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

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

Attachment 9 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** **EDP Renewables North America LLC (as successor in interest to Horizon Wind Energy LLC)** **Complainants,** **v.** **Bonneville Power Administration** **Respondent.**	)	**Docket Nos. EL11-44-002**

PROTEST OF COMPLAINANTS TO COMPLIANCE FILING BY BONNEVILLE POWER ADMINISTRATION

March 27, 2012

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PROTEST OF COMPLAINANTS TO COMPLIANCE FILING BY BONNEVILLE POWER ADMINISTRATION

Pursuant to Rules 211 and 212 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[1] Iberdrola Renewables, Inc. ("Iberdrola Renewables"); PacifiCorp; NextEra Energy Resources, LLC ("NextEra"); Invenergy Wind North America LLC; and EDP Renewables North America LLC (as successor in interest to Horizon

[1] 18 C.F.R. §§ 385.211, 385.212 (2011). *See also* "Notice of Compliance Filing," Docket No. EL11-44-002, dated Mar. 7, 2012 (setting a comment date of March 27, 2012).

Wind Energy LLC) ("EDPR NA")[2] (collectively, "Complainants") hereby submit this Protest of Bonneville Power Administration's ("Bonneville") Compliance Filing filed on March 6, 2012 (the "March 6 Filing")[3] in response to the Commission's Order in this docket (the "December 7 Order.").[4] In support thereof, Complainants state the following:

I. EXECUTIVE SUMMARY

The Complaint sought two main forms of relief from this Commission: a finding that Bonneville's Environmental Redispatch and Negative Pricing Policies ("Environmental Redispatch Protocol") was unduly discriminatory and a requirement for Bonneville to file an OATT pursuant to Federal Power Act ("FPA") Section 211A.[5] The Commission's December 7 Order granted the Complaint in both respects and directed Bonneville to cease its unduly discriminatory curtailment practices and to "submit a revised OATT, pursuant to section 211A, that addresses the comparability concerns raised in this proceeding in a manner that provides comparable transmission service that is not unduly discriminatory or preferential."[6]

Bonneville has convened both public meetings and non-public settlement discussions to discuss its potential actions in response to the December 7 Order. While not all of the Complainants were invited by Bonneville to participate in all of the discussions, to the extent permitted by Bonneville, the Complainants have participated in these meetings and have welcomed the opportunity for dialogue on these important issues. The Complainants also

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[2] Since this proceeding was initiated, Horizon Wind Energy LLC changed its name to EDP Renewables North America LLC. The name change has no effect on EDPR NA's position with respect to the issues raised in this docket.

[3] *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, Docket No. EL11-44-000, "Compliance Filing of the Bonneville Power Administration," dated Mar. 6, 2012 ("March 6 Filing").

[4] *Iberdrola Renewables, Inc., et al., v. Bonneville Power Admin.*,137 FERC ¶ 61,185 (2011) ("December 7 Order").

[5] 16 U.S.C. § 824j-1.

[6] December 7 Order at Ordering Paragraph.

supported the use of non-decisional Commission Staff to facilitate settlement discussions. Despite the considerable work of all the participants to attempt to resolve these issues, however, significant disputes remain for the Commission to resolve.

Complainants' primary concern with Bonneville's March 6 Filing is that it does not include an OATT. Bonneville has taken the position that the December 7 Order does not require it to file an OATT, but that it will nonetheless voluntarily submit a reciprocity tariff in a separate, non-jurisdictional docket. Complainants respectfully disagree that such an approach is appropriate or responsive to the December 7 Order. Complainants requested an FPA Section 211A OATT in the Complaint, Bonneville vigorously opposed that request in its Answer, and the Commission granted the Complaint and specifically directed filing of an FPA Section 211A OATT.

Indeed, the December 7 Order stated no fewer than *six* times that Bonneville must file an OATT,[7] including in the Ordering Paragraph quoted above. The only discretion left to Bonneville was the proposed substantive contents of the OATT—*i.e.*, how to meet the comparability standard—not whether to file an OATT. Bonneville then sought rehearing of this directive and "clarification" that the Commission did not mean what it actually said.[8] Bonneville now professes that its "understanding" of these plain words is that it need not file an OATT at all.[9]

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[7] *Id.* at PP 30, 38, 65, 66, 78, Ordering Paragraph.

[8] *Iberdrola Renewables, Inc., et al., v. Bonneville Power Admin.,* Docket No. EL11-44-000, "Bonneville Power Administration's Request for Clarification and in the Alternative Rehearing," dated Jan. 6, 2012 at 8-9 ("Bonneville Rehearing Request").

[9] March 6 Filing at 1.

The Commission has consistently held that compliance filings are for compliance with the Commission's directives, not for questioning the Commission's underlying order.[10] The Commission has statutory authority to enforce its own orders,[11] and it should not allow Bonneville to avoid the Commission's explicit directives and instead substitute its own, preferred response. Complainants have participated in good faith in Bonneville's regional process to develop a tariff, and the tariff that resulted from that process should have been submitted to the Commission pursuant to FPA Section 211A as part of Bonneville's March 6 Filing, along with an explanation of how any proposed deviations from the *pro forma* OATT are comparable and not unduly discriminatory or preferential.[12]

In response to the Commission's order, Bonneville has submitted only a proposed "Oversupply Management Protocol" – a document describing a curtailment program in conjunction with a *proposal to propose* a rate allocation methodology that will not even be filed for Commission review until August at the earliest, after a second year of operation under an unduly discriminatory operational protocol has occurred. While Complainants acknowledge that

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[10] *See, e.g.*, *Sierra Pacific Power Co.*, 80 FERC ¶ 61,376 at 62,271 (1997) ("As a preliminary matter, we remind Sierra Pacific that a compliance filing is not an appropriate mechanism to challenge Commission directives. If Sierra Pacific is dissatisfied with any aspect of a Commission order, or is uncertain as to the extent of the directives the Commission is ordering, it should seek rehearing or clarification of that order, as appropriate. The sole purpose of a compliance filing is to make the revisions directed by the Commission."); *El Paso Natural Gas Co.*, 115 FERC ¶ 61,395 at P 13 (2006) ("…the purpose of a compliance filing is limited, *i.e.*, it must implement the specific directives of the Commission's order. The Commission's focus in reviewing a compliance filing is similarly limited to whether the filing complies with the Commission's previously stated directives."); *NorthWestern Corp.*, 113 FERC ¶ 61,215 at P 9 (2005) ("The Commission has long established that compliance filings must be limited to the specific directives ordered by the Commission. The purpose of a compliance filing is to make the directed changes and the Commission's focus in reviewing them is whether or not they comply with the Commission's previously-stated directives."). In addition, the Commission's regulations under the Natural Gas Act, which the Commission has also applied to filings under the FPA, state that "[f]ilings made to comply with Commission orders must include only those changes required to comply with the order. Such compliance filings may not be combined with other rate or tariff change filings. A compliance filing that includes other changes or that does not comply with the applicable order in every respect may be rejected." 18 C.F.R. § 154.203(b) (2011).

[11] *See, e.g.*, *Cal. Indep. Sys. Operator Corp.*, 97 FERC ¶ 61,151, 61,660 (2001) and *Consumers Power*, 68 FERC ¶ 61,077, 61,379 (1994) (both stating that the Commission has statutory authority to enforce its orders). *See also AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 at P 43 (2003) (stating that the Commission has the authority "to interpret and enforce [its] own orders").

[12] December 7 Order at n.101.

Bonneville's proposal represents a modest improvement over the Environmental Redispatch Protocol in effect during 2011, it continues to exhibit significant flaws. It treats non-Federal generation on a non-comparable basis and includes a proposed cost allocation methodology that has little bearing on cost causation principles in general or Bonneville's organic statutes in particular. Nonetheless, if the proposal had been accompanied by and properly integrated with an FPA Section 211A OATT filing to address the fundamental and systemic undue discrimination problems identified in the Complaint proceeding, it is possible that Complainants and Bonneville might have reached agreement on using the proposed Oversupply Management Protocol as part of a short-term solution, despite these flaws. But Bonneville has refused to file an OATT with the Commission, which has left the region with a flawed interim solution to only one part of the problem, not a meaningful proposal to address the broader, systemic undue discrimination by Bonneville.

Bonneville has announced that it intends to soon submit a voluntary reciprocity tariff. Bonneville will likely assert that this "reciprocity tariff" is a reasonable substitute for the Commission's directive and allows Bonneville to pursue a "Northwest solution." That is clearly not the case. A reciprocity tariff is nonjurisdictional and essentially unenforceable by the Commission. It is a voluntary filing that Bonneville can modify, ignore or withdraw at any time, as it has done in the past, with no review or meaningful redress. The importance of this jurisdictional difference cannot be overstated – it is the difference between Bonneville being *required* to provide comparable, not unduly discriminatory or preferential service going forward (as the Commission has the authority to require), and Bonneville being able to engage in undue discrimination without consequence.

