UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION

Oversupply Management Protocol Rate Proceeding	**)** **)**	**BPA Docket No. OS-14**

Attachment 5 to Rebuttal Testimony of Joint Party 3,

OS-14-E-JP03-02

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REQUEST FOR LEAVE TO ANSWER AND ANSWER TO INTERVENOR COMMENTS

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 C.F.R. §§ 385.212 and 213 (2003), the Bonneville Power Administration (Bonneville) hereby requests leave to answer the comments and answers filed by certain intervernors in this proceeding, and files the following answer.

REQUEST FOR LEAVE TO ANSWER

This is an extremely complex case that raises factual, legal, biological, environmental, and economic issues. The case has great significance in the Pacific Northwest, if not nationally. At least 47 parties have intervened, raising a variety of factual and legal issues. Legal issues include interpretations of Bonneville's organic

statutes (the Bonneville Project Act, Northwest Power Act, and Pacific Northwest Preference Act), the Endangered Species Act, and the Federal Power Act, and even an allegation of a taking under the Fifth Amendment to the Constitution. Several of the issues intervenors have raised were not raised by Complainants and therefore Bonneville has not yet addressed them (these include issues raised under Bonneville's organic statutes, which Bonneville is in a unique position to address, and the constitutional issue). Bonneville addresses some of the intervenor issues in this answer; Bonneville does not thereby suggest that it agrees with all other points intervenors have raised.

The Commission has accepted answers to pleadings when they facilitate the Commission's decisional process or aid in clarifying issues.[1] The Commission has also accepted answers when they respond to new arguments.[2] Given the importance and complexity of this case and the extensive and new arguments raised by intervenors, the record will be well-served by the acceptance of Bonneville's answer to the interventions in this case.

ANSWER

A. Environmental Redispatch is Not a Confiscation of Transmission Rights

Several intervenors assert that, under its Environmental Redispatch policy, Bonneville is "confiscating" or "appropriating" their transmission capacity.[3] As Bonneville noted in its Answer, however, Bonneville had ample transmission capacity during the 2011 high-water event.[4] Indeed, Northwest Wind Group (NWG) argues that

[1] *See, e.g.*, *Old Dominion Elec. Coop v. PJM Interconnection*, 92 FERC ¶ 61,278, at 61,937 (2000); *Paiute Pipeline Co*., 104 FERC ¶ 61,078, at P 12 (2003).
[2] *See, e.g.*, *Tesoro Refining and Marketing Co. v. SFPP, L.P.*, 118 FERC ¶ 61,092, at P 3 (2007).
[3] *See, e.g.*, Eurus Combine Hills Answer 9; TransAlta Comments 11; Northwest Wind Group Comments 4.
[4] Bonneville Answer 54.

Bonneville could have found a market for its excess generation without curtailments because transmission capacity was almost always available.[5] Bonneville had no need to "confiscate" any customer's transmission capacity and does not do so under Environmental Redispatch. To the contrary, Bonneville honors the customer's transmission schedule by delivering the scheduled amount of power to the point of delivery. Bonneville curtails generation pursuant to its rights under the LGIA.

A common theme of the comments opposing Bonneville's Environmental Redispatch policy is that transmission service is affected because transmission customers do not receive Renewable Energy Credits (RECs) or Production Tax Credits during periods of Environmental Redispatch. For example, NWG states that

> [e]nergy generated by federal hydro projects is not an equivalent or acceptable substitute for wind energy because, unlike wind energy, federal hydropower does not qualify for [RECs] and cannot be used by utilities to meet state renewable portfolio standard obligations. *Firm transmission rights are therefore materially affected when Bonneville appropriates firm transmission capacity associated with wind energy . . . .*"[6]

Stated more succinctly, this argument says a) the two types of generation differ; b) therefore, transmission rights are affected. The conclusion has no connection to the premise; it is a non sequitur. Notably, NWG simply asserts (or actually takes for granted), in a subordinate clause, that Bonneville "appropriates" firm transmission capacity. NWG offers no reason to accept this assertion. Similarly, TransAlta claims that Environmental Redispatch "effectively confiscates a customer's firm transmission capacity and gives that capacity to BPA's native generation"[7] − again, an unsupported assertion.

[5] Northwest Wind Group Comments 11-12 & Ex. A, at 5 fig. 8.
[6] *Id.* at 4 (emphasis added).
[7] TransAlta Comments 11.

TransAlta and EURUS add that under Environmental Redispatch Bonneville also eliminates their rights to reassign transmission capacity and to use secondary receipt and delivery points.[8] The basis of these assertions is unclear. Transmission customers may reassign or redirect service at any time before or during the preschedule window the day before service, or during the real-time scheduling window (up to 20 minutes before the hour of delivery).[9] A customer will submit a schedule to transmit power from its stated point of receipt only if it has decided not to redirect or reassign; that is, if it has no interest in a redirect or reassignment. But Bonneville issues Environmental Redispatch orders only during the delivery hour. Therefore, if Bonneville must displace that schedule through Environmental Redispatch, the displacement will take place after the customer has submitted its schedule and has already foregone its right to reassign or redirect.

The transmission customer may still reassign or redirect service before the scheduling deadline for the next hour or for a later period. Environmental Redispatch is used only as needed, and its use in one hour does not necessarily mean it will be used the next hour or the next day, or if so, that it will be used to the same extent. As Bonneville noted in its Answer, Bonneville curtailed 5.4 percent of the MWh of wind generation produced between May 18 and July 18, 2011.[10] Therefore, transmission customers have ample opportunity to reassign or redirect transmission service.

