. Section 211A of the FPA grants the Commission broad legal authority to require unregulated transmitting utilities to provide comparable transmission service. We continue to find that section 211A is an appropriate statutory tool in this instance to ensure transmission service on a comparable basis for all resources connected to Bonneville's transmission system. In our December Order, we determined that Bonneville's Environmental Redispatch Policy significantly diminished access to Bonneville's transmission system for certain resources, which compelled us to act pursuant to this statutory authority.

21. We do not agree that the Ninth Circuit's jurisdiction over final actions by Bonneville under the Northwest Power Act precludes the Commission from invoking its own independent statutory authority under section 211A. The legal precedent cited by parties to challenge our jurisdiction over Bonneville's actions has no bearing on our determination here, as that precedent does not address the Commission's authority to ensure comparable transmission service under section 211A. Thus, we reaffirm the finding that our authority to act in this case under section 211A is not limited by the Ninth Circuit's jurisdiction under the Northwest Power Act.

22. With respect to the assertion that the Commission inappropriately bifurcated jurisdiction in this proceeding by determining that the Ninth Circuit has jurisdiction over Bonneville's past actions, while the Commission has jurisdiction to challenge Bonneville's prospective actions, we conclude that parties mischaracterize our jurisdictional finding. We did not in the December Order create bifurcated jurisdiction, nor did we otherwise make a substantive jurisdictional determination regarding the Ninth Circuit's jurisdiction over Bonneville's actions. The Commission's finding in the December Order was more limited: that the Northwest Power Act does not preclude the Commission from exercising its authority under section 211A to require Bonneville to provide comparable transmission service on a prospective basis.

23. Moreover, we note that the effect of our directive in the December Order did not interrupt or impede Bonneville's actions under the Environmental Redispatch Policy (which, in any event, expired on March 30, 2012).³⁷ As we

³⁷ According to Bonneville, the Environmental Redispatch Policy would be implemented during the high water season which typically starts in April of each year. Under the Policy, the first curtailment occurred on May 18, 2011, and the last curtailment occurred on July 10, 2011.

stated in the December Order, we did not reach a determination regarding whether Bonneville's actions in the past were consistent with its own statutory obligations, nor did we require Bonneville to cease actions under the Environmental Redispatch Policy that expired on March 31, 2012.³⁸ The Commission specifically stated that we were taking only "prospective action," directing Bonneville to submit tariff revisions that prospectively provide for comparable service to non-federal resources.³⁹

24. In sum, we reaffirm our prior determination that we acted within our jurisdictional authority under section 211A when we directed Bonneville to provide comparable transmission service on a prospective basis.

B. The Scope of December Order

1. Interplay with Bonneville's enabling organic and applicable environmental statutes.

25. Bonneville seeks clarification that the Commission determined that its authority under section 211A must be harmonized with Bonneville's enabling and applicable environmental statutes. In the alternative, Bonneville argues that the Commission erred if it concluded that the Commission's authority under section 211A overrides Bonneville's enabling and applicable environmental statutes. Bonneville argues that nothing in the Energy Policy Act of 2005 (EPAcT 2005) suggests that it was Congress's intent for section 211A to override Bonneville's existing statutory obligations.⁴⁰ Moreover, Bonneville contends that the legislative history of EPAcT 2005 affirmatively demonstrates that Bonneville's statutory authority was not inferior to the Commission's authority under section 211A.⁴¹

³⁸ December Order, 137 FERC ¶ 61,185 at P 30.

³⁹ To provide guidance to Bonneville in the development of prospective tariff changes, the Commission stated that Bonneville "may not extend its current environmental redispatch policies or implement new environmental redispatch policies that result in non-comparable transmission service." *See* December Order, 137 FERC ¶ 61,185 at P 78.

⁴⁰ Bonneville Rehearing at 6 (citing 16 U.S.C. § 824k(i)(B)(i)).

⁴¹ Bonneville Rehearing at 7.

26. Further, Bonneville argues that, while section 211A applies to every unregulated transmission entity in the country, Bonneville's statutory obligations, which were established prior to the promulgation of section 211A, cover a single federal entity and are tailored specifically to govern that entity's obligations. Bonneville argues that, according to legal precedent, in such cases there is no implied repeal of the earlier statute by the later statute.⁴²

27. Several other parties similarly claim that the Commission erred by ignoring Bonneville's competing statutory obligations in reaching its determination, or in otherwise finding that its authority under section 211A overrides Bonneville's other statutory obligations.⁴³ They argue that the Commission failed to evaluate Bonneville's other statutory obligations, and that this failure constitutes an abuse of discretion.⁴⁴ Joint Public Parties further argue that the Commission should have denied the petition in light of Bonneville's enabling and applicable environmental statutes. According to Joint Public Parties, Supreme Court precedent requires the Commission to harmonize section 211A and Bonneville's enabling and applicable environmental statutes to the extent possible.⁴⁵ APPA argues that Bonneville made a good faith effort in the Environmental Redispatch Policy to harmonize its obligations with its provision of transmission service to non-federal generators.⁴⁶

28. Joint Intervenors state that Bonneville's statutory mandates are numerous and far reaching and, therefore, these mandates differentiate the agency from any other power generator and transmission provider in the United States.⁴⁷ They argue that, in meeting its responsibilities under the FPA, the Commission must

⁴² *Id.* at 8 (citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976))).