Indeed, as Bonneville's actions have illustrated in the wake of prior reciprocity submissions, Bonneville can and will ignore any Commission policy with which it does not agree and will retain the right to change its reciprocity tariff unilaterally at any time without prior Commission approval. The Commission's only remedy is to withdraw reciprocity status – a consequence Bonneville has stated it does not consider to be "significant."[13]

Bonneville's proposed approach is not a "Northwest solution." It is a solution that benefits only Bonneville's power business line, which avoids having to dispose of surplus power at negative prices, and its preference customers, who avoid having to pay costs properly attributable to them. It does not benefit the region's other power generators or consumers, and it again proposes to give Bonneville the authority to unilaterally amend transmission and interconnection contracts. There can be no non-discriminatory transmission access or well-functioning energy markets when the entity that dominates the grid in the Northwest can write its own rules and change them at will any time it sees fit to protect its own load and the generation it markets.

Bonneville's approach is also administratively unworkable. According to Bonneville, a Transmission Provider subject to an FPA Section 211A order cannot be required to submit the terms and conditions of its transmission service to the Commission's 211A jurisdiction, but instead can just add "attachments" to a voluntary tariff document over which the Commission has no jurisdiction. This piecemeal approach would conceal the impacts of such "attachments" on the underlying tariff, preventing the Commission from reviewing the Transmission Provider's deviations from the *pro forma* OATT, and relieving the Transmission Provider from explaining

[13] *See Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.,* Docket No. EL11-44-000, "Complaint and Petition for Order under Federal Power Act Section 211A Against Bonneville Power Administration," Attachment C, entitled "Conferring with Customers on BPA's Transmission Tariff and Reciprocity Status from FERC" at 3, filed June 17, 2011.

how such deviations are comparable and not unduly discriminatory or preferential. Bonneville's approach would create administrative disarray, as numerous separate "211A attachments" accumulate in a Transmission Provider's tariff, while the tariff itself remains "nonjurisdictional" and unable to be evaluated as a whole against the *pro forma* OATT. Such a result does not make sense, and there is nothing in FPA Section 211A or the Commission's December 7 Order to suggest that Congress, or the Commission, intended such a result. The Commission should not accept a compliance filing whose precedential value could severely undermine the Commission's scope of authority under FPA Section 211A.

Complainants have demonstrated a compelling case of undue discrimination, and should not be required to make repeated requests to the Commission for FPA Section 211A relief in order to get transmission service that satisfies the *minimum* requirements for open access transmission service by a utility controlling 80 percent of the transmission in the region. Indeed, Bonneville's deficient response to the December 7 Order underscores the significant need for Commission review of Bonneville's proposed OATT changes pursuant to FPA Section 211A going forward.

This case therefore presents an important choice. If the Commission changes the position it set forth in the December 7 Order and accepts Bonneville's view of FPA Section 211A, the Commission will deny Complainants any meaningful relief from Bonneville's unduly discriminatory practices, and can discard any hope that its open access reforms will have any effect in the Northwest, a region with 12.5 million people.[14] Worse yet, this will leave FPA Section 211A a dead letter in all regions – surely not the Commission's intent when it made the

[14] *See* 2010 BPA Facts, Bonneville Power Administration, available at: http://www.bpa.gov/corporate/about_BPA/Facts/FactDocs/BPA_Facts_2010.pdf (April 2011).

decision to exercise its FPA Section 211A authority for the first time nor Congress' intent when the provision was enacted in 2005.

In enacting FPA Section 211A, Congress vested the Commission not only with the authority but with the fundamental responsibility to eliminate undue discrimination and ensure open access to transmission across the *entire* interstate transmission grid -- not just the two-thirds of the grid owned by public utilities. The Commission has issued its order and it should not back away from it now, in the face of such blatant undue discrimination and disregard for the Commission's authority.

II. BACKGROUND

On May 13, 2011, Bonneville issued its Final Record of Decision implementing its Environmental Redispatch Protocol.[15] On June 13, 2011, Complainants filed a "Complaint and Petition for Order under Federal Power Act Section 211A Against Bonneville Power Administration."[16] Several parties, including Bonneville,[17] filed answers on or before July 19, 2011. On August 3, 2011, the Complainants filed an Answer to Bonneville's Answer ("Complainants' August Answer").[18] On December 7, 2011, the Commission issued an order ("December 7 Order") directing Bonneville to cease its unduly discriminatory curtailment

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[15] *Administrator's Final Record of Decision, BPA's Interim Environmental Redispatch and Negative Pricing Policies*, dated May 13, 2011, available at: http://www.bpa.gov/corporate/pubs/RODS/2011/ERandNegativePricing_FinalROD_web.pdf ("Environmental Redispatch ROD").

[16] While the Complainants originally submitted a complaint on June 13, 2011 ("June 13th Complaint"), the June 13th Complaint requested privileged treatment, and Complainants filed a new, public complaint on June 17, 2011. *See Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, Docket No. EL11-44-000, "Complaint and Petition for Order under Federal Power Act Section 211A Against Bonneville Power Administration," dated June 17, 2011 ("Complaint").

[17] *Iberdrola Renewables, Inc., et al., v. Bonneville Power Admin.*, Docket No. EL11-44-000, "Answer of the Bonneville Power Administration," dated Jul. 19, 2011 ("Bonneville Answer"). Several other parties also filed comments and/or protests to the Complaint on or before that date.

[18] *Iberdrola Renewables, Inc., et al., v. Bonneville Power Admin.*, Docket No. EL11-44-000, "Motion for Leave to Answer and Answer," dated Aug. 3, 2011 ("Complainants' August Answer").

practices and to file an OATT that complies with FPA Section 211A standards.[19] On January 6, 2012, several parties, including Bonneville,[20] filed requests for clarification and/or rehearing of the December 7 Order. On January 23, 2012, Complainants filed a Motion for Leave to Answer and Answer to the Rehearing Requests ("Complainants' Answer to Rehearing Requests").[21]

On February 7, 2012, Bonneville posted on its website an initial draft of its Oversupply Management Protocol ("Draft Oversupply Management Protocol").[22] This draft document contained language which Bonneville anticipated adding to its tariff as a new miscellaneous section and as a new attachment to the tariff, Attachment P. In response to the December 7 Order, Bonneville submitted a slightly revised version of the Draft Oversupply Management Protocol as its March 6 Filing ("Oversupply Management Protocol").

III. PROTEST

A. Bonneville's March 6 Filing Does Not Comply With the Commission's December 7 Order

The Commission's December 7 Order directed Bonneville to cease its unduly discriminatory curtailment practices and to "submit a revised OATT, pursuant to section 211A, that addresses the comparability concerns raised in this proceeding in a manner that provides

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[19] *Iberdrola Renewables, Inc., et al., v. Bonneville Power Admin.*, 137 FERC ¶ 61,185 (2011) ("December 7 Order").

[20] *Iberdrola Renewables, Inc., et al., v. Bonneville Power Admin.*, Docket No. EL11-44-000, "Bonneville Power Administration's Request for Clarification and in the Alternative Rehearing," dated Jan. 6, 2012 ("Bonneville Rehearing Request").

[21] *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, Docket No. EL11-44-000, "Complainants' Motion for Leave to Answer and Answer to Motions for Clarification and Requests for Rehearing, and Motion Opposing Requests for Stay, Additional Briefing and Evidentiary Hearing," dated January 23, 2012 ("Complainants' Answer to Rehearing Requests").

[22] *See* Bonneville Power Administration's Draft OATT Attachment P: Oversupply Management Protocol, *available at* http://www.bpa.gov/corporate/AgencyTopics/ColumbiaRiverHighWaterMgmnt/20120207-proposed-protocol/Attachment-P-020712.pdf, dated Feb. 7, 2012 ("Draft Oversupply Management Protocol"). The Draft Oversupply Management Protocol is attached hereto as Attachment A.

comparable transmission service that is not unduly discriminatory or preferential."[23] Bonneville's March 6 Filing satisfies neither of these directives. Rather, Bonneville has refused to file an OATT, and has instead filed the Oversupply Management Protocol, which is intended to be attached to a nonjurisdictional, voluntary reciprocity tariff that has not yet been submitted to the Commission. This Oversupply Management Protocol proposes to curtail non-Federal resources in a manner that is virtually identical to Bonneville's curtailments under the Environmental Redispatch Protocol – curtailments that the Commission found to be non-comparable and unduly discriminatory in the December 7 Order. In addition, the Oversupply Management Protocol contains a proposal to propose a temporary cost allocation methodology in a future Bonneville rate case proceeding.[24]

The Commission's directive in the December 7 Order that Bonneville must file an OATT[25] was clear, and the only discretion left to Bonneville was the proposed substantive contents of the OATT—*i.e.,* how to meet the comparability standard—not whether to file an OATT subject to Commission review under 211A. Bonneville then sought rehearing of this directive and "clarification" that the Commission's order did not obligate Bonneville to file an OATT.

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[23] December 7 Order at Ordering Paragraph.

[24] March 6 Filing at 21. The Commission's review of Bonneville's rates under the Northwest Power Act is limited and only involves an assessment of whether Bonneville's proposed regional power and transmission rates meet the three specific requirements of Northwest Power Act section 7(a)(2), 16 U.S.C. § 839e(a)(2), or whether Bonneville's proposed non-regional, non-firm rates meet the requirements of Northwest Power Act section 7(k), 16 U.S.C. § 839e(k). Unlike the Commission's statutory authority under the FPA, the Commission's authority under sections 7(a) and 7(k) of the Northwest Power Act does not include the power to modify the rates. As the Commission has described, its role in approving or disapproving Bonneville's rates can be viewed as an appellate one: to affirm or remand the rates submitted to it for review. *See, e.g., U.S. Dep't of Energy – Bonneville Power Admin.*, 136 FERC ¶ 62,253 at 64,753-54 (2011).