Intervenors' assertions are transparent attempts to turn Environmental Redispatch into a transmission issue to invoke the Commission's jurisdiction under section 211A of the Federal Power Act. In addition, NWG's argument suggests that unless Bonneville (or

[8] TransAlta Comments 11; Eurus Combine Hills Answer 13.
[9] Open Access Transmission Tariff § 13.8.
[10] Bonneville Answer 56.

any transmission provider) takes into account each transmission customer's unique circumstances − in this case, accounting for RECs that have nothing to do with transmission service − it will be affecting a transmission customer's firm transmission rights. Not only is there no logic to this argument, but nothing in Bonneville's open access transmission tariff (OATT) or in any transmission customer's service agreement guarantees that the transmission customer will receive third-party benefits.

Moreover, the substitution of hydro power for non-Federal power is consistent with the day-to-day management of the transmission system. For example, under generator and energy imbalance service Bonneville provides Federal energy to serve a transmission customer's load whenever the generator is generating below its schedule or the actual load is above its schedule. Likewise, Bonneville regularly redispatches Federal generation when necessary to relieve a transmission constraint. Thus, Federal energy routinely substitutes for wind (and thermal) generation. In this case, however, to protect their government benefits the wind generators seek special treatment.

B. Northwest Wind Group's Challenges to the Science Behind Environmental Redispatch Do Not Belong Before the Commission and are Incorrect

Northwest Wind Group (NWG) has contested the very basis of Environmental Redispatch, challenging the proposition that it benefits fish. NWG asserts that it converted the MWh of curtailed wind energy to an equivalent amount of incremental spill and calculated the expected increase in total dissolved gas (TDG) levels. According to NWG, the calculations show that, had Bonneville not curtailed wind, the effect on TDG levels would have been "negligible."[11]

[11] Northwest Wind Group Comments 10-11.

NWG thus challenges the environmental science that is at the heart of this dispute. Yet NWG would have the Commission resolve this scientific dispute under provisions of the Federal Power Act that concern discrimination in transmission service. As NWG's arguments make clear, this case concerns a challenge to a Bonneville environmental policy, not a Bonneville transmission policy. Such a challenge belongs before the Ninth Circuit Court of Appeals.

In a similar case, *Nw. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv*., 25 F.3d 872 (9th Cir. 1994), several environmental groups sued Bonneville in district court under the Endangered Species Act, challenging a Bonneville record of decision under which Bonneville established a water management program that included spill and flow levels to benefit salmon and ways to replace the power that was lost as a consequence. The district court dismissed the action for lack of jurisdiction and the Ninth Circuit affirmed, holding that "the determinations here made were final actions by the agency carrying out its authorized mission of managing the river system and enhancing fish stock. They fall within the exclusive jurisdiction of this court."[12] The environmental groups emphasized that the Endangered Species Act, not the Northwest Power Act, motivated Bonneville's action. The court said that "[t]he motivation . . . is irrelevant. Jurisdiction depends upon the kind of action taken. The action was final action by the Bonneville Power Administration based upon an administrative record."[13]

Finally, to the argument that the "specific authorization of citizen suits under the Endangered Species Act takes precedence over the jurisdictional provision of the Northwest Power Act," the court replied, "To the contrary, the Endangered Species Act is

[12] 25 F.3d at 875.
[13] *Id*.

of a general character governing citizen suits throughout the United States. The Northwest Power Act is explicit in its jurisdictional requirements for the administration of the Columbia River Power System."[14] Similarly, the Federal Power Act is of a general character governing administrative actions brought by entities throughout the United States, and in this case Bonneville issued a record of decision carrying out its authorized mission of managing the river system and enhancing fish stock.

In case the Commission nevertheless asserts jurisdiction over this case, Bonneville will respond briefly to NWG's assertions. NWG's primary point is that curtailments did not correlate with TDG levels. Instead, almost all curtailments occurred during off-peak periods when prices were low. NWG concludes that this pattern "is consistent" with BPA's objective of avoiding having to dispose of excess energy when prices are negative.[15]

Of course most curtailments occurred during off-peak periods. Bonneville uses Environmental Redispatch when it has insufficient load to absorb all of the excess water behind the dams. As Bonneville stated in its Answer (and as is self-evident), load is more likely to be insufficient during light load, or off-peak, hours.[16] NWG makes the classic mistake of correlating the wrong factors. By its very nature Environmental Redispatch correlates with light load hours, and it is light load hours that correlate with lower prices. This does not mean that lower prices cause the use of Environmental Redispatch.

NWG makes two other mistakes. First, it asserts that there is no correlation between the use of Environmental Redispatch and TDG levels, noting that wind was

[14] *Id*.
[15] Northwest Wind Group Comments 10.
[16] Bonneville Answer 37, 38, 49, 50.

often not curtailed when TDG levels were high.[17] This latter point is true: Bonneville can curtail wind and substitute hydro power only if it has unloaded turbine capacity; that is, unused generation capacity.[18] If Bonneville is already at maximum generation, curtailment is not an option even if TDG levels are high. Because of Bonneville's extensive search for additional load, detailed at length in its Answer,[19] in many hours its turbines were fully loaded, leaving it no choice but to spill excess water despite the effect on TDG levels.

The mistake is concluding that this means there is no correlation between Environmental Redispatch and TDG levels. The less-than-perfect correlation exists because Environmental Redispatch can address only the lack of load, not lack of turbine capacity. All of the graphs in included in NWG's answer suffer from this same mistake.