⁴³ Joint Public Parties Rehearing at 9, 11; APPA Rehearing at 6; Joint Intervenors Rehearing at 13; NRECA Rehearing at 15.

⁴⁴ Joint Public Parties Rehearing at 9; Joint Intervenors Rehearing at 13.

⁴⁵ Joint Public Parties Rehearing at 13 (citing *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)).

⁴⁶ APPA Rehearing at 10.

⁴⁷ *Id.* at 14.

respect other federal laws and statutes.⁴⁸ Joint Public Parties, Joint Intervenors, and Western Agencies argue that there is no language in section 211A or its legislative history that authorizes the Commission to override or preempt Bonneville's other statutory obligations.

29. Joint Intervenors assert that the December Order seems to place greater importance on the contractual rights to transmission service than to Bonneville's obligations under its organic statutes and the Clean Water Act and Endangered Species Act. Joint Intervenors argue that the protection of contractual rights to transmission service does not override Bonneville's obligation to comply with the Endangered Species Act.⁴⁹

30. Western Agencies argues that the Commission erred as a matter of law by failing to give equitable treatment to Bonneville's obligations under the Endangered Species Act and Clean Water Act. Western Agencies maintains that the Commission's order requires Bonneville to adjust the output of its hydroelectric facilities during periods of low load and high generation even though this would violate the Endangered Species Act and the Clean Water Act.⁵⁰

Commission Determination

31. The Commission did not find in the December Order that its authority under section 211A supersedes Bonneville's other statutory obligations. Rather, the Commission was considering only whether Bonneville's actions resulted in the non-comparable treatment of certain resources, while recognizing that Bonneville also has obligations under its organic statutes and other environmental laws. We appreciate that Bonneville faces the burden of satisfying the obligations set forth in its statutes, as well as numerous other environmental rules and regulations, including those promulgated under the Endangered Species Act and the Clean Water Act. However, in the December Order, we determined that, among the statutory obligations that Bonneville must meet, Bonneville must also provide comparable transmission service on a prospective basis in accordance with section

⁴⁸ Joint Intervenors Rehearing at 18.

⁴⁹ *Id.* at 37.

⁵⁰ Western Public Agencies Group Rehearing at 17-18.

211A. We did not, however, find that section 211A, and our authority therein, is superior to, or overrides, Bonneville's other statutory obligations.⁵¹

32. We find no basis for the assertion that, by directing Bonneville to provide comparable transmission service in accordance with section 211A, we were ignoring Bonneville's other statutory obligations and were requiring Bonneville to act in a manner that violates those governing statutes. The Commission did not direct Bonneville to act in a manner inconsistent with its other statutory obligations, and parties cite no language from the December Order demonstrating otherwise.

33. Moreover, Bonneville's March Compliance Filing – addressed in an order issued contemporaneous with this order – belies arguments that our December Order required Bonneville to violate its other statutory obligation. Bonneville states there that it believes it is capable of providing comparable transmission service in accordance with section 211A while also satisfying its other statutory obligations.⁵² Specifically, Bonneville proposes to modify the Policy to provide compensation to certain curtailed generation. Therefore, we do not agree with those claims that the Commission's directive in the December Order forced Bonneville to contravene its other statutory obligations.

2. Requirement to File An Entire Section 211A Tariff

34. Bonneville seeks clarification regarding whether the Commission directed Bonneville to file tariff revisions or an entire tariff, and it seeks rehearing only if the intent of the Commission in the December Order was to require Bonneville to file an entire tariff. Bonneville points out that the Commission did not address specific provisions of Bonneville's tariff or any of its business practices or operations, and the Commission's only finding was that the Environmental Redispatch Policy was non-comparable. Moreover, Bonneville argues that administrative remedies should be reasonably commensurate with the nature of the

⁵¹ But, likewise, we equally did not find that section 211A and our authority therein, is inferior to, or can be subordinated to, Bonneville's other statutory obligations.

⁵² March Compliance Filing at 26 (“[Bonneville's OMP] reconciles the standard for comparable and not unduly discriminatory or preferential transmission service with Bonneville's statutory responsibilities and, as discussed earlier, thereby achieves a reasonable balance of statutory responsibilities.”).

violation, and that an order to file an entire tariff would be incommensurate with the nature of the violation found in this case.⁵³

35. LPPC and Joint Public Parties similarly seek clarification that the Commission directed only that Bonneville file tariff revisions. They also argue that, if the order more broadly required Bonneville to file and maintain a full tariff under section 211A, such remedy would exceed the harm recognized by the Commission's findings. LPPC points out that section 211A does not authorize the Commission to regulate non-public utilities as it does fully regulated utilities by making appropriate findings of fact under FPA sections 205 and 206.⁵⁴ Moreover, LPPC argues that the Commission's determination in this proceeding does not support an order compelling Bonneville to file and maintain a *pro forma* OATT.⁵⁵

36. Joint Intervenors argue that the issue of whether Bonneville maintains a *pro forma* OATT has no bearing on whether Bonneville has met the standard for comparability under section 211A and is not the appropriate basis for the Commission to issue an order under that statutory provision.⁵⁶ Joint Intervenors also argue that the Commission erred in suggesting that Bonneville could remedy its purported non-comparable and unduly discriminatory behavior by using the Commission's *pro forma* OATT.⁵⁷

Commission Determination

37. The Commission did not expressly require that Bonneville file and maintain an entirely new, updated open access transmission tariff. Rather, in the December Order, the Commission directed Bonneville to file revisions to its tariff to address the Commission's comparability concerns with respect to the Environmental Redispatch Policy, i.e, tariff revisions that ensure the provision of transmission service prospectively for non-federal resources on terms and conditions

⁵³ Bonneville Rehearing at 8-9.