[25] December 7 Order at PP 30, 38, 65, 66, 78, Ordering Paragraph.

The Commission has consistently held that compliance filings are for compliance with the Commission's directives, not for questioning the Commission's underlying order.[26] The Commission has statutory authority to enforce its own orders,[27] and it should not allow Bonneville to avoid the Commission's explicit directives and instead substitute its own, preferred response.

1. The Commission's Order Required Bonneville to File an OATT

On December 7, 2011, the Commission took action to remedy undue discrimination in transmission service by Bonneville, stating that it did "not take the exercise of [its] authority under FPA section 211A lightly" and that it found "a compelling case here to exercise that authority to ensure open access to transmission service at comparable terms, and conditions."[28] The Commission went on to state:

> 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

[26] *See, e.g.*, *Sierra Pacific Power Co.*, 80 FERC ¶ 61,376 at 62,271 (1997) ("As a preliminary matter, we remind Sierra Pacific that a compliance filing is not an appropriate mechanism to challenge Commission directives. If Sierra Pacific is dissatisfied with any aspect of a Commission order, or is uncertain as to the extent of the directives the Commission is ordering, it should seek rehearing or clarification of that order, as appropriate. The sole purpose of a compliance filing is to make the revisions directed by the Commission."); *El Paso Natural Gas Co.*, 115 FERC ¶ 61,395 at P 13 (2006) ("…the purpose of a compliance filing is limited, *i.e.*, it must implement the specific directives of the Commission's order. The Commission's focus in reviewing a compliance filing is similarly limited to whether the filing complies with the Commission's previously stated directives."); *NorthWestern Corp.*, 113 FERC ¶ 61,215 at P 9 (2005) ("The Commission has long established that compliance filings must be limited to the specific directives ordered by the Commission. The purpose of a compliance filing is to make the directed changes and the Commission's focus in reviewing them is whether or not they comply with the Commission's previously-stated directives."). In addition, the Commission's regulations under the Natural Gas Act, which the Commission has also applied to filings under the FPA, state that "[f]ilings made to comply with Commission orders must include only those changes required to comply with the order. Such compliance filings may not be combined with other rate or tariff change filings. A compliance filing that includes other changes or that does not comply with the applicable order in every respect may be rejected." 18 C.F.R. § 154.203(b) (2011).

[27] *See, e.g.*, *Cal. Indep. Sys. Operator Corp.*, 97 FERC ¶ 61,151, 61,660 (2001) and *Consumers Power*, 68 FERC ¶ 61,077, 61,379 (1994) (both stating that the Commission has statutory authority to enforce its orders). *See also AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 at P 43 (2003) (stating that the Commission has the authority "to interpret and enforce [its] own orders").

[28] December 7 Order at P 32.

ensure open access to transmission service at comparable and not unduly discriminatory or preferential rates, terms, and conditions.[29]

As a result of these findings, the Commission granted the Complaint and specifically adopted the first and third forms of relief, and found that this relief requested (listed below) was sufficient to moot the second request:

- "Order Bonneville to immediately revise its curtailment practices to comport with the undue discrimination standards of FPA Section 211A and submit them in a compliance filing for the Commission's approval within 60 days of the date of the Commission order;"
- "Order Bonneville under FPA Sections 210 and 212(i) to abide by the terms of its interconnection agreements with Complainants by immediately ceasing these unduly discriminatory and preferential practices;" and
- "Order Bonneville, pursuant to FPA Section 211A, to remedy its unduly discriminatory and preferential practices by filing an OATT for Commission approval within 120 days, and to maintain a Commission-approved OATT on file."[30]

Complainants requested the first remedy – reforming the curtailment practices – in order to "halt the immediate and significant harm being caused by the Environmental Redispatch Protocol."[31] The second remedy – an order for interconnection service – was requested "[i]n the event the Commission declines to order Bonneville to provide comparable and non-discriminatory transmission service."[32] The third form of relief – filing an OATT for

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29 *Id.*

30 Complaint at 7-8.

31 *Id.* at 8.

32 *Id.* at 56.

Commission approval under Section 211A – was requested in order to "assure that non-discriminatory open access is available in the Pacific Northwest on a long term basis."[33]

In granting the petition, the Commission clearly and repeatedly directed Bonneville to file an OATT under FPA Section 211A. For instance, the Commission noted that it has the authority under Section 211A of the FPA to require Bonneville to file a tariff providing 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.[34] Consistent with the language of FPA Section 211A, the Commission took prospective action "requiring the filing of a tariff that will govern service provided by Bonneville in the future."[35] The Commission declined to address the Complainants' request for 210 and 212(i) relief "[b]ecause the Commission finds that it has the jurisdictional authority to grant relief under section 211A."[36] The Commission also directed Bonneville to file within 90 days "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."[37] While the Commission declined to specify the precise terms and conditions that must be set forth in Bonneville's OATT, it noted:

> 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. 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

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33 *Id.* at 8.

34 December 7 Order at P 30.

35 *Id.*

36 *Id.* at P 31.

37 *Id.* at P 64.

> 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.[38]

Finally, the Ordering Paragraph states "Bonneville must submit a revised OATT, pursuant to section 211A, that addresses the comparability concerns raised in this proceeding in a manner that provides comparable transmission service that is not unduly discriminatory or preferential within 90 days of the date of this order."[39]

Despite this clear requirement, Bonneville has now taken the position that this case concerns only a narrow issue regarding oversupply situations, not whether an OATT should be filed under Section 211A. Yet Bonneville's own pleadings in this case demonstrate that Bonneville was acutely aware that Complainants sought an OATT that was enforceable under FPA Section 211A because it devoted a significant portion of its Answer to the Complaint disputing the Commission's authority to order an OATT. It argued, inter alia, that:

- "Complainants devote a significant portion of their complaint to surveying Bonneville's alleged failings as a reciprocity transmission provider, trying to portray Bonneville as a bad actor in the hope that the Commission will rule on that basis."[40]
- "Similarly, the Commission may not order Bonneville to submit an open access tariff for approval under section 211A. . . . [S]ection 211A does not give the Commission the authority to order an unregulated transmitting utility to adopt the pro forma tariff or submit an open access tariff for Commission approval."[41]

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38 *Id.* at n.101 (internal citation omitted).

39 *Id.* at Ordering Paragraph.

40 Bonneville Answer at 13.

41 *Id.* at 14.

- "Complainants suggest that section 211A gives the Commission the authority to regulate Bonneville – an 'unregulated transmitting utility' – as if it were a public utility. . . . Specifically, they ask the Commission to order Bonneville to file an open access transmission tariff for Commission approval."[42]
- "[211A] does not authorize the Commission to fix the terms and conditions of transmission service offered by unregulated transmitting utilities."[43]
- "[S]ection 211A does not give the Commission the authority to order an unregulated transmitting utility to adopt the *pro forma* tariff or to submit an open access tariff for Commission approval."[44]
- "A review of the legislative proposals that preceded the enactment of section 211A shows that Congress did not intend to authorize the Commission to order unregulated utilities to adopt the *pro forma* tariff."[45]

The Commission squarely rejected Bonneville's broad attack on its jurisdiction. As such, Bonneville's suggestion that it is not required to file an OATT is not a credible reading of the December 7 Order.

2. Bonneville's March 6 Filing *Proposes To Propose* a Cost Allocation Methodology in a Future Rate Case

Rather than file an OATT, Bonneville has instead submitted the Oversupply Management Protocol, a document describing a curtailment program and a cost allocation methodology that Bonneville proposes to include as part of an Initial Proposal in a future rate case.[46] In particular,

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42 *Id.* at 87.

43 *Id.* at 88.

44 *Id.* at 16; *see also id.* at 94.

45 *Id.* at 91.

46 March 6 Filing at 21.

Bonneville proposes to propose a temporary cost allocation mechanism whereby Bonneville would, assuming it in fact adopts its proposal, charge 50 percent of the costs of oversupply events to wind generators, and 50 percent to "purchasers of power from the Federal Base System."[47] While Bonneville's proposal contemplates a certain amount of cost-sharing through the rate allocation, it also assumes a continuation of Bonneville's non-comparable curtailment practices.[48] By continuing to treat non-Federal renewable resources differently from Federal hydroelectric resources for the purposes of transmission curtailments, despite the fact that they all take firm transmission service, Bonneville extends the same undue discrimination the Commission rejected in its December 7 Order, and a potential partial payment for curtailment costs cannot rectify this flaw.[49]

Bonneville's Oversupply Management Protocol does not include any OATT revisions that respond to the Commission's Order. Bonneville attempts to get around this shortcoming by proposing to attach the proposed, temporary cost allocation protocol to its current, non-reciprocal tariff, and call such attachment a "tariff revision." However, Bonneville's March 6 Filing falls

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[47] *Id.* Bonneville describes the Federal Base System as "a defined term under the Northwest Power Act; it includes the Federal Columbia River Power System hydroelectric projects, resources acquired by the Administrator under long-term contracts in force on the effective date of the Act (December 5, 1980), and resources acquired by the Administrator to replace reductions in the above resources." *Id.*

[48] Complainants' also note that Bonneville's proposal, if it is adopted, is expressly a temporary one-year proposal and it is unlikely the Commission will be able to provide relief during this year -- the second year of unduly discriminatory curtailment practices implemented by Bonneville. This pattern could be followed indefinitely by Bonneville no matter how unduly discriminatory its practices might be. The Commission's order did not direct Bonneville to file a temporary proposal – it directed them to file an OATT "that will govern service provided by Bonneville in the future." December 7 Order at P 30.