For example, although Figure 1 in NWG's Comments does not reflect all the measurement points used to track TDG levels, it does tend to demonstrate the beneficial effect of Environmental Redispatch. The spikes below the horizontal line show the use of Environmental Redispatch. The jagged lines show TDG levels at some of the measurement points. (Because the link that NWG included did not work, it was not possible to verify the nature of the TDG data.) The higher points, when Bonneville did not use Environmental Redispatch, are when Bonneville spilled either because it had no unused generating capacity and therefore could not curtail wind or thermal generation and substitute hydro power, or because there was no generation available to be displaced. One can see that in a number of cases the TDG is rising toward the waiver level at one or

[17] Northwest Wind Group Comments 10.
[18] Bonneville Answer 43.
[19] *Id.* at 49, 52-54.

more projects before Environmental Redispatch events and then plateaus or moderates when Environmental Redispatch is used.

NWG's second mistake is its assertion that its conversion of MWh into hypothetical spill (had Bonneville not curtailed wind) would have had "a negligible impact" on TDG levels.[20] To support this assertion, NWG includes two graphs (figures 6 and 7 in Exhibit A to its Comments). One graph shows the hypothetical increase in TDG levels had increased spill occurred at John Day Dam; the other shows the hypothetical increase in TDG levels had increased spill occurred at eight selected Federal projects.

In the John Day example, NWG calculated presumed TDG levels "if one-eighth of ER curtailments were substituted with increased spill from May 13, 2011 to June 28, 2011."[21] Similarly, in its calculations for figure 6, NWG assumed that curtailments "are substituted with equal reductions of generation, rather than optimized reductions, at the [eight] federal dams."[22] This is not what would have happened. As Bonneville explained in its Answer, the Army Corps of Engineers issues a spill priority list requiring spill increases in a specific project-by-project order and setting spill caps for each project.[23] The decision of how much to spill at each project must account for many factors, including, for example, the location of the project and the spill already occurring at the project because its turbines are fully loaded. Allocating spill evenly across all projects without regard to these factors would undermine the objective of the spill priority list to minimize TDG levels. Although NWG asserts that its assumptions are "conservative" −

[20] Northwest Wind Group Comments 10-11.
[21] *Id*. Exhibit A, at 5 fig. 7.
[22] Northwest Wind Group Comments Exhibit A, at 4 n.30.
[23] Bonneville Answer 48-49.

that is, the real effect on TDG levels would be less − that conclusion is based on an incomplete and incorrect analysis of the spill regime.

Finally, Bonneville notes that on August 2, 2011, the U.S. District Court in the BiOp litigation issued an order keeping in place through 2013 existing hydro spill operations to aid the migration of fish. The court said that "[t]he 2008/2010 BiOp shall remain in place until December 31, 2013," [24] and that "Federal defendants shall implement spring and summer spill operations in a manner consistent with this court's previous spill orders."[25]

C. Bonneville Pursued All Reasonable Avenues to Dispose of Excess Water Before Resorting to Environmental Redispatch

The PPL Companies argue that Bonneville failed to pursue other solutions to its overgeneration problem before implementing Environmental Redispatch.[26] Eurus Combine Hills II LLC similarly argues that Bonneville failed to engage in Good Utility Practice because it did not pursue other solutions.[27] As Bonneville documented in its Answer, Bonneville thoroughly explored viable alternatives to Environmental Redispatch and continues to do so. Although Bonneville was unable to eliminate the need for Environmental Redispatch, Bonneville was able to minimize its use.[28]

Other intervenors cited specific solutions they say Bonneville should have pursued. Bonneville addresses those points below.

[24] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. CV01-00640-RE, slip op. at 23 (D. Or. Aug. 2, 2011).
[25] *Id*. at 3.
[26] PPL Companies' Answer 15-16.
[27] Eurus Combine Hills Answer 15-16.
[28] Bonneville Answer 46-55.

1. Bonneville Did Not Pay Negative Prices in the 1983 High-Water Event

Caithness notes that when Bonneville faced a similar high-water event in 1983, it purchased the scheduling rights to the Trojan nuclear plant and shut the plant down. According to Caithness, this transaction was the same as paying negative prices, and therefore Bonneville should be willing to pay negative prices today.[29]

Bonneville did not pay negative prices in the Trojan case. In that situation, Bonneville sought additional load to so it could sell power and generate additional revenues rather than spill. Bonneville owned 30 percent of Trojan, and it turned to Trojan's co-owners to request displacement. However, the Bonneville power rate that applied to the Trojan owners was 0.9 cents per kilowatt-hour, higher than the variable cost of running Trojan. Therefore, the other Trojan owners were not interested in purchasing Bonneville replacement power.[30]

To craft a deal, Bonneville sold the Trojan owners replacement power at the established rate, for a purchase price of $15.5 million, and purchased the co-owners' Trojan scheduling rights for $13.1 million. Thus, in effect the other Trojan owners paid $2.4 million for the Bonneville power ($15.5 million - $13.1 million).[31] As the Court noted, "the average net price for the replacement power was approximately 0.14 cents per kilowatt-hour . . . . PGE and PP&L saved money . . . but BPA still profited . . . ."[32] BPA did not pay negative prices.

[29] Caithness Answer 20.
[30] *Calif. Energy Resources Conservation and Redevelopment Comm'n v. Bonneville Power Admin.*, 754 F.2d 1470, 1472 (9th Cir. 1985).
[31] *Id*.
[32] *Id*.