⁵⁴ LPPC Rehearing at 11-12; Joint Public Parties Rehearing at 24.

⁵⁵ LPPC Rehearing at 3, 8-10.

⁵⁶ Joint Intervenors Rehearing at 39.

⁵⁷ Joint Intervenors Rehearing at 29.

comparable to those under which Bonneville provides transmission services to itself and that are not unduly discriminatory or preferential.⁵⁸

C. Non-Comparable Transmission Service

38. Several parties argue that the Commission erred in determining that federal hydroelectric resources are similarly situated to non-federal renewable resources because they both take firm transmission service.⁵⁹ They argue that these resources are *not* similarly situated and it was therefore inappropriate to direct that they be treated comparably. Bonneville asserts that resources that take the same transmission service may nonetheless be differently situated for purposes of curtailment. Bonneville argues that the Commission has permitted different rates or terms and conditions for customers taking the same service when there are relevant factual distinctions between customer classes.

39. Joint Public Parties and Bonneville note that the Commission and courts have made it clear that differences in rates and non-rate terms are permissible “where they are predicated upon differences in facts.”⁶⁰ Joint Public Parties also maintain that a Commission finding that a showing of undue discrimination “will necessarily turn upon the facts of each case, including the characteristics of the

⁵⁸ Parties object to the Commission’s proposing in footnote 101 of the December Order that one possible option for addressing the Commission’s comparability concerns was using the *pro forma* OATT. These parties mischaracterize the nature and meaning of this footnote. The *pro forma* OATT was merely one possible framework within which Bonneville could provide the comparable transmission service required by the Commission; other options for achieving comparable service are available.

⁵⁹ Joint Public Parties Rehearing at 17 (citing *Complex Consol. Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992 (D.C. Cir. 1999)); Western Agencies Rehearing at 19 (citing *Complex Consol. Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992, 1013 (D.C. Cir. 1999), *PUC of Cal. v. FERC*, 900 F.2d 269, 278 (D.C. Cir. 1990)); NRECA Rehearing at 22 (citing *Ala. Elec. Co-op Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (holding that “[it] matters little that the affected customer groups may be in most respects similarly situated ... [if] the costs of providing service to one group are different from the costs of serving the other, the two groups are in one important respect quite dissimilar.”)).

⁶⁰ Joint Public Parties Rehearing at 19; Bonneville Rehearing at 11-14.

customer class involved and the service requested, as well as myriad other potentially relevant factors.”⁶¹ APPA similarly argues that, if Bonneville’s Environmental Redispatch Policy is supported by its need to satisfy its other statutory obligations, then its action cannot result in undue discrimination, as these actions are required by statute.⁶²

40. Joint Public Parties, Western Agencies, and Joint Intervenors argue that the differing operational characteristics of the facilities and the statutes governing their operations should be part of the comparability analysis.⁶³ They assert that the Commission failed to recognize that hydroelectric resources operate differently from other types of resources. Moreover, they point out that Bonneville’s hydroelectric resources must operate under particular legal and policy constraints, while non-hydroelectric resources do not. Accordingly, they believe the Commission’s finding that federal resources and non-federal resources are similarly situated is contrary to judicial and Commission precedent. NRECA states that the Commission’s and the courts’ decisions that address undue discrimination do not base a determination of whether two groups of customers are similarly situated on whether they have any single common characteristic; rather, they turn on whether there are any differences that justify a difference in treatment.⁶⁴

41. Joint Intervenors argue that the record indicates that, in certain emergency over-generation conditions, federal hydroelectric generation must run in order to comply with Endangered Species Act and Clean Water Act requirements. This, they maintain, is the relevant distinction that supports the difference in curtailment

⁶¹ Joint Public Parties Rehearing at 19 (citing *So. Cal. Edison Co.*, 46 FERC ¶ 61,052, at 61,243 (1989)).

⁶² APPA Rehearing at 9 (citing *El Paso Nat’l Gas Co.*, 104 FERC ¶ 61,045, at P 115 (2003)).

⁶³ Joint Public Parties at 19; Joint Intervenors at 15; Western Public Agencies Group Rehearing at 19 (citing *Sacramento Municipal Utility District v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007); *Transmission Agency of Northern Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010); *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002); *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1515 (D.C. Cir. 1994)).

⁶⁴ NRECA Rehearing at 22 (citing *Ala. Elec. Co-op Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982)).

priorities under the Environmental Redispatch Policy.⁶⁵ Thus, Joint Intervenors state that the difference in curtailment priorities is not unduly discriminatory or preferential under section 211A, because the Environmental Redispatch Policy reflects the environmental must-run nature of Bonneville's federal hydroelectric resources under certain conditions.⁶⁶ Joint Intervenors seek rehearing of the Commission's finding that non-federal renewable or wind resources are similarly situated to federal hydroelectric resources in the circumstances contemplated in the Environmental Redispatch Policy.⁶⁷

42. Bonneville explains that, for purposes of curtailments to protect endangered species, hydroelectric power differs from all other resources, both federal and non-federal, because, when its system has more water than it can store, it is required to generate additional power to avoid spilling water to protect fish and other aquatic life. Bonneville states that generation by any non-hydroelectric resource, federal or non-federal, does not reduce excess spill and therefore is not similarly situated for purposes of protecting aquatic life.⁶⁸

43. Parties argue that the record does not support a finding that the Environmental Redispatch Policy results in non-comparable transmission service.⁶⁹ Joint Intervenors contend that the Record of Decision supporting the Environmental Redispatch Policy is clear that 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 low load conditions are present.⁷⁰

44. Western Agencies further argues that the fact that wind generators may lose some of their Production Tax Credits (PTC) and Renewable Energy Credits (REC) does not make Bonneville's Environmental Redispatch Policy non-comparable. They state that the Commission has held that, so long as a term and condition of

⁶⁵ *Id.* at 25.