[49] *See* December 7 Order at P 63 ("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 services it provides itself, justifying the Commission's exercise of its authority under section 211A.").

far short of responding to the Commission's order to file an actual OATT, nor does it address "the comparability concerns raised in this proceeding."[50]

Bonneville may disagree with the Commission's December 7 Order, but it does not have the authority to disregard it. Bonneville's approach is inconsistent with any reasonable interpretation of the Commission's December 7 Order, and Bonneville's request for clarification and/or rehearing does not alter or toll Bonneville's obligation to comply with the Commission's directives.[51]

Bonneville has also stated its intent to file a voluntary reciprocity tariff.[52] The Commission's December 7 Order specifically draws a distinction between its expectations in the voluntary, safe harbor/reciprocity context, as opposed to the standards it intended to apply to

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[50] *Id.* at P 78; *see also* Complaint at 25-27, 37-42, 46-56 (discussing, for example, Bonneville's efforts to change its tariff through its business practices, including business practices that perpetuate discriminatory practices, such as Dispatcher Standing Order 216); Complainants' August Answer at 24-25; *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, Docket No. EL11-44-000, "Answer of Complainants in Opposition to Motion to Hold Proceeding in Abeyance," dated September 14, 2011 at 8-9 ("Complainants Answer to Abeyance") ("To be clear – Bonneville's discriminatory practices at issue in the Complaint Proceeding are not the result of a single decision or a single policy. Rather, the Commission's examination of the Environmental Redispatch Protocol will be part of the Commission's much broader review of Bonneville's unduly discriminatory and preferential transmission practices, from the time that Bonneville first began to stray from the Commission's open access principles up to and including implementation of the Environmental Redispatch Protocol. More specifically, the examples of unduly discriminatory practices set forth in the Complaint include Bonneville's curtailment practices (specifically related to not only the Environmental Redispatch Protocol, but also Dispatcher Standing Order 216 and curtailment-related business practices that contravene the provisions of Bonneville's tariff); Bonneville's unilateral attempts to amend interconnection customer LGIAs; Bonneville's unilateral and uncompensated taking of firm transmission service and transmission customer loads in violation of its tariff; Bonneville's failure to incorporate the OATT changes required by Order No. 890; Bonneville's failure to incorporate the OATT changes required by Order No. 739 regarding elimination of the price cap for resales; Bonneville's admitted failure to comply with numerous provisions of its current tariff; and Bonneville's attempts to modify the terms and conditions of its tariff by promulgating business practices."); Complainants' Answer to Rehearing Requests at 14-15.

[51] *Nockamixon Hydro Associates*, 54 FERC ¶ 61,245 at 61,715 (1991) ("A request for rehearing of a Commission order does not stay the effectiveness of that order.") (citing to Section 313(c) of the Federal Power Act, 16 U.S.C. § 825l(c)).

[52] March 6 Filing at 2.

Bonneville's compliance filing under FPA Section 211A.[53] But the Commission has directed Bonneville to file an OATT "pursuant to section 211A,"[54] not a temporary cost allocation proposal, nor a subsequent voluntary reciprocity tariff.

Bonneville's proposed cost allocation methodology also contains several legal infirmities,[55] making it highly likely that, even if it is ultimately adopted by Bonneville in a future rate case, it will not be approved by the Commission or will be successfully challenged at the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), and the Complainants will be left with nothing other than the same non-comparable curtailments and Bonneville's offer to "seek longer-term solutions."[56] Such a result surely was not the intent of the Commission's December 7 Order.

Bonneville is not the first federal agency to demonstrate resistance in response to a Commission order to provide transmission service. In a recent line of cases, East Kentucky Power Cooperative ("East Kentucky") requested interconnection with the Tennessee Valley Authority's ("TVA") system in order to provide services to Warren Rural Electric Cooperative

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53 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. December 7 Order at n.101.

54 December 7 Order at Ordering Paragraph.

55 As discussed in Complainants' comments to Bonneville on its draft Oversupply Management Protocol, Bonneville's proposal is inconsistent with Bonneville's statutes and Commission precedent, including, without limitation, the FPA Section 211A comparability and non-discrimination standards, 16 U.S.C. § 824j-1; the Northwest Power Act Section 7(g) prohibition on allocation of the costs of "fish and wildlife measures" and "the sale or inability to sell excess electric power" to transmission rates, 16 U.S.C. § 839e(g); the Northwest Power Act Section 7(i) ratemaking requirements, 16 U.S.C. 839e(i); and the Transmission System Act Section 10, 16 U.S.C. § 838h, and Northwest Power Act Sections 7(a)(1), 16 U.S.C. § 839e(a)(1), and 7(a)(2)(C), 16 U.S.C. § 839e(a)(2)(C), equitable allocation standards. *See* "Comments on Bonneville Power Administration's Proposed Draft Oversupply Management Protocol" submitted by Complainants on February 21, 2012, available at, http://www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=154 (scroll down and click on hyperlink titled OMP12 0065) (last visited Mar. 27, 2012).

56 March 6 Filing at 4.

Corporation ("Warren").[57] TVA resisted such an interconnection, arguing, among other things, that East Kentucky's system was insufficient to meet Warren's needs, and that the interconnection of East Kentucky would necessarily be coupled with the provision of transmission service and, thus, went beyond the bounds of the Commission's FPA Section 211 authority.[58] Ultimately, the Commission found that the proposed interconnection would benefit the general public because it would give Warren access to more economical sources of electricity and that Warren and its customers would be able to purchase electricity at rates lower than what they pay TVA for service. The Commission issued a Final Order directing TVA to provide interconnection service pursuant to FPA Section 210,[59] a directive the Commission reiterated in its Order Denying Rehearing[60] and once again in its Order on Compliance Filing.[61] Despite these orders, TVA refused to make the interconnection. In response, the Commission reminded TVA that it cannot simply ignore the Commission's clear directives because it does not agree with them and that such behavior could result in a further order initiating a proceeding to enforce the Commission's directives, including a possible civil penalty assessment:

> Once again, TVA is inappropriately continuing to disregard the Commission's clear directives in the Final Order, simply because it does not agree with the Commission's findings. To the extent that TVA disagrees with the Commission's directives in this proceeding, it may raise those issues in the context of its appeal to the courts. In the meantime, it cannot ignore the Commission's directives. Once again, we direct and order TVA to revise section GP-9.14 to allow for unilateral modification of the Interconnection Agreement, consistent with our Final Order. Absent a court-ordered stay, failure to file as directed within 30 days

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57 *East Kentucky Power Coop., Inc.*, Proposed Order, 111 FERC ¶ 61,031 (2005).

58 *East Kentucky Power Coop., Inc.*, Final Order, 114 FERC ¶ 61,035 at P 7 (2006).

59 *Id.* at Ordering Paragraph (2006).

60 *East Kentucky Power Coop., Inc.*, Order Denying Rehearing, 115 FERC ¶ 61,347 at P 30 (2006).

61 *East Kentucky Power Coop., Inc.*, Order on Compliance Filing, 116 FERC ¶ 61,072 at 28 (2006). The proceeding was eventually terminated for mootness when Warren, after private negotiations, elected to forgo service from East Kentucky and instead worked directly with TVA. TVA requested that the Commission vacate its prior orders, but the Commission refused to do so. *East Kentucky Power Coop., Inc.*, Order Granting Motion to Terminate and Denying Motion to Vacate, 121 FERC ¶ 61,255 at P 11 (2007).

> may result in a further order initiating a proceeding to enforce these directives. Such a proceeding may include a determination of whether civil penalties are appropriate for failure to comply with the Commission's directions in this order.[62]

Similarly, Bonneville has ignored the Commission's directive to file a tariff in this proceeding, only serving to reinforce the need for Bonneville to file a full FPA Section 211A OATT with the Commission. The Commission should reject Bonneville's deficient filing and order it to immediately adopt an FPA Section 211A OATT in compliance with the December 7 Order.

Bonneville may argue that *TVA* is distinguishable because the act of submitting a request for a declaratory order regarding a reciprocity tariff "substantially complies" with the Commission's order. It does so neither in form nor in substance. The Commission clearly required, in its Ordering Paragraph, that Bonneville "submit an OATT, pursuant to section 211A." There is nothing ambiguous in that directive. That is the relief Complainants sought; that is the relief Bonneville specifically opposed in its answer to the Complaint; and that is the relief the Commission ordered.

B. Reciprocity is Voluntary and Unenforceable, and Therefore Inadequate to Prevent Undue Discrimination

Bonneville states in its March 6 Filing that, while it has not filed an OATT as part of its "compliance filing," it intends to submit a request for a declaratory order seeking a finding that a new Bonneville tariff meets the Commission's voluntary "reciprocity" standards.[63] The Commission has directed Bonneville to file, in this proceeding, an OATT pursuant to FPA

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62 *East Kentucky Power Coop., Inc.*, Order on Compliance Filing, 116 FERC ¶ 61,072 at P 28 (2006).