2. In 2010 and 2011 Bonneville Worked with Wind Generators And Regulators on Legislative Solutions

Caithness states that Bonneville could have worked with wind generators and regulators in the Northwest and California to have Federal power that displaces wind power qualify as renewable energy under state renewable portfolio standards.[33] In fact, in 2010 and 2011 Bonneville spent considerable effort pursuing a legislative solution, only to meet resistance by the very same wind generators and regulators that Caithness implies were ready to help. Bonneville raised the prospect of legislation in multiple public workshops. In most cases wind generators and renewable energy advocates opposed the idea, fearing that reopening legislation could undermine public confidence that renewable energy is actually being generated and delivered to load and lead to repeal of provisions that favored the renewable energy industry.[34]

Despite scant support from the renewable energy industry, Bonneville still pursued legislation in California, where most of the wind generation in Bonneville's balancing authority is exported. Bonneville participated in many administrative and legislative processes, including testifying before the California legislature in support of legislation allowing Federal hydropower that displaced wind power to qualify for RECs. Bonneville found little support for this approach.[35]

3. Bonneville Cannot Designate Hydro Power That Displaces Wind Power as Environmentally Preferred Power

Caithness suggests that, even in the absence of legislation, under Oregon law Bonneville can simply declare Federal power that temporarily displaces wind power to be

[33] Caithness Answer 20.
[34] Attachment A, Marker Affidavit P. 3.
[35] *Id.* P. 4.

"environmentally preferred power" that qualifies for RECs.[36] Caithness relies on Oregon Revised Statutes § 469A.010(2), which provides that "[a]ny electricity that the Bonneville Power Administration has designated as environmentally preferred power, or has given a similar designation for electricity generated from a renewable resource, may be used to comply with a renewable portfolio standard." Caithness concludes that "Bonneville can decide what constitutes 'environmentally preferred power' under Oregon law."[37]

Under Caithness's interpretation of the Oregon statute, Bonneville could designate coal power as environmentally preferred power and the state would have to accept the coal as a renewable resource. Bonneville does not read the statute this way. Instead, Bonneville assumes that the Oregon legislature was familiar with Bonneville's environmentally preferred power program (after all, the legislature referred to the program in the statute) and passed the legislation in light of this knowledge. Caithness itself attached a brochure about the program to its answer. In that brochure, Bonneville notes that environmentally preferred power is "a renewable power product offered by BPA," and that "[w]hen BPA public power customers purchase Environmentally Preferred Power, an equal amount of BPA system power is replaced with wind power" − that is, the environmentally preferred power displaces hydro generation.[38] The Oregon legislature undoubtedly was aware that Bonneville does not label hydro power as environmentally preferred power.

In addition, the Oregon statute provides that electricity qualifies for a renewable portfolio standard if Bonneville has given a designation of environmentally preferred

[36] Caithness Answer 21.
[37] *Id*.
[38] *Id*. Ex. 4.

power or a similar designation "for electricity generated from a renewable resource."[39] The statute defines "renewable energy source" as "a source of electricity described in ORS 469A.025."[40] The sources of electricity described in ORS 469A.025 include wind; solar; wave, tidal, and ocean thermal; geothermal; biomass; hydrogen gas; and, finally, subject to very specific criteria, hydro.[41] Federal hydro does not qualify (except for limited exceptions contemplated by the Oregon statute). In deferring to Bonneville's designations of environmentally preferred power, therefore, it is clear that the legislature did not intend to give Bonneville carte blanche to decide that any power may qualify for the state's RPS standard, or, except for the limited exceptions, to allow Federal hydro power to qualify.

D. None of the Statutes Intervenors Cite Apply to this Case

Intervenors cite a variety of statutes that Bonneville's Environmental Redispatch policy allegedly violates. As Bonneville noted in its Answer, the Commission does not have jurisdiction over such allegations. In any case, as is clear on the face of the statutes cited, none of them apply to this case.

1. The Rate Standard of Section 212(i) of the Federal Power Act Does Not Apply to This Case

Caithness argues that under section 212(i) of the Federal Power Act, 16 U.S.C. § 824k(i), Bonneville's rates for transmission must be just and reasonable and not unduly discriminatory or preferential, and that the Commission should not approve the

[39] Or. Rev. Stat. § 469A.010(2).
[40] *Id*. § 469A.005(10).
[41] *Id*. § 469A.025.

transmission rates Bonneville recently submitted under the Northwest Power Act as long as Environmental Redispatch continues.[42]

Section 212(i) authorizes the Commission to order Bonneville to provide transmission service under sections 210 and 211. Caithness quotes section 212(i)(1)(B)(ii) while conveniently ignoring the introductory language of section 212(i), the crucial portion of which appears below in italics:

> The Commission shall have authority pursuant to section 824i of this title, section 824j of this title, this section, and section 824l of this title to (A) order the Administrator of the Bonneville Power Administration to provide transmission service and (B) establish the terms and conditions of such service. *In applying such sections to the Federal Columbia River Transmission System,* the Commission shall assure that −
>
> (i) * * *
> (ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section 824i of this title, section 824j of this title, this section, or section 824l of this title, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.[43]

Thus, the substantive rate standard of section 212(i) (just and reasonable and not unduly discriminatory or preferential) applies only to transmission ordered by the Commission under the Federal Power Act. It does not apply to the Commission's review of Bonneville's rate filings under the Northwest Power Act, which specifies the standards for Commission review.[44]

Indeed, the Commission so held in its first review of Bonneville's rates after enactment of the Energy Policy Act of 1992 (which added section 212(i) to the Federal Power Act), rebutting a challenge to Bonneville's rates under section 212(i) because "the

[42] Caithness Answer 42-43.
[43] 16 U.S.C. § 824k(i) (emphasis added).
[44] *Id*. § 839e(a)(2).

Commission has not ordered Bonneville to provide transmission services under section 211 and, therefore, the new standard does not apply. . . . Since this application [for approval of Bonneville's rates] does not involve transmission services ordered by the Commission under section 211, the review standards under section 211 are totally inapplicable."[45]

Caithness's argument would fail even if section 212(i) applied to this case. Caithness argues that the Commission should not approve Bonneville's transmission rates because, under Environmental Redispatch, Caithness's transmission is no longer "firm."[46] This is a service issue, not a rates issue. Moreover, if Caithness's argument were accepted, the Commission could rule on Bonneville's rates only after reviewing all of Bonneville's transmission policies to assess the quality of Bonneville's various transmission products. This exercise would increase the scope of the Commission's review immeasurably, something Congress never intended. It is also irrelevant to a review of cost-based rates.