⁶⁶ *Id.* at 27.

⁶⁷ *Id.* at 27.

⁶⁸ Bonneville Rehearing at 11-14.

⁶⁹ Joint Intervenors Rehearing at 37-42; NRECA Rehearing at 27-33.

⁷⁰ Joint Intervenors Rehearing at 15.

transmission service is applied equally to affiliated and non-affiliated generators, differential economic effects of that term and condition are not relevant to comparability.⁷¹

45. Western Agencies and NRECA argue that the Environmental Redispatch Policy actually favors non-federal resources because Bonneville manages over-generation events by first taking all reasonable actions with regard to federal generation, then by curtailing non-federal thermal generators and then, only as a last resort, by curtailing wind generators.⁷² Western Agencies notes that Bonneville curtails the Columbia Generating Station, an affiliated 1,150 MW nuclear facility, and spills federal hydroelectric generation wherever feasible, before implementing environmental redispatch. Thus, Western Agencies points out, Bonneville's preference customers bear the cost of curtailing generation from federal and non-federal thermal resources before Bonneville curtails non-federal renewable resources.⁷³ Additionally, Western Agencies states that the Environmental Redispatch Policy treats wind generators in a preferential manner by shielding them from both the operational and financial consequences of over-generation events until all other options are exhausted, including curtailment of all federal resources that can be curtailed without violating applicable environmental statutes.⁷⁴

Commission Determination

46. The Commission reaffirms its determination that Bonneville's actions resulted in transmission service provided to non-federal generating resources that is not comparable to the service it provides itself. As we found previously, under the Environmental Redispatch Policy, Bonneville unilaterally substitutes energy generated by Bonneville's hydroelectric system for energy produced by wind generation, by issuing dispatch orders that require such generators to reduce output. Energy from Bonneville's hydroelectric facilities can then serve the curtailed generator's load. Bonneville's actions affect the ability of certain resources to inject energy at a point of receipt by effectively changing the point of

⁷¹ Western Rehearing at 21-22 (citing *Bonneville v. Puget Sound Energy*, 125 FERC ¶ 61,273, at P 13 (2008)).

⁷² NRECA Rehearing at 27; Western Rehearing at 22-23.

⁷³ Western Rehearing at 22-23.

⁷⁴ *Id.* at 23.

receipt from the affected resource to Bonneville's hydroelectric facility. This unilateral action by Bonneville interrupts the firm point-to-point transmission service of non-federal transmission customers, without causing similar interruptions to firm transmission service for federal resources. Thus, Bonneville's actions under the Policy result in the non-comparable treatment of certain generation connected to Bonneville's transmission system.

47. We disagree with parties arguing that the federal hydroelectric facilities and non-federal resources are not similarly situated for purposes of transmission curtailments at issue in this proceeding. Our determination regarding whether these resources are similarly situated requires a fact-specific and case-by-case analysis of the circumstances of the entities, and the nature of the dispute at issue. This dispute relates to the provision of transmission service and whether Bonneville's decision to curtail the transmission service of certain transmission customers, without similarly interrupting the service of other customers, results in non-comparable treatment of curtailed customers. It is undisputed that both Bonneville's hydroelectric facilities and those resources that are subject to curtailment under the Environmental Redispatch Policy take firm transmission service. Those facts alone support the determination that federal hydroelectric facilities and non-federal generating resources are similarly-situated with respect to the curtailment of transmission service resulting from Bonneville's implementation of the Policy. The alleged factual distinctions between such facilities described by the parties to challenge our findings are immaterial to our determination here.

48. We also dismiss as irrelevant the Commission precedent cited by the parties to criticize our findings. Such precedent demonstrates only the fact-specific nature of the Commission's inquiry into whether entities are similarly situated, and in that respect the cited legal precedent is consistent with our analysis here.⁷⁵ We find no basis for concluding that the fact-specific determinations made in those cases bear any relevance to the facts in this proceeding.

49. Parties state that, because of specific statutory obligations, Bonneville was required to curtail certain generation, without compensating the curtailed generation, as a means to address over-generation problems arising during the high water season. Bonneville and others essentially claim that Bonneville had no options but to interrupt the firm transmission reservation of such generation

⁷⁵ See, e.g., *Sacramento Municipal Utility District v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007) (finding that entities are not similarly-situated based on a specific analysis of the relevant facts to the dispute at issue).

without compensation to manage Bonneville's transmission system in accordance with its numerous statutory obligations. The Commission dismisses these assertions. Bonneville has statutory obligations related to the protection of fish and wildlife. However, Bonneville has other statutory obligations as well. As directed by the Commission in its December Order, Bonneville is also required by statute to provide comparable transmission service on a prospective basis. The Commission acknowledges that Bonneville may need to reconcile these numerous statutory obligations. However, Bonneville is not authorized to disregard its obligation to provide comparable transmission service pursuant to section 211A.