63 March 6 Filing at 2.

Section 211A standards.[64] A voluntary reciprocity tariff is a wholly inadequate substitute for compliance with the Commission's directive.

The importance of this jurisdictional difference cannot be overstated – it is the difference between Bonneville being *required* to provide comparable, not unduly discriminatory or preferential service going forward, and Bonneville being able to do whatever it pleases without consequence. This difference fundamentally underlies the Complainants' request for relief in the Complaint, as Bonneville's past behavior, in the absence of Commission review, has strayed far afield of the Commission's open access policies and has manifested in multiple instances of blatant non-comparability and undue discrimination.

Bonneville maintained a reciprocity tariff from 1997[65] until 2009, when Bonneville declined to incorporate certain OATT changes required by Order No. 890.[66] Bonneville has

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64 December 7 Order PP at 30, 78, Ordering Paragraph.

65 In 1997, in accordance with the Order No. 888 procedure, and at the behest of the Department of Energy, Bonneville voluntarily submitted an OATT to the Commission and requested a declaratory order finding that the tariff satisfied the Commission's comparability (non-discrimination) standards. The Commission found that the terms and conditions of Bonneville's tariff substantially conformed with or were superior to those in the *pro forma* OATT, deemed it to be an acceptable reciprocity tariff and required public utilities to provide open access transmission service upon request to Bonneville as a result. *See United States Dep't of Energy – Bonneville Power Admin.*, 80 FERC ¶ 61,119 (1997), *order on reh'g*, 81 FERC ¶ 61,165 (1997) (finding reciprocity tariff to be acceptable with modifications); *United States Dep't of Energy – Bonneville Power Admin.*, 84 FERC ¶ 61,068 (1998), *reh'g denied*, 84 FERC ¶ 61,250 (1998) (finding reciprocity tariff to be acceptable with further modifications); *United States Dep't of Energy – Bonneville Power Admin.*, 86 FERC ¶ 61,278 (1999) (finding reciprocity tariff to be acceptable); *United States Dep't of Energy – Bonneville Power Admin.*, 87 FERC ¶ 61,351 (1999) (finding amended open access tariff acceptable and dismissing complaint).

66 *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *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 No. 890"). Specifically, Bonneville: (1) proposed deviations from the Order No. 890 *pro forma* tariff for conditional firm service; (2) omitted revisions to section 23.1 of its tariff (under which the transmission provider charges or credits the reseller for the difference between the price reflected in the reseller's service agreement with the transmission provider and the price reflected in the reseller's service agreement with the assignee); (3) stated that it could not implement a simultaneous window process for the submission of certain transmission requests; and (4) omitted generator imbalance provisions under *pro forma* tariff schedule 9 for generator imbalance service. The Commission found that Bonneville's proposed tariff modifications did not substantially conform to the Order No. 890 *pro forma* OATT, and denied Bonneville's request for continued safe harbor reciprocity status. Accordingly, the Commission directed Bonneville to submit a compliance filing to incorporate the necessary provisions in order to regain its safe harbor reciprocity status. *United States Dep't of Energy – Bonneville Power Admin.*, 135 FERC ¶ 61,057 (2009) *reh'g denied*, 135 FERC ¶ 61,023 (2011).

operated without a reciprocity tariff since then, veering further and further away from open access principles through its business practices, tariff implementation, and operating protocols.

Bonneville has stated that it has experienced "no significant consequences"[67] as a result of its failure to maintain reciprocity.[68] But Bonneville ignores the consequences of this failure on its transmission customers. Of course, in the absence of a Commission approved OATT under 211A, there is little an independent power producer ("IPP")[69] can do to ensure Bonneville continues to follow Commission policies in its tariff implementation. IPPs that do not own transmission facilities cannot deny Bonneville transmission service for failure to satisfy reciprocity. Absent Bonneville's agreement, such a transmission customer cannot even bring disputes over the terms of its transmission agreement to the Commission for resolution, and even if Bonneville agrees to use the Commission for dispute resolution under a voluntary reciprocity tariff, the Commission cannot enforce the terms of the reciprocity tariff. If a reciprocity transmission provider is interpreting its tariff inconsistent with Commission policies, all the Commission can do is withdraw reciprocity status[70] – a consequence Bonneville does not consider to be "significant."[71]

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67 Complaint, Attach. C at 3.

68 Since Bonneville controls 80 percent of the region's transmission system, this exercise of vertical market power is not surprising.

69 Many wind generators, and four of the five Complainants, are IPPs.

70 *See, e.g.*, *Emerald People's Util. Dist. v. Bonneville Power Admin.*, 85 FERC ¶ 61,229 (1998) (finding that, to the extent an eligible customer under Bonneville's reciprocity tariff presents a credible claim that Bonneville is not providing comparable service pursuant to the tariff, the Commission has the authority to review that claim and upon an appropriate finding, issue an order determining that Bonneville is no longer satisfying the reciprocity condition).

71 Complaint, Attach. C at 3.

Bonneville has suggested that transmission customers should be satisfied with a voluntary reciprocity tariff because they have remedies against Bonneville in their contracts.[72] In the case of Bonneville, however, any contract remedies are challenging to access, and may not involve consideration of the Commission's policies. More importantly, after demonstrating Bonneville's systemic undue discrimination and receiving an FPA Section 211A order, Complainants should not have to file repeated breach of contract claims in order to get transmission service that is comparable and not unduly discriminatory or preferential.

For the Complainants, the *only* way to ensure comparable, not unduly discriminatory or preferential transmission service from Bonneville is through FPA Section 211A. After years of being denied open access transmission services, Complainants sought relief under FPA Section 211A because Bonneville's actions had become so unduly discriminatory, and its disregard of the Commission's authority so pervasive, that Complainants had no choice but to seek this significant remedy. After reviewing the extensive pleadings, the Commission granted the requested relief. The Commission's December 7 Order, however, will mean nothing if Bonneville does not have to file and maintain an OATT that meets FPA Section 211A standards, and can only be revised pursuant to Commission approval under 211A.

Complainants have consistently argued that Bonneville should be permitted to propose OATT deviations to meet statutory *requirements* and regional practices, and the Commission should permit such deviations if it finds they meet the FPA Section 211A standards. Complainants have worked cooperatively with Bonneville over the past year to identify and develop deviations that can be supported by the region. Under no circumstances, however, do

[72] Complainants note that Bonneville's argument that transmission customers have effective contract remedies is ironic in light of the fact that Bonneville again intends to make unilateral amendments to its contracts to legitimize its proposed Oversupply Management Protocol.

Complainants regard Bonneville's submission of a voluntary reciprocity tariff an acceptable solution for the region.

C. Bonneville Must File an Entire OATT Under FPA Section 211A

The Complainants sought, and the Commission ordered, relief in the form of an OATT filing "that will govern service provided by Bonneville in the future."[73] Despite this, and despite Bonneville's lengthy discussion of this remedy in its Answer,[74] Bonneville now claims to interpret the issues in this proceeding as being solely concerned with the payment of negative prices under the Environmental Redispatch Protocol.[75] As discussed in detail in the Complaint, the attachments to the Complaint, Complainants' August Answer, the Commission's December 7 Order, and the Complainants' Answer to Rehearing Requests,[76] the Environmental Redispatch Protocol is one glaring example of Bonneville's systemic undue discrimination at issue in this proceeding, but Bonneville's unduly discriminatory practices extend far beyond any single policy, began years before the Environmental Redispatch Protocol was in effect, and affect almost every aspect of Bonneville's provision of transmission service. Complainants again emphasize below, as they have done repeatedly throughout this proceeding, some of

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[73] December 7 Order at P 30.

[74] Bonneville Answer at 13 ("Complainants devote a significant portion of their complaint to surveying Bonneville's alleged failings as a reciprocity transmission provider, trying to portray Bonneville as a bad actor in the hope that the Commission will rule on that basis."); *Id.* at 13-14 ("Most importantly, however, Bonneville's reciprocity status is irrelevant to this dispute. Congress debated and rejected in both the 1992 and 2005 Energy Policy Acts the expansive relief Complainants now seek from the Commission to address their reciprocity-related allegations. Complainants are well-aware of that. They appear to be unaware that by focusing on the broad range of issues under regional discussion concerning Bonneville's open access tariff, the vast majority of which have nothing to do with Environmental Redispatch, they make it much more likely that parties' energies will be devoted to litigation rather than problem solving."); *Id.* at 14 ("Similarly, the Commission may not order Bonneville to submit an open access tariff for approval under section 211A. . . . [S]ection 211A does not give the Commission the authority to order an unregulated transmitting utility to adopt the pro forma tariff or submit an open access tariff for Commission approval."); *see also, id.* at 16, 87-106.

[75] March 6 Filing at 6.

[76] *See, e.g.*, Complaint at 25-31, Attach. C, page 12; Complainants' August Answer at 25; December 7 Order at P 78; Complainants' Answer to Rehearing Requests at 13.

Bonneville's more serious unduly discriminatory practices – first discussing oversupply-related issues, and then further describing the other significant issues that similarly require a comparable solution going forward.[77] These practices implicate many OATT provisions and will continue harming Bonneville's transmission customers, unless and until Bonneville is required to adopt an entire OATT under FPA Section 211A.