2. Section 6 of the Pacific Northwest Preference Act Does Not Apply

Both Caithness and the Northwest & Intermountain Power Producers Association (NIPPC) allege that Bonneville has violated section 6 of the Pacific Northwest Preference Act, which provides as follows:

> Any capacity in Federal transmission lines connecting . . . a generating plant in the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas. . . . No contract for the transmission of non-Federal energy on a firm basis shall be affected by any increase, subsequent to the execution of such contract, in the

[45] *U.S. Dep't of Energy − Bonneville Power Admin.*, 67 FERC ¶ 61,351, at 62,218 (1994).
[46] Caithness Answer 42.

> requirements for transmission of Federal energy, the energy described in section 837h of this title, or other electric energy.[47]

Bonneville's alleged violation of this statute relies on the erroneous assertion, addressed above, that Bonneville has "confiscated" the wind generators' transmission and therefore "affected" transmission.[48] Moreover, the statute concerns Bonneville's increased need for transmission capacity after Bonneville has made the capacity available to others. Environmental Redispatch is not based on a need for transmission capacity but on a need for load; it would be necessary regardless of how much transmission capacity Bonneville had available.

The legislative history intervenors quote demonstrates that this statute is irrelevant. As quoted by Caithness (the underlining is Caithness's), the House Report on the bill provides that Bonneville may enter into wheeling agreements to transmit other parties' power, but that

> if the wheeling agreement is on a firm basis the existence of excess capacity will be determined and frozen at the time the wheeling contract is executed. Thereafter, the energy of any party for whom the Secretary has agreed to wheel cannot be displaced by energy of others for whom the Secretary subsequently might agree to wheel. In determining the existence of capacity excess to the needs of the Government . . . the Secretary may not decline to enter into a wheeling agreement merely because he may have energy available for sale to serve the same load.[49]

Energy of a party for whom Bonneville has agreed to wheel is not being displaced by energy of others for whom Bonneville has agreed to wheel. Bonneville has not declined to enter into a wheeling agreement with any party. There has been no subsequent increase in the needs of the Federal government for transmission. The

[47] 16 U.S.C. § 837e
[48] *See, e.g.*, Caithness Answer 31.
[49] Caithness Answer 32 (quoting H.R. Rep. No. 88-590 (1963), *reprinted in* 1964 U.S.C.C.A.N. 3342, 3350 (emphasis by Caithness)).

statute has nothing to do with this situation. Caithness's means of advocacy is argument by emphasis, as if underlining proves the point.

For its part, NIPPC asserts that Bonneville violated section 6 of the Northwest Preference Act because Bonneville "failed to reasonably foresee its needs for [transmission] and reserve FCRTS transmission capacity."[50] Environmental Redispatch has nothing to do with a failure to reserve sufficient transmission capacity. The parties' citation of the Preference Act is part of their effort to convert an environmental dispute into a transmission dispute in order to convince the Commission to intervene.

3. Section 2(b) of the Bonneville Project Act Does Not Apply

Caithness also claims that Bonneville has violated section 2(b) of the Bonneville Project Act by its "monopolization" of the Federal transmission system.[51] Section 2(b) provides that

> [i]n order to encourage the widest possible use of all electric energy that can be generated and marketed and to provide reasonable outlets therefor, and to prevent the monopolization thereof by limited groups, the administrator is authorized and directed to provide, construct, operate, maintain, and improve such electric transmission lines and . . . facilities . . . as he finds necessary, desirable, or appropriate for the purpose of transmitting electric energy . . . from the Bonneville project to existing and potential markets.[52]

Once again Caithness has conveniently quoted one part of a statute while omitting the rest, thereby again twisting the statute's meaning. Caithness claims that "[i]n entrusting Bonneville with the federal transmission system, Congress directed it

[50] NIPPC Comments 15.
[51] Caithness Answer 28-29.
[52] 16 U.S.C. § 832a(b).

to 'prevent the monopolization thereof by limited groups.'"[53] However, the statutory phrase "to prevent the monopolization thereof" unambiguously refers to electric energy, not to the transmission system; at the point in the statute at which the phrase appears (with "thereof" necessarily referring to language that preceded it), "transmission" has not even been mentioned.

In addition, the statute authorizes and directs the Bonneville Administrator to construct and operate transmission to allow him to sell energy into different markets, so that different groups have access to Federal energy. The statute is irrelevant to the issues in this case. Finally, even if the statute applied, and even if it were true that Bonneville had "confiscated" the wind generators' transmission, redispatching wind generation for 5.4 percent of the MWh produced for a two-month period[54] would hardly be "monopolization" of the transmission system. Intervenors are searching for any statute, no matter how questionable the connection, to challenge Bonneville's Environmental Redispatch policy.