50. The Commission further does not agree with the underlying premise that Bonneville was justified in implementing the Policy because it had no other option for addressing over-generation problems during high water seasons without violating its organic and enabling statutes. Bonneville now acknowledges in its March Compliance Filing that it believes there are other lawful options for addressing over-generation other than curtailment of non-federal generation without compensation. In that filing, Bonneville proposes to modify the Policy by compensating curtailed generation at specified levels.⁷⁶ Bonneville contends that its new proposal to compensate curtailed generation would strike an appropriate balance that would enable Bonneville to comply with the Commission's December Order, while also satisfying its other statutory obligations.⁷⁷ Moreover, it is evident from the record that Bonneville has taken, and continues to identify, a number of other options for mitigating the over-generation problem.

51. For all of these reasons, the Commission concludes that Bonneville has options for addressing over-generation other than through the Environmental Redispatch Policy. As noted above, Bonneville has suggested as much. Therefore, Bonneville cannot justify its implementation of the Policy, and its curtailment of resources without compensation, by suggesting that any other approach would result in violation of its other statutory obligations.

D. Impact of Bonneville's Actions On Transmission Service

52. Joint Public Parties, Western Agencies, Joint Intervenors, and NRECA contend that the Commission cannot exercise its discretionary authority under

⁷⁶ Although Bonneville made other technical revisions to the Protocol in its compliance filing, these technical revisions do not bear on this discussion.

⁷⁷ March Compliance Filing at 26.

section 211A because environmental redispatch does not affect transmission service.⁷⁸ Joint Public Parties state that the Commission's assertion that environmental redispatch affects the ability of a non-federal resource with firm transmission service to inject energy at the point of receipt makes no difference to that non-federal resource's transmission rights. Joint Public Parties, Western Agencies, and NRECA point out that transmission schedules are not curtailed under the Environmental Redispatch Policy because Bonneville is substituting non-federal generation with federal hydropower to ensure that scheduled energy is delivered. Because Bonneville is continuing, under its Environmental Redispatch Policy, to provide transmission service to its customers in accordance with the customer's transmission contracts, Joint Public Parties argue that there is nothing that would allow the Commission to act under section 211A.⁷⁹

53. Joint Intervenors state that Bonneville's actions under the Environmental Redispatch Policy, as characterized by the Commission, do not constitute a "curtailment" as that term is defined in the *pro forma* OATT. According to Joint Intervenors, the *pro forma* OATT defines curtailment as "[a] reduction in firm or non-firm transmission service in response to transfer capability shortage as a result of system reliability conditions."⁸⁰ Joint Intervenors assert that Bonneville uses environmental redispatch to respond to over-generation conditions that often occur in low-load periods when there is ample transmission transfer capability.⁸¹ Thus, they assert that Bonneville's actions under the Environmental Redispatch Policy cannot constitute curtailment under the *pro forma* OATT.

54. Joint Intervenors further argue that, even if the Commission meant to use the term "transmission curtailment" in a manner that differs from how that term is used in the *pro forma* OATT, the Commission was in error, because such new definition was unexplained and inconsistent with the December Order and Commission precedent.⁸²

⁷⁸ Joint Public Parties Rehearing at 13-14.

⁷⁹ *Id.* at 14 and 17; Western Rehearing at 16; NRECA Rehearing at 16.

⁸⁰ Joint Intervenors Rehearing at 29 (citing section 1.8 of *pro forma* OATT).

⁸¹ *Id.* at 29.

⁸² *Id.* at 32.

55. Similarly, NRECA states that, although the Commission found that the Environmental Redispatch Policy resulted in an interruption of transmission service, the Commission's use of "interruption" is inconsistent with the definition in the *pro forma* OATT which states that an interruption is "a reduction in non-firm transmission service due to economic reasons."⁸³ NRECA argues that the Commission acted beyond its section 211A authority, because that authority applies only to the provisions of transmission service by unregulated transmitting utilities; it does not confer on the Commission the authority to regulate generation redispatch by those unregulated transmitting utilities.⁸⁴

56. Joint Intervenors argue that the regional Commission-approved Independent System Operators' and Regional Transmission Organizations' tariffs contain over-generation protocols that recognize environmental must-run requirements.⁸⁵ They note that the California Independent System Operator Corporations's (CAISO's) Commission-approved tariff has provisions for managing over-generation protocol conditions and over-generation operating procedures. According to Joint Intervenors, the Commission has failed to explain why it analyzed the Environmental Redispatch Policy as a transmission issue as opposed to a reliability issue, and the Commission has also failed to explain why it has approved the inclusion of environmental must-run provisions in the over-generation protocols of other regional transmission providers but failed to approve Bonneville's Environmental Redispatch Policy.⁸⁶

Commission Determination

57. The Commission reaffirms that Bonneville's actions under its Environmental Redispatch Policy affect transmission service, making it appropriate for the Commission to act under section 211A. We do not agree with claims that the dispute before us involves only the scheduling and dispatch of generation resources. Bonneville's actions under the Policy cause the curtailment of the firm transmission schedules of certain resources without similarly interrupting the firm transmission schedules of Bonneville's resources. Moreover, under the Policy, Bonneville's curtailment of resources affects their ability to

⁸³ *Id.* at 17 (citing Order No 890-A, *pro forma* tariff, Section 1.16).