Complainants note that extensive explication on the varied impacts of Bonneville's tariff non-compliance ought not to be necessary because the underlying point – *Bonneville does not follow its tariff* – is amply demonstrated by Bonneville's own documents, attached to the Complaint, admitting that Bonneville is out of compliance with more than 19 provisions in its current tariff.[78] Irrespective of Bonneville's unregulated transmitting utility status, it is clear that the Commission does not take tariff non-compliance by *any* Transmission Provider lightly, and extensive tariff non-compliance over many years is even more serious.[79] Bonneville has been

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[77] Complainants note that these issues are all issues raised in the Complaint and specified in attachments to the Complaint.

[78] Complaint, Attach. C at 12; June 13th Complaint, Attach. D.

[79] As just one example, the Commission found that Portland General Electric ("PGE") had unintentionally violated its OATT and Commission policy by setting aside transmission capacity that was not adequately supported by designated network resources, along with several other violations that did not result in unjust profits or harm to customers. After discussion with the Commission, PGE agreed to pay a civil penalty of $375,000 and submit to making compliance monitoring reports for its inadvertent violations. *In re Portland General Electric Co.*, 131 FERC ¶ 61,224 (2010). *See also, e.g.*, *Standards of Conduct for Transmission Providers*, Order No. 717, 125 FERC ¶ 61,064 (2008); 18 C.F.R. § 358.4 ("Non-discrimination requirements. (a) A transmission provider must strictly enforce all tariff provisions relating to the sale or purchase of open access transmission service, if the tariff provisions do not permit the use of discretion. (b) A transmission provider must apply all tariff provisions relating to the sale or purchase of open access transmission service in a fair and impartial manner that treats all transmission customers in a not unduly discriminatory manner, if the tariff provisions permit the use of discretion. (c) A transmission provider may not, through is tariffs or otherwise, give undue preference to any person in matters relating to the sale or purchase of transmission service (including, but not limited to, issues of price, curtailments, scheduling, priority, ancillary services, or balancing)."); 18 C.F.R. §358.5 ("Independent Functioning Rule. (a) General rule. Except as permitted in this part or otherwise permitted by Commission order, a transmission provider's transmission function employees must function independently of its marketing function employees. (b) Separation of functions. (1) A transmission provider is prohibited from permitting its marketing function employees to: (i) Conduct transmission functions; or (ii) Have access to the system control center or similar facilities used for transmission operations that differs in any way from the access available to other transmission customers. (2) A transmission provider is prohibited from permitting its transmission function employees to conduct marketing functions."); *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (2008); *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005).

aware of its non-compliance, and has discussed it at length in public documents for the past year, yet in many cases it still has not taken any steps to correct it.

It goes without saying that a public utility under the Commission's jurisdiction would not be permitted to violate more than 19 OATT provisions, and under the Commission's enforcement policies, would be expected to promptly self-report and remedy non-compliance, as well as face civil penalties and additional enforcement monitoring. While the Commission need not reach whether Bonneville's past behaviors should be subject to similar enforcement actions, the fact that Bonneville could allow such a non-compliant situation to occur, then spend years pondering whether it is "worth the time and expense to comply with the tariff"[80] in the future, demonstrates how important it is that Bonneville file and maintain an enforceable 211A OATT with the Commission going forward.

Complainants note that in some cases Complainants may not oppose, and may even support, certain of Bonneville's deviations; however, Complainants believe that before implementing such deviations Bonneville should submit them to the Commission for approval under the appropriate standard – which in the past should have been the reciprocity standard for tariff deviations, and in the future should be the FPA Section 211A standard.

[80] Bonneville's documents indicate that in some cases this is because of "[d]ifferences in policy where BPA questions whether it is worth the effort and expense to comply with the tariff." Complaint, Attach. C at 3.

1. The Undue Discrimination Set Forth in the Complaint is Much Broader than the Undue Discrimination Resulting from the Oversupply Protocols

As the Complainants have discussed throughout this proceeding and as the Commission recognized in its December 7 Order,[81] the Environmental Redispatch Protocol is one example of Bonneville's systemic undue discrimination at issue in this proceeding, but Bonneville's larger pattern of departing from open access was at the core of the Complaint. As described more fully below, the documents filed in this proceeding bear witness to a broad range of unduly discriminatory practices that can only be remedied by requiring Bonneville to fulfill the Commission's directive to file an OATT that satisfies FPA Section 211A standards.

a. Bonneville's Admitted Tariff Noncompliance – Complaint Attach. C, p. 12

Bonneville began diverging from open access principles over four years ago, when, after receiving a detailed order from the Commission describing the tariff changes it needed to make in order to regain reciprocity status, it decided not to make such changes and instead in 2011 undertook to "confer with the region" about its tariff.[82]

In its "Conferring with the region" document, Bonneville admits and discusses numerous instances where it is not complying with the terms of its current tariff. Complainants reiterate that these are not issues where Bonneville believes it is complying with its tariff and Complainants disagree. Rather, *Complainants note over 19 instances where Bonneville admits*

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[81] December 7 Order at P 38 ("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. Petitioners assert that Commission oversight through application of section 211A standards going forward is necessary to ensure 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.").

[82] Complaint, Attach. C at 11.

in writing that it is not following its tariff.[83] Further, more than a year later, Bonneville is still considering whether to address these issues.

Bonneville, on the other hand, not only admits these violations, but expresses ambivalence about the necessity and value of remedying them. Suggesting in its document that reciprocity status may not be a worthwhile pursuit, Bonneville went on to describe the differences between its current tariff and the *pro forma* OATT as falling into three categories:

1) Issues that can be remedied within one year.

2) Issues for which it will take more than one year to implement fixes.

3) Differences in policy where BPA *questions whether it is worth the effort and expense to comply with the tariff.*[84]

In the chart at page 12 of Attachment C to the Complaint, each of these categories of issues is listed – Bonneville identifies 9 issues of current tariff non-compliance that can be remedied within one year, 10 issues of current tariff non-compliance that will take more than a year to remedy (and Bonneville notes that the "timeline estimates for these items are subject to resource constraints and reprioritization"), 8 issues Bonneville believes it could resolve by working with the Commission, and 14 issues where Bonneville thought it would likely seek a tariff modification if it pursued reciprocity.

Given that the *pro forma* OATT constitutes the *minimum* terms and conditions of open access transmission service,[85] it is troubling that a utility owning 80 percent of the transmission

[83] Complaint, Attach. C at 12.

[84] Complaint, Attach. C at 3 (emphasis added).

in a region would allow its tariff and practices to stray so far from the minimum industry standard in the first place. Bonneville's refusal to comply with the Commission's order starkly reveals its intent to continue operating outside the Commission's authority and reforms – a path that has left the Northwest without open transmission access and without competitive markets *sixteen years* after the Commission promulgated its Order No. 888 reforms.

i. Dispatcher Standing Order 216 -- Complaint Attach. D

Dispatcher Standing Order ("DSO") 216 is an important example of how Bonneville's unduly discriminatory behavior extends beyond the Environmental Redispatch and the proposed Oversupply Management Protocols, and often occurs through separate business practices and operational protocols that contravene the tariff. DSO 216 was only intended to be a temporary stop-gap measure to allow Bonneville and the wind community to balance risks and costs while developing alternative solutions to wind balancing issues. However, it has not been replaced or modified in a way that is comparable or that would permit it to become a permanent solution.

As discussed in the Complaint and Answer, DSO 216 is an operational mechanism – not included in Bonneville's tariff -- to curtail wind when generation imbalance reserves for wind reach certain levels. When 85 percent of wind reserves are deployed, Bonneville issues a warning to wind generators via its web-based dashboard that DSO 216 implementation is imminent. When 90 percent of wind decremental reserves are deployed, Bonneville issues an order limiting wind generation to schedule, plus allocated reserves. When 100 percent of wind reserves are deployed, wind generation is limited to schedule. When 90 percent of wind

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[85] *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶ 31,036 at 31,635 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. [Regs. Preambles 1996-2000] ¶ 31,048 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998*), aff'd in part and remanded in part, sub nom., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002) ("Order No. 888").

incremental reserves are deployed, wind generation schedules are cut, forcing a shortage onto the sink Balancing Authority Area. All of these actions can and do occur when other imbalance reserves are available, and all of these actions can and do occur in the absence of any reliability issue.[86]

Realizing that the tariff and LGIA do not permit DSO 216 schedule curtailments, Bonneville attempted to include the authority to implement DSO 216 in its unilateral LGIA amendments implementing the Environmental Redispatch Protocol.[87] Bonneville has stated in the Oversupply Management Protocol its intent to attempt similar future LGIA amendments.[88]

Not only is DSO 216 unduly discriminatory by its own terms, but the discriminatory impact of the practice is aggravated by the way Bonneville implemented its Environmental Redispatch Protocol (and proposes to implement the Oversupply Management Protocol, if it is adopted). Prior to initiating curtailments under its Environmental Redispatch Protocol in 2011, Bonneville unilaterally eliminated all generation imbalance reserves available to wind generators – reserves that wind generators had purchased on a fixed cost basis from Bonneville under the Variable Energy Resources Balancing Service ("VERBS") rate. Without the availability of these reserves, some wind generators were forced to schedule and generate at lower levels (to remain inside permitted imbalance bands) and were increasingly subject to Bonneville's DSO 216 protocol – which results in intra-hour tag curtailments.