E. Bonneville's Environmental Redispatch Policy is Not a Taking Under the Fifth Amendment to the Constitution

Caithness claims that the Environmental Redispatch policy is a taking of contractual rights without compensation from the wind generators, the third-party purchasers of wind energy, and the third-party landowners who lease land to wind generators.[55] As a threshold matter, this claim should be denied because the remedy that Caithness and the Complainants are seeking is not available under takings law. They "plainly [do] not seek compensation for a taking of [their]

[53] Caithness Answer 28.
[54] *See* Bonneville Answer 56.
[55] Caithness Answer 22-23.

property . . . but rather an injunction against the enforcement of a regulation that [they] allege[] to be fundamentally arbitrary . . . ."[56] Caithness relies on the remedies requested in the Complaint. Neither Caithness nor the Complainants seek "just compensation," nor does the Commission have the authority to award monetary damages. Instead, the Complainants ask the Commission to order Bonneville to take, or refrain from taking, certain actions.[57] "Whatever the merits of that claim, it does not sound under the Takings Clause."[58]

Caithness also alleges that Bonneville took royalty payments from landowners and RECS from wind energy purchasers.[59] These landowners are not parties to the contracts allegedly taken. One party cannot ground a taking claim on the taking of another party's property.[60] Moreover, Caithness has no standing to raise these third-party claims, and in any case offers no evidence (and doesn't even quite assert but rather hopes the reader will infer) that the reduction in wind generation reduces royalty payments.

Finally, none of the cases Caithness cites support its claim. In *Omnia Commercial Co. v. United States*,[61] the United States requisitioned a steel company's entire production of steel plate for the year 1918 and directed the company not to comply with a contract to sell the steel to Omnia Commercial Company. *In Brooks-Scanlon Corp. v. United States,*[62] as quoted by Caithness, the United States "'took from claimant and appropriated to the use of the United

[56] *Lingle v. Chevron U.S.A, Inc.*, 544 U.S. 528, 544 (2005).
[57] Complaint 64.
[58] *Lingle*, 544 U.S. at 544.
[59] Caithness Answer 23.
[60] *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215 (Fed. Cir. 2005).
[61] 261 U.S. 502 (1923).
[62] 265 U.S. 106 (1924).

States all the rights and advantages that an assignee of the contract would have had.'"[63] In *First English Evangelical Lutheran Church v. County of Los Angeles*,[64] after a forest fire and subsequent flood destroyed a church's buildings, the county of Los Angeles passed an ordinance prohibiting the construction or reconstruction of any building or structure on the site. In reversing a lower court's decision to strike portions of the complaint, the Supreme Court said that "the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property."[65]

In all of these cases a government entity took the entire value of property, hardly the case here (in which 5.4 percent of generation was curtailed for two months) even if one were to consider the substitution of hydropower for wind power (with the generators' loads still being served) a "taking." Moreover, in *Omnia*, the Court held that there was no taking, because the government took the subject matter of the contract − the steel − but not the contract itself, which consists of "the agreement and obligation to perform."[66] There was no taking in Omnia because "there was no acquisition of the obligation or the right to enforce it."[67] The same is true here.

Caithness relies especially heavily on *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001). In *Tulare Lake*, the state and Federal governments had granted two county water districts the right to withdraw

[63] Caithness Answer 23 (quoting *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 120 (1924)).
[64] 482 U.S. 304 (1987).
[65] *Id*. at 321.
[66] *Omnia*, 261 U.S. at 511.
[67] *Id*. at 510-11.

and distribute a set amount of water from the Feather and Sacramento Rivers. The Court of Federal Claims held that the Government had taken property without compensation when the National Marine Fisheries Service (the predecessor of the National Oceanic and Atmospheric Administration) limited the withdrawal of water after issuing a biological opinion concluding that the withdrawal of the full amount was likely to jeopardize the continued existence of the salmon population. According to the plaintiffs, the limitation deprived one of them of approximately 16 percent of its water allocation and the other one of approximately nine percent of its allocation.[68]

The plaintiffs in *Tulare Lake* urged the court to treat the case as a physical taking of property. The United States, on the other hand, argued that the court must review the government's action under the test for regulatory action that interferes with the use of property, and that the plaintiffs' claim must fail because "plaintiffs' reasonable contract expectations were necessarily limited by regulatory concern over fish and wildlife; and because the economic loss asserted here − a fraction of the master contract's overall value − was de minimis."[69]

The court concluded that the plaintiffs' position was correct; the limitation was a taking. And *Tulare Lake* has uncanny similarities to our case (except that, in percentage terms, the "taking" in *Tulare Lake* was much greater than the alleged "taking" here). But the court's conclusion that the Government's regulatory action was akin to a physical taking is highly questionable; and indeed,

[68] *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 315, 316 (2001). These percentages are calculated from the figures for allocation and deprivation of water cited on pages 315 and 316 of the case.
[69] *Id*. at 318-19.

it has been much questioned. In a later case in which *Tulare Lake* was cited as precedent, the Court of Federal Claims (the same court that issued *Tulare Lake*) declined to follow it, noting that "*Tulare* appears to be wrong on some counts, incomplete in others and, distinguishable, at all events,"[70] and that "this court disagrees with the approach taken in *Tulare* and concludes that the decision lends no support to the views espoused by plaintiffs here."[71] The court added that "*Tulare* has been the subject of intense criticism by commentators who, *inter alia*, have challenged the court's application of a physical taking theory to what was a temporary reduction in water."[72]

In a yet later case the court of appeals of California also declined to follow *Tulare Lake*, noting that "the persuasive value of *Tulare Lake* has been undercut in Klamath Irrigation District v. United States . . . in which the court rejected the underpinnings of its *Tulare Lake* decision."[73] Still later the United States District Court for the Eastern District of California also refused to follow *Tulare Lake*, noting that "the conclusory reasoning in the *Tulare Lake Basin* case is without analytical foundation and is suspect, as it has been criticized in the Court of Claims."[74] Finally, the United States Court of Appeals for the Federal Circuit also declined to follow *Tulare Lake*, noting that "its author expressly disclaimed" the case.[75]

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[70] *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 538 (2005).
[71] *Id*.
[72] *Id*. n.59 (citations omitted).
[73] *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1274, 42 Cal. Rptr. 3d 122, 131 (2006).
[74] *Meeker v. Belridge Water Storage Dist*., No. 1:05CV603(OWW SMS), 2006 U.S. Dist. LEXIS 91774, at *34 (E.D. Cal. Jan. 17, 2006).
[75] *Casitas Municipal Water Dist. v. United States*, 543 F.3d 1276, 1301 (Fed. Cir. 2008) (quoting *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 106 (2007).