⁸⁴ NRECA Rehearing at 18.

⁸⁵ Joint Intervenors Rehearing at 30.

⁸⁶ Joint Intervenors Rehearing at 35.

inject energy at the point of receipt, and effectively changes the points of receipt for those facilities under their firm point-to-point transmission agreements from the curtailed resources to Bonneville's hydroelectric resources.

58. We also disagree with the argument that transmission service is not affected here because the Policy ensures that power from the hydroelectric facilities will be delivered to load, as a replacement for wind power, in accordance with transmission schedules. We believe this reasoning is flawed, and is squarely inconsistent with Commission precedent, discussed below. Transmission service in a contract-path system such as Bonneville's is reserved in a manner that allows injection of power at a specific point of the transmission grid and the withdrawal of power at another specific point on the transmission grid. By replacing wind power with federal hydropower under the Policy, the point where power is injected into the transmission grid is changed. Thus, the Policy clearly curtails a transmission customer's use of the transmission system by interrupting that customer's transmission service reservation. That is, Bonneville's policy may not result in an interruption of a power sale, but it clearly interrupts the reserved use of the transmission system.

59. Moreover, Commission precedent supports these conclusions. An interconnection customer with a transmission service agreement is entitled to inject power onto the grid. We have previously found that "(i)nterconnection is an element of transmission service,"⁸⁷ and that "the right to inject a new generator's output into the transmission system is a component of transmission delivery service."⁸⁸ Therefore, by hindering Petitioners' ability to inject power onto the grid, Bonneville's Policy affects Petitioners' transmission service and the ability to deliver non-federal power to load.

60. Parties contend that the Commission erred by using the terms "curtailments" and "interruptions" to describe the nature of Bonneville's conduct. They argue those terms are specifically defined in the pro forma OATT and Order No. 890, and Bonneville's actions under the Policy do not constitute the type of conduct that would fall within the definition of either "curtailment" or "interruption." We dismiss this characterization of the December Order. The Commission did not utilize those terms in the December Order as terms of art as they are defined in the pro forma OATT or Order No. 890. Rather, the Commission used those terms in the December Order and uses them in this order

⁸⁷ *Tennessee Power Company*, 90 FERC ¶ 61,238 (2000).

⁸⁸ *Duke Electric Transmission*, 95 FERC ¶ 61,302 (2001).

to describe the nature of Bonneville's conduct, and the impact of that conduct on non-federal resources' ability to inject power onto Bonneville's transmission system.

61. Similarly, NRECA asserts that Bonneville is not curtailing transmission service; rather Bonneville is simply redispatching generation resources as permitted under section 33.2 of the *pro forma* OATT, while ensuring that specified quantities of power are delivered to specified load. We disagree. Section 33.2 addresses the redispatch of designated network resources to address transmission constraints. The wind resources owned by Petitioners do not appear to be designated network resources, but rather firm point-to-point transmission service customers. Moreover, Bonneville has not characterized its actions under the Policy as necessary to relieve, or otherwise address, transmission constraints. Thus, section 33.2 of the *pro forma* OATT is inapplicable.

62. We also do not agree with claims that our approval of tariff provisions or market rules for managing over-generation conditions in CAISO's market is inconsistent with our determination here. CAISO's over-generation protocol states that prior to involuntary curtailment it will use available bids from generators to decrement its generation from the amount scheduled in the day-ahead market.⁸⁹ In this scenario, generators would generally receive compensation from decrementing their generation from their day-ahead schedules. To the extent it is necessary for CAISO to involuntarily decrement a generator from its day-ahead schedule, that generator would be similarly settled and would receive compensation.⁹⁰ This is not analogous to Bonneville's Environmental Redispatch Policy, which involuntarily curtails generation without compensation.

E. Evidentiary Record

63. Various parties allege that the Commission did not develop an adequate evidentiary record in this proceeding to support its determination. Joint Public Parties contend that the issues underlying the dispute in this proceeding, including the impacts of the Environmental Redispatch Policy on non-federal resources, involve both significant factual and policy matters best resolved through an

⁸⁹ CAISO Operating Protocol No. 2390

⁹⁰ CAISO Tariff Section 11.5.6.1.

evidentiary hearing.⁹¹ Therefore, Joint Public Parties and NRECA contend that the Commission erred by not instituting an evidentiary hearing to resolve issues of fact. NRECA states that the factual allegations when interpreted most favorably to Bonneville demonstrate that the policy does not result in non-comparable transmission service.

64. Joint Intervenors argue that the Commission must, at a minimum, “provide a coherent and adequate explanation of its decisions.”⁹² They further argue that the Commission must address objections raised during the proceeding and its “failure to respond meaningfully to the evidence renders its decisions arbitrary and capricious.”⁹³ In particular, Joint Intervenors assert that the Commission failed to develop a record that demonstrated how Bonneville’s Environmental Redispatch Policy was inconsistent with the terms and conditions for transmission it provided itself.⁹⁴ They also assert there is no evidence in the record to support the alleged harm suffered by Petitioners.⁹⁵ They also state that Petitioners failed to include actual executed LGIAs. Joint Intervenors more generally argue that due process requires the development of a factual record and clear delineation of standards by which statutory authority shall be applied.⁹⁶ They state that there is no evidence in the record as to the precise type of transmission service that Petitioners are taking, and regarding whether Petitioners are network or point to point transmission customers.