Instead of setting aside the hydro power to balance schedules for the wind generators who had purchased the reserves, Bonneville sold this hydro power into the market during peak periods when the prices were highest, preserving its secondary revenue. Many wind generators

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86 *See* June 13th Complaint, Attach. D; Complaint at 26; Complainant's August Answer at 25.

87 *See* sample Bonneville letter attempting to unilaterally amend the LGIA at Complaint, Attach. E.

88 Bonneville Answer at 16, 87-106.

have a firm obligation to serve customers, and when their wind facilities were limited due to Bonneville's default, these wind generators were forced into the market to purchase generation. Oftentimes, these wind generator operators were purchasing this power from Bonneville. Under these circumstances, *Bonneville was reselling the capacity already sold to wind generators under the VERBS rate - and profiting twice*.

This unduly discriminatory behavior is another example of why the Commission's December 7 Order requiring Bonneville to file an OATT pursuant to FPA Section 211A is essential to ensure transmission service is available to customers on terms and conditions that are comparable to those under which Bonneville provides to itself and that are not unduly discriminatory or preferential. Wind generators do not oppose Bonneville making curtailments for true reliability reasons, but DSO 216 is not limited to reliability issues and Bonneville uses it to curtail wind, often when other reserves are available.

Wind generators have actively sought and proposed alternatives to DSO 216, asking Bonneville to do what every other Balancing Authority Area ("BAA") in the region does – provide balancing services to the extent it is physically feasible to do so from its resources or from resources available to it. By ordering Bonneville to adopt an FPA Section 211A OATT, and making clear that Bonneville is not permitted to implement business practices and operational protocols that violate such OATT, Bonneville will be required to work with the region to modify or replace DSO 216 as it exists in its current form with a new approach that is comparable and not unduly discriminatory or preferential.

ii. Priority Access to Federal Transmission – Complaint Attach. C, p. 8

Bonneville has made, and continues to make, attempts to incorporate language in its tariff or otherwise promulgate policies that will permit it unfettered discretion to grant "priority access

to Federal transmission" (sometimes also referred to as "queue jumping").[89] In Attachment C to the Complaint, Bonneville describes priority access as follows:

> **Priority access to federal transmission**: BPA believes it is required by law to give federal power priority access to contractually uncommitted transmission capacity in certain instances. For example, BPA must give priority to deliveries of federal power to new BPA preference utility customers. This priority does not affect transmission capacity that is under contract to another customer.
>
> FERC standards require that service goes to those customers that are first in line. It does not provide for priority access. BPA believes its transmission tariff should reflect its statutory obligation to use federal transmission as Congress intended.[90]

Complainants acknowledge that circumstances could occur where Bonneville's statutory obligations may need to be reconciled with the available transmission capacity ("ATC") calculation and transmission queue requirements of the OATT. However, in most if not all cases, proper transmission planning should obviate any need for queue jumping or "priority access" to ATC. Bonneville has cited Canadian Treaty return obligations and formation of a new preference utility as examples of the need for priority access – yet it is unlikely that these types of obligations would occur on such short notice that Bonneville could not accommodate them through normal transmission queue processes. More importantly, while Bonneville points to one

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[89] Bonneville has released various versions of this "priority access to Federal transmission," including in February 2011, April 2011, September 2011 and January 2012. Complaint, Attach. C at 8 (describing this policy in February 2011); *BPA Principles Relating to Planning, Operations and Commercial Practices Affecting the Federal Columbia River Power and Transmission Systems*, Bonneville Power Administration, *available at* http://transmission.bpa.gov/customer_forums/tx_customer_forum/documents/nt_moa_principles_061411.pdf (April 2011), attached hereto as Attachment B; *Overview of BPA's Statutory Priorities to Available Transmission Capacity*, Bonneville Power Administration, *available at* http://transmission.bpa.gov/customer_forums/bpa_oatt/documents/priority_access_overview_091411.pdf (September 2011), attached hereto as Attachment C; *Bonneville's PowerPoint presentation on Priority Access to Transmission*, Bonneville Power Administration, *available at http://transmission.bpa.gov/customer_forums/bpa_oatt/documents/priority_access_overview_092911.pdf* (September 2011), attached hereto as Attachment D**;** *New Section 1A – Draft Common Services Provisions*, Bonneville Power Administration, *available at* http://transmission.bpa.gov/customer_forums/bpa_oatt/documents/Comm_Serv_1a_Binder.pdf (January 2012), attached hereto as Attachment E. It is the Complainants' understanding that the most recent version of this policy is not yet final, but is anticipated to be included in Attachment C to Bonneville's upcoming reciprocity tariff filing.

[90] Complaint, Attach. C at 8.

or two specific reasons for priority access, it is always careful to ensure that the language describing such rights is broad enough to encompass anything Bonneville determines to be within its "statutory obligations." If an unusual circumstance occurs, Bonneville could request relief from tariff requirements at that time, and explain the competing statutory requirements. Bonneville's statutes do not require, and it is inappropriate for Bonneville to have, an unlimited and unsupervised ability to reserve ATC or jump to the top of the transmission queue.[91] In its December 7 Order, the Commission made clear that the requirement to provide transmission service that is comparable, and not unduly discriminatory or preferential, is also one of Bonneville's statutory obligations. Calculation of ATC and integrity of the transmission queue are two of the fundamental aspects of open access.

Bonneville seeks to reserve priority access rights for anything Bonneville determines in the future to be part of its "statutory obligations." Just as Bonneville used this type of general statutory justification to promulgate its Environmental Redispatch Protocol,[92] Bonneville continues to seek ways to create an open-ended opportunity to engage in unduly discriminatory practices under the guise of "statutory obligations." Bonneville's assertion of a priority right to reserve ATC outside tariff rules and jump to the top of the queue is an example of the need for Bonneville to file and maintain an OATT with the Commission that meets FPA Section 211A requirements.

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[91] Complainants note that, while Bonneville has recently stated in a public meeting that it no longer intends to specifically request the right to queue-jump, it continues to propose tariff language that would arguably permit it. Absent Commission supervision through an FPA Section 211A OATT, transmission customers will not have any protection against Bonneville interpreting its tariff to provide it improper priority access or queue-jumping rights.

[92] Environmental Redispatch ROD at 2.

iii. Generation Imbalance Service, Complaint Attach. C, p. 4

In Order No. 890, the Commission required transmission providers to offer generation imbalance service to all generators located in the balancing authority areas as part of their tariff services.[93] Bonneville's current tariff does not include Schedule 9 for Generation Imbalance Service.[94] The *pro forma* language would require Bonneville to offer Generator Imbalance Service "to the extent it is physically feasible to do so from its resources or from resources available to it."[95] According to Bonneville, its "tariff on this subject is under development,"[96] and once completed "may differ from FERC's version to make BPA's generation imbalance service consistent with any related BPA rate case decisions and to protect BPA ratepayers from becoming responsible for paying stranded costs, for example, costs of resources acquired to balance generators that then choose not to use those services."[97]

Bonneville's currently proposed Schedule 9[98] would limit Bonneville's obligation to offer Generator Imbalance Service to the amount of balancing reserve capacity that is available to it

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93 Order No. 890 at P 72.

94 The Commission has already found that Bonneville's omission of Schedule 9 does not substantially conform with and is not superior to the *pro forma* OATT, stating that "[w]e find Bonneville's tariff is incomplete and, therefore, does not meet the safe harbor reciprocity requirements given the absence of a standardized generator imbalance service offered through its tariff. Bonneville should submit a compliance filing to incorporate standardized imbalance provisions under Schedule 9 of its tariff, consistent with Order No. 890." *See U.S. Dep't. of Energy – Bonneville Power Admin.*, 128 FERC ¶ 61,057 at P 32 (2009).

95 *Pro forma* Open Access Transmission Tariff at Schedule 9.

96 Complaint, Attach. C at 3. Whether and when Bonneville will finally move out of the "development" phase on this subject is unclear, particularly since Bonneville has been unable to do so in the approximately five years since Order No. 890 originally mandated the provision of Generator Imbalance Service.

97 *Id.*

98 Complainants note that Bonneville does not currently have a Schedule 9 in its tariff, and instead is implementing Generation Imbalance Service based upon a business practice titled "Generation Imbalance Service, Version 6" available at http://transmission.bpa.gov/ts_business_practices/Content/8_Ancillary_and_Control_Area_Services/Gen_Imbalance.htm?SearchType=Stem.

pursuant to Schedule 10.[99] The proposed Schedule 10, a schedule that would be unique to Bonneville, then defines the amount of balancing reserve capacity that is available to a fixed quantity of reserves that Bonneville establishes in its rate case process.[100] Bonneville's use of its rate case process – where the Administrator enjoys great discretion and singularly determines the amount of reserves Bonneville will provide – attempts to insulate this decision and its impacts from meaningful Commission review. The rate case process also ensures that the method, cost and quantity of reserves will always be unpredictable, as year after year, in rate case after rate case, the provision of the services will be continually re-litigated. Not only will this result in inefficient use of resources for all of the parties involved, this creates a structural systemic uncertainty with regard to the terms and conditions of Schedule 9 and 10 service into the infinite future.