Tulare Lake is not good law. The Government's position in that case, so much like Bonneville's position here, has been recognized as the better view. The case would be irrelevant even if the substitution of hydro power for wind power were the same as the absolute reduction in water use that was at issue in *Tulare Lake*.

F. Section 211A of the Federal Power Act Does Not Authorize The Commission To Order Adoption of the *Pro Forma* Tariff

NIPPC notes that, in the Order No. 890 rulemaking process, the Commission decided not to use its authority under section 211A of the Federal Power Act to order all non-public utilities to adopt a tariff that conforms with or is superior to the *pro forma* tariff because there was no evidence of a general problem with respect to transmission service provided by non-public utilities.[76] According to NIPPC, however, Environmental Redispatch is "evidence of a major problem" that must be remedied by ordering Bonneville to file a tariff.[77]

In its Answer, Bonneville argued that the Commission does not have the authority to order it to adopt the *pro forma* tariff, and that references in the legislative history to "open access," besides having very little weight, referred only to service that is open to all on a non-discriminatory basis.[78] NIPPC quotes the Commission to the same effect. As quoted by NIPPC, in Order No. 890 the Commission said that section 211A "does not limit the Commission to ordering transmission services only to the public utility from whom the non-public utility takes transmission services, but rather permits the Commission to order the non-

[76] NIPPC Comments 9 (quoting *Preventing Undue Discrimination and Preference in Transmission Service*, FERC Stats. & Regs. ¶ 31,241, at P 168) (2007)) (Order No. 890).
[77] NIPPC Comments 9-10.
[78] Bonneville Answer 87-98.

public utility to provide 'open access' transmission service; *i.e., service to all eligible customers*."[79]

This statement is consistent with the most straightforward reading of section 211A, which authorizes the Commission to require non-discriminatory service but has no language authorizing the Commission to set the terms of that service (unlike sections 206 and 207, discussed in Bonneville's Answer) and no substantive standard for such terms (unlike section 205, which sets out the just and reasonable standard). Similarly, section 212(i) provides that the Commission has the authority under sections 210 and 211 to order Bonneville to provide transmission service and to "establish the terms and conditions of such service."[80] Section 211A includes no such language; therefore, the Commission has such authority only if it is implicit. If the authority to establish terms and conditions is implicit, however, it would need no mention in sections 206, 207, or 212(i).

Most tariff provisions are matters of policy and judgment as to how to provide transmission service and how to balance the needs of the transmission provider and the transmission customer. In almost all cases, other provisions could substitute without being discriminatory so long as the same terms were offered to all similarly situated customers. It is too great a stretch of the statutory language to suggest that the authority to order non-discriminatory service is the authority to establish the terms of that service in intricate detail.

[79] Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 164 (quoted by NIPPC, NIPPC Comments 9 n.37) (emphasis added).
[80] 16 U.S.C. § 824k(i)(1)(B).

G. Bonneville's Environmental Redispatch Policy Protects Thermal Generators by Allowing Them to Establish Minimum Generation Levels

TransAlta asserts that the Environmental Redispatch policy harms thermal generators because Bonneville curtails them without regard to the effect on their operations; for example, by requiring them to ramp up or down quickly.[81] This assertion ignores Bonneville's minimum generation business practice, with which TransAlta should be quite familiar. It is untrue.

As Bonneville noted in its Answer, Bonneville developed two business practices to implement its Environmental Redispatch policy, one of which establishes a process by which thermal generators submit minimum generation levels for reliability reasons.[82] Under this business practice, thermal generators "may establish a maximum downward ramp rate and/or a minimum generation level that they cannot drop below while operating."[83]

The business practice further provides that reliability factors that generators should consider when establishing minimum generation levels include, but are not limited to, such things as "[a]pplicable environmental constraints" (TransAlta complains that rapid ramping can increase emissions; it can take this increase into account in setting its ramp rate); "[g]eneration levels required for stable plant operation"; "[m]aximum duration for reduced generation"; and "safety requirements."[84] These are all within the control of the generator; they are not dictated by Bonneville.

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[81] TransAlta Answer 3-4.
[82] Bonneville Answer 40.
[83] Establishing Minimum Generation Levels for Environmental Redispatch, http://transmission.bpa.gov/ts_business_practices/ (2011).
[84] *Id*.

Bonneville adopted this business practice at TransAlta's request. In its comments on the draft Environmental Redispatch ROD, TransAlta expressed concern about "dispatching non-Federal generation below minimum stable generation and related market power problems."[85] In response, Bonneville said that

> BPA agrees with TransAlta . . . that the Environmental Redispatch policy should not impact the minimum generation levels of non-Federal generators. BPA will allow each non-Federal thermal generator . . . to specify its minimum generation level. . . . BPA will not redispatch a non-federal generator below its stated minimum generation level. . . . The process for a non-federal generator to specify its minimum generation level will be addressed in the Business Practices.
>
> Accordingly . . . TransAlta's . . . broad concerns associated with the operation of a generator below its minimum generation level should now be moot.[86]

In light of this business practice, TransAlta's claim that Bonneville curtails thermal generators "without regard to the effect of such curtailment on any of their operations" [87] is simply astonishing.

[85] Bonneville Answer Attachment A (ROD), at 49.
[86] *Id*. at 49-50.
[87] TransAlta Answer 3.