⁹¹ Joint Public Parties Rehearing at 23-24 (citing *Southern Union Gas Co. v. FPC*, 536 F.2d 440, at 442 (D.C. Cir. 1976)) (finding that a hearing also may be required if the matter “requires orderly discussion and presentation of a number of interrelated policy and legal issues requiring careful ventilation ... even in the absence of specific factual controversy”).

⁹² Joint Intervenors Rehearing at 38, citing *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)).

⁹³ *PPL Wallingford*, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

⁹⁴ Joint Intervenors Rehearing at 38.

⁹⁵ *Id.* at 41.

⁹⁶ *Id.* at 44.

65. NRECA and Joint Intervenors argue that the Commission impermissibly considered estimates of harm to renewable generators associated with lost PTCs and RECs, as well as harm to load serving entities from curtailment of generation. They argue that nothing in section 211A gives the Commission the authority to take into consideration, for example, the economic impact of a curtailment of transmission service on transmission customers.⁹⁷ They argue that the consideration of economic harm in determining whether undue discrimination exists is inappropriate when the harm alleged is the loss of out-of-market subsidies, rather than direct costs such as increased generation or transmission costs.

Commission Determination

66. We will deny rehearing. We continue to find that there is sufficient evidence in the record to support our determination, and that additional factual development through an evidentiary hearing is unnecessary. Our determination in the December Order rested on whether federal resources and non-federal resources are similarly situated transmission customers. Because both federal resources and non-federal resources are firm transmission customers, a fact not in dispute, they are similarly situated entities for purposes of determining whether transmission curtailments occurred on a comparable basis. This conclusion formed the basis for our finding that Bonneville's actions under the Policy resulted in the non-comparable treatment of non-federal resources. Because our determination was based on undisputed facts, we reject as without foundation those arguments challenging specific aspects of the factual record.⁹⁸

67. Moreover, we find that parties place too much emphasis on the Commission's findings regarding the economic harm caused by Bonneville's actions. There is sufficient record evidence demonstrating the economic harm caused by Bonneville's practices under the Policy.⁹⁹ However, contrary to

⁹⁷ NRECA Rehearing at 29.

⁹⁸ The Commission notes that, while Joint Intervenors claim that there is no evidence in the record regarding whether Petitioners are point-to-point transmission customers, publicly-available information demonstrates that the Petitioners' wind facilities are indeed firm point-to-point transmission customers. http://transmission.bpa.gov/business/ts_tariff/documents/ptp_transmission_customers.pdf

⁹⁹ December Order, 137 FERC ¶ 61,185 at P 99.

assertions, our evaluation of economic harm was not a factor in our determination that the Policy resulted in non-comparable treatment of resources. Rather, the discussion of economic considerations provided context for why we chose to exercise our discretion under section 211A to require Bonneville to file tariff revisions that prospectively provide for comparable service.¹⁰⁰ Thus, the Commission dismisses the objections regarding the Commission's authority under section 211A to consider the economic impact of Bonneville's conduct.

F. Bonneville's Authority to Act under the LGIA

68. Joint Intervenors and Joint Public Parties object to the Commission's determination that the Policy was not authorized under existing provisions of the LGIA. Joint Intervenors criticize the Commission for citing language from section 9.7.2 of the LGIA, when Petitioners failed to place the LGIA in the record. Joint Intervenors also contend that the Commission utilized an inappropriate construction for the term "Good Utility Practice." They argue that, contrary to the Commission's finding, the definition of Good Utility Practice contained in the final Record of Decision does not include an obligation to comply with statutory mandates. Joint Intervenors further note that, even if there is an obligation to comply with statutory obligation that the Commission has read into this definition, the Commission's construction of this definition failed to account for the Congressional mandates that have been imposed on Bonneville through its organic and applicable environmental statutes.¹⁰¹

69. Joint Public Parties argue that the Article 4.3 and the Force Majeure provision of the LGIA permit Bonneville to implement environmental redispach.¹⁰² They argue that a party will not be found in breach in the event of a Force Majeure, which includes "any order, regulation, or restriction, imposed by governmental authorities, or any cause beyond a party's control." They likewise argue that, under Article 4.3 of the LGIA, a party is not in breach if it is required

¹⁰⁰ In the December Order, the Commission stated, "[r] egardless of the magnitude of the loss, however, Petitioners have demonstrated that Bonneville's [Policy] 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." December Order, 137 FERC ¶ 61,185 at P 63.

¹⁰¹ Joint Intervenors Rehearing at 42-43.

¹⁰² *Id.* at 22.

to take any action in compliance with Applicable Laws and Regulations.¹⁰³ Joint Public Parties assert that statutory and court ordered requirements prevent Bonneville from spilling excess water from its hydroelectric facilities. Moreover, according to Joint Public Parties, Bonneville's statutory obligations require Bonneville to provide service at the lowest cost rates to consumers. Joint Public Parties state that the Policy is a reasonable and balanced approach that satisfies those legal obligations.

Commission Determination

70. We reaffirm our prior conclusions that Articles 4.3 and 9.7.2 of the LGIA, and the Force Majeure provisions of the LGIA and the OATT, do not authorize Bonneville to implement its Policy. We concluded in our December Order that implementation of the Policy results in non-comparable transmission service, and directed Bonneville to file tariff revisions that result in the provision of comparable transmission service in accordance with section 211A. We continue to find that provisions in the LGIA do not authorize Bonneville to act in a manner inconsistent with this statutory obligation. Nonetheless, we will address here arguments that specific provisions of the LGIA authorize Bonneville to implement the Policy. With respect to Article 9.7.2, we do not agree with Joint Intervenors' assertion that the definition of Good Utility Practice does not include the requirement that Bonneville comply with its legal obligations, including its prospective obligation to provide comparable service under section 211A. Good Utility Practice means "all acceptable practices, methods, or acts, generally accepted in the region." Such practices include compliance with legal obligations, such as the statutory obligation to provide comparable service prospectively.

71. We also conclude that Article 4.3 does not authorize Bonneville's conduct. We appreciate that Article 4.3 of the LGIA requires Bonneville to act in accordance with all applicable laws and regulations, which include its obligations to prevent excess water spillage from its hydroelectric facilities. However, Bonneville is no less obligated to comply with the statutory obligation to provide comparable transmission service under section 211A. Similarly, we find that the Force Majeure provision of the LGIA does not authorize Bonneville's Policy. Force Majeure is defined in the LGIA as "any order, regulation or restriction imposed by the governmental, military, or lawfully established civilian authorities,

¹⁰³ Applicable Laws and Regulations means "all duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority."

or any other cause beyond a Party's control." Joint Public Parties appear to argue that the legal obligations that prevent Bonneville from spilling excess water constitute Force Majeure, thus authorizing Bonneville to implement environmental redispatch without violating the LGIA. However, Bonneville is also required to prospectively provide comparable transmission service in accordance with section 211A. Bonneville cannot claim Force Majeure under the LGIA to justify the Environmental Redispatch Policy, while ignoring its obligations to provide comparable transmission service. The Commission finds that these LGIA provisions do not authorize Bonneville to selectively choose which laws and regulations that it proposes to follow, and which obligations it can ignore.

G. Miscellaneous Issues

72. LPPC seeks a stay of the instant proceeding for a period of at least 90 days, pending the outcome of ongoing settlement discussions between Bonneville and its customers, including Petitioners. LPPC suggests that the Commission direct the parties to file a report on the status of their discussions at the end of the 90-day period. LPPC is concerned that an obligation to comply with the order immediately will needlessly complicate the ongoing effort to resolve this matter.¹⁰⁴

73. Western Agencies states that, although the Order does not make a finding that Dispatch Scheduling Order 216 (DSO 216) contravenes comparability, its continued use by Bonneville was a comparability concern raised by Petitioners in their Complaint. Western Agencies argues that, by servicing preference customers first under DSO 216, Bonneville is acting in accordance with its legal obligation to give them preference and priority to the output of the FCRPS when there is a competing application for the same power. Western Agencies argues that, to the extent the Commission's order can be read to direct Bonneville not to give preference customers such priority, the Commission is directing Bonneville to act in a manner contrary to the priority and preference established by statute.¹⁰⁵

74. In the December Order, the Commission stated that, "to the extent that Bonneville changes the source of a point-to-point transaction (e.g., substituting hydropower for wind power), it should update e-tags in accordance with applicable North American Electric Reliability [(NERC)] and North American Energy Standards Board [(NAESB)] standards." Bonneville asserts that that its

¹⁰⁴ LPPC Rehearing at 17.

¹⁰⁵ Western Rehearing at 30.

actions comply with such standards. Bonneville explains that environmental redispatch is a within-hour redispatch of generation within Bonneville's balancing authority area and is no different from the provision of generation imbalance service within the hour, which does not require e-tags to be updated under NERC and NAESB standards. Therefore, Bonneville asks the Commission to clarify that its practice was consistent with NERC and NAESB e-tagging requirements, or clarify that it was not expressing a conclusion as to whether the practice was consistent with NERC and NAESB e-tagging requirements.¹⁰⁶

Commission Determination

75. We dismiss LPPC's request for a stay in this proceeding. We continue to find that the record in this case provides a sufficient basis for our determination. Nevertheless, we encourage parties to continue working together to reach a mutually-agreeable solution for addressing over-generation problems during high water periods.

76. With respect to DSO 216, the Commission's comparability concerns in this proceeding only addressed the Environmental Redispatch Policy, and did not address Bonneville's other operational practices including DSO 216. Thus, our determination in this case does not bear on the appropriateness or lawfulness of Bonneville's actions under DSO 216.

77. Regarding e-tagging requirements, the Commission did not express any conclusion regarding whether Bonneville's e-tagging practices as they relate to environmental redispatch are consistent with NERC and NAESB e-tagging requirements.

¹⁰⁶ Bonneville Rehearing at 9-10.

The Commission orders:

Requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

**ATTACHMENT B TO
THE JOINT PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL ENERGY REGULATORY COMMISSION**

CORPORATE DISCLOSURE STATEMENTS OF PETITIONERS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure,

Petitioners state:

Petitioner Northwest Requirements Utilities is a non-profit corporation, duly incorporated and organized under the laws of the State of Oregon, with its principal place of business located in Portland, Oregon. Northwest Requirements Utilities has no stock and no parent corporation.

Petitioner Public Power Council is a non-profit corporation, duly incorporated and organized under the laws of the State of Washington, with its principal place of business in Portland, Oregon. Public Power Council has no stock and no parent corporation.

Petitioner the City of Seattle is a Washington municipal corporation, with its principal place of business located in Seattle, Washington. The City of Seattle has no stock and no parent corporation.