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[99] Bonneville's proposed Schedule 9, current draft dated 2/15/12, *available at* http://transmission.bpa.gov/business/ts_tariff/documents/DRAFT_new_BPA_OATT_clean.pdf, reads in relevant part as follows:

> Generator Imbalance Service is provided when a difference occurs between the output of a generator located in the Transmission Provider's Control Area and a delivery schedule from that generator to (1) another Control Area or (2) a load within the Transmission Provider's Control Area over a scheduling period. The Transmission Provider must offer this service, to the extent it is physically feasible to do so from the amount of balancing reserve capacity that is available to it pursuant to Schedule 10, when Transmission Service is used to deliver energy from a generator located within its Control Area.

[100] Bonneville's proposed Schedule 10, current draft dated 2/15/12, *available at* http://transmission.bpa.gov/business/ts_tariff/documents/DRAFT_new_BPA_OATT_clean.pdf, reads in its entirety as follows:

> In a Northwest Power Act section 7(i) rate proceeding, the Transmission Provider will establish either a fixed quantity of balancing reserve capacity to provide Generator Imbalance Service during the rate period, or a formula for determining a quantity of balancing reserve capacity that may vary by season or otherwise. The Transmission Provider will offer to provide Generator Imbalance Service to Transmission Customer, up to a maximum of the quantity of balancing reserve capacity (whether fixed or determined by the formula) established in the rate proceeding, through its own resources, purchased resources, or other means (for example, nongenerating resources such as demand response or energy storage.)

iv. Other Tariff Sections With Which Bonneville Is Noncompliant – Complaint Attach. C

Complainants recognize that noncompliance with some tariff provisions may be more serious than noncompliance with others, as some aspects of the OATT are fundamental to open access structures and others may be more administrative in nature. Nevertheless, the Commission has never sanctioned the idea that Transmission Providers can simply ignore provisions of their OATT without consequence. Compliance with all tariff provisions is necessary to deliver open access transmission services, and a Transmission Provider should not be able to pick and choose the tariff provisions with which it will comply. To that end, and in further demonstration of the pervasive nature of Bonneville's past tariff noncompliance, Complainants note below the other sections of its tariff with which Bonneville admits it does not comply.[101]

- Tariff Sections 2.2 and 17.7 – Conduct Long Term Firm Competitions (Renewal and Deferral)
- Tariff Section 6 – Require Reciprocity Statement from Customers
- Tariff Sections 19.9 and 32.5 – Begin Posting Study Metrics Percentages
- Tariff Attachment C – Fix Inoperable Link to ATC Methodology Data
- Tariff Attachment L – Meet LGIP Timelines
- 18 C.F.R. Sec 37.6(e) – Post List of DNRs on OASIS

[101] Complainants include this list to demonstrate the wide-ranging nature of Bonneville's deviations, and not to indicate that Complainants necessarily oppose the substance of all of these deviations. In some cases Complainants may not oppose, or may even support, such deviations, but believe the deviations should be approved by the Commission under the proper standard for tariff deviations before being implemented.

- 18 C.F.R. Sec 37.6(h) – Begin Posting Data from SIS and SFS
- Regulations Related to Meeting Deadlines for Posting Study Results
- Tariff Section 15.4(c) – Provide System Conditions for Conditional Firm
- Tariff Sections 13.2 and 14.2 – Create Short-Term Bumping Market
- Tariff Section 14.1, 14.5 and 14.7 – Offer NF PTP Products Beyond Hourly
- Tariff Section 33.2 – Redispatch All NT Resources
- Tariff Sections 13.6, 33.2 and 33.5 – Conduct Non-Discriminatory Redispatch
- Tariff Attachment K – Finalize Business Practices
- 18 C.F.R. Sec 37.6(b) – Post Capacity Benefit Margin Practices
- S&CPs – Stop Selling Unlimited Hourly Firm and Non-Firm
- Order No. 890 – Allow Conditional Firm Resales and Redirects
- Order No. 890 – Implement Simultaneous Windows

v. Business Practices That Contravene the Tariff, Complaint at 25-31; Answer at Attach. A

As discussed in the Complaint and Answer,[102] since the issuance of Order No. 890, Bonneville has begun to rely on a business practice process to effectively employ tariff changes that should be approved by the Commission. Despite the fact that a business practice is not supposed to contradict or supersede a tariff provision, Bonneville has promulgated business practices and other policies that are inconsistent with its tariff, and has acknowledged that it is effectively making tariff changes in this manner because Bonneville is not currently filing tariff

[102] Complaint at 25-31.

changes with the Commission.[103] Some of Bonneville's current business practices – its implementation of DSO 216,[104] in particular – unduly discriminate against wind generation in a manner that is similar to the Environmental Redispatch Protocol, but are less obviously discriminatory on their face. Complainants attached Bonneville's Environmental Redispatch Business Practice to their Answer[105] as an example of a business practice that contravenes the tariff, and Bonneville currently has a similar Oversupply Management Business Practice out for comment to implement its new proposal, again in contravention of the tariff.

As noted in the December 7 Order, Bonneville also engages in business practices that may violate certain North American Electric Reliability Corporation ("NERC") and North American Energy Standards Board ("NAESB") e-tagging requirements, because Bonneville does not change original e-tags when it substitutes hydropower for wind power. The Commission's December 7 Order stated "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 [NERC] and [NAESB] standards."[106] Failing to alter the e-tags could potentially lead to false information about flow patterns on the grid, which could affect reliability and proper accounting for environmental credits. Complainants note that, as with the Environmental Redispatch Protocol, the Oversupply Management Protocol states that Bonneville will not update e-tags.[107]

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[103] Complaint, Attach. C at 3 (stating that Bonneville has not made additional tariff submissions at the Commission since 2009).

[104] DSO 216 is an operational mechanism to curtail wind when generation imbalance reserves for wind reach certain levels. *See* June 13th Complaint, Attach. D.

[105] Complainants' August Answer, Attach. A.

[106] December 7 Order at P 76.

[107] March 6 Filing at 19 ("[G]enerators will remain responsible for loss returns (based on the original schedule, since under the protocol Bonneville provides replacement power *but does not revise the schedule*) and Operating Reserve obligations.") (emphasis added).

The Commission's "rule of reason" policy requires that public "utilities must file 'those practices that affect rates and service significantly, that are reasonably susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous.'"[108] Thus, where a public utility adopts certain practices that condition or otherwise significantly affect rates on its system, those practices must be set forth expressly in its tariff.[109] Further, as discussed in the Complaint, putting proposed changes through a "business practice" process or through a terms and conditions case process similar to the Northwest Power Act Section 7(i) rate process is not an acceptable alternative to Commission review and approval under 211A.[110] Bonneville seeks only to submit a reciprocity tariff, thereby insulating both its tariff and any related business practices from the Commission's review and authority under 211A. Complainants reiterate that permitting Bonneville to continue to engage in such practices going forward will deny Complainants access to comparable, not unduly discriminatory or preferential transmission service over Bonneville's system, and will virtually ensure continued disputes going forward.

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[108] *See, e.g.*, *KeySpan Ravenswood, LLC v. FERC*, 474 F.3d 804, 811 (D.C. Cir. 2007) (citing *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985).).

[109] *See Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,269 at P 26 (2010) ("We find that because the price used for settlements has a direct impact on rates, this provision should be included in the tariff."). *See also Cal. Indep. Sys. Operator Corp.*, 131 FERC ¶ 61,280 at PP 60-61 (2010) (requiring CAISO to include a table explaining demand curves for ancillary service products, as the table constituted a practice, rule, and regulation that affected rates).

[110] Section 9 of Bonneville's current tariff states that "Nothing contained in the Tariff shall be construed as affecting in any way the right of the Transmission Provider to unilaterally propose a change in rates, terms and conditions, charges or classification of service. The Transmission Provider may, subject to the provisions of the applicable Service Agreement under this Tariff, change the rates that apply to transmission service under such Service Agreement pursuant to applicable law. The Transmission Provider may, subject to the provisions of the applicable Service Agreement under this Tariff, change the terms and conditions of this Tariff upon, and only upon, a determination by the Commission that (i) such change is just and reasonable and not unduly discriminatory or preferential, or (ii) such change meets the non-public utility reciprocity requirements pursuant to a request for declaratory order under 18 CFR § 35.28(e). Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and pursuant to the Commission's rules and regulations promulgated thereunder."

D. The Purpose of FPA Section 211A Was to Broaden and Strengthen the Commission's Authority to Remedy Undue Discrimination

1. Bonneville's Interpretation of the December 7 Order is Antithetical to Congress' Purpose in Enacting FPA Section 211A

Bonneville interprets the December 7 Order to mean that Bonneville can do essentially nothing to remedy its non-comparable transmission services. In addition to disregarding the Commission's directives, Bonneville's preferred interpretation would severely undermine the Commission's authority under FPA Section 211A, contrary to Congress' intent for FPA Section 211A to strengthen, not diminish, the Commission's authority. The Commission should not acquiesce in an interpretation of FPA Section 211A that severely limits the Commission's authority to remedy undue discrimination by unregulated transmitting utilities.

Bonneville asserts that the Complaint only concerned the Environmental Redispatch Protocol and therefore the Commission's December 7 Order should be construed to only address Environmental Redispatch. Besides being factually inaccurate -- and Bonneville's own response to the Complaint belies this interpretation[111] -- Bonneville's interpretation would create enormous and unwarranted burdens for transmission customers seeking open access to transmission services.

According to Bonneville, a transmission customer would have to demonstrate that a Transmission Provider has violated *