For the foregoing reasons, Bonneville respectfully asks that the Commission accept this answer and deny the complaint.

DATED this 15th day of August, 2011.

Respectfully submitted,

/s/ Randy Roach
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Request for Leave to Answer and Answer to Intervenor Comments upon each person designated on the official service list compiled by the Secretary in Docket No. EL11-44 by electronic mail or by United States Postal Service where requested.

Dated this 15th day of August, 2011.

/s/ Barry Bennett
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ATTACHMENT A

Affidavit of Douglas R. Marker

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

AFFIDAVIT OF DOUGLAS R. MARKER IN SUPPORT OF ANSWER OF THE BONNEVILLE POWER ADMINISTRATION

1. My name is Douglas R. Marker. My business address is 905 N.E. 11th Ave, P.O. Box 3621, Portland, Oregon 97208-3621. I am a Constituent Account Executive in the Bonneville Power Administration's ("Bonneville") Regional Relations group. As such, I have personal knowledge of the facts stated herein and I am providing this affidavit in support of Bonneville's answer.

2. Since July, 2009 I have followed California's renewable portfolio standard rulemaking and legislative processes because of the potential effects on the development of wind energy in Bonneville's balancing authority and on the operations of the Federal Columbia River Power System. I organized Bonneville's efforts at the California Public Utilities Commission ("CPUC") and the California State Senate in 2010 and 2011 to

allow renewable energy that would have been delivered but for displacement by Federal hydropower to qualify for Renewable Energy Credits ("RECs"). At workshops and meetings with wind developers in the same time period, I presented similar proposals for potential legislation in Oregon, Washington, and California.

3. In all discussions I have had, policy representatives for wind developers and renewable energy advocates told me that they would firmly oppose any such proposal. They expressed their concern that reopening legislation could lead to repeal of provisions that favored renewable energy and undermine public confidence that renewable energy is actually being generated and delivered to load.

4. Bonneville's efforts in California included the following:

° On January 19, 2010, Bonneville intervened as a party to CPUC Docket 06-02-012. In the comments it filed in the proceeding, Bonneville asked the CPUC to consider the following:

> "What potential environmental, operational and reliability impact/risks may occur on neighboring systems that are carrying the additional balancing obligations for intermittent renewable generation sited on their systems by California interests?"

Bonneville further stated, "We would welcome a collaborative process with California parties to identify whether there are problems and if so how best to resolve them."[1]

° On May 12, 2010, Bonneville filed post-workshop comments with the CPUC listing its many efforts to improve transmission services for intermittent renewable generation that is exported from the Pacific Northwest to California, such as more accurate weather forecasting and within-hour scheduling,. Bonneville recommended

[1] Bonneville Power Administration's Comments on the Revised Proposed Decision of December 23, 2009. Public Utilities Commission of the State of California, Rulemaking 06-02-012 (January 19, 2010).

several provisions for inclusion in the CPUC's rules for the use of RECs. One recommendation was, "Create incentives through the REC qualification processes for the development of new flexibility options to help limit the need for curtailment of out-of-state variable energy projects."[2]

- On September 27, 2010, Bonneville comments with the CPUC regarding a CPUC proposal for tradable RECs. In its comments Bonneville made the following proposal:

> "Allow California utilities to count for RPS compliance the eligible renewable electricity that would have otherwise been generated but for curtailment to allow the host balancing authority to operate hydrosystem generation needed to meet requirements of Biological Opinions under the federal Endangered Species Act. BPA would be happy to work with the Commission and its customers to develop terms that ensure these provisions result in carbon-free electricity delivered to California."[3]

- In a special legislative session in February, 2010, the California legislature considered a bill that would require utilities to obtain 33 percent of their generation from renewable energy sources. (SBX 1-2.) The draft legislation included definitions of renewable generation eligible for the state's increased RPS. On February 15, 2011, in a public hearing that I attended, Elliot Mainzer, Bonneville's Executive Vice President for Corporate Strategy, appeared before the Senate Energy, Utilities and Communications Committee. Mr. Mainzer described the potential for overgeneration conditions in Bonneville's balancing authority area and expressed Bonneville's interest in working with California parties on remedies that could be included in SBX 1-2. He testified to Bonneville's interest in allowing wind generators to claim RECs

[2] Post-Workshop Reply Comments of the Bonneville Power Administration. Before the Public Utilities Commission of the State of California, Rulemaking 06-02-012. May 12, 2010.
[3] Bonneville Power Administration 's Comments on Proposed Decision Modifying Decision 10-03-021 (Issued August 25, 2010). Before the Public Utilities Commission of the State of California, Rulemaking 06-02-012. September 27, 2010.

for the amount of wind that would have been generated and delivered to California but for curtailment by Bonneville to meet Bonneville's environmental obligations. In that hearing and in meetings with California renewable industry members and advocates that I also attended, Bonneville staff were told that, although people were aware of the potential overgeneration conditions in the Northwest, there was no support for including such a provision in SBX 1-2.

5. This concludes my affidavit.

AFFIDAVIT

State of Oregon
County of Multnomah

NOW BEFORE ME, the undersigned authority, personally came and appeared, Douglas R. Marker, who after being duly sworn by me, did depose and say:

That the above and foregoing is true to the best of his knowledge, information, and belief.

Douglas R. Marker

SIGNED AND SWORN TO BEFORE ME ON THIS 12th Day of August, 2011

NOTARY PUBLIC, STATE OF OREGON

OFFICIAL SEAL
BARBARA M WILLARD
NOTARY PUBLIC - OREGON
COMMISSION NO 438867
MY COMMISSION EXPIRES APR. 28, 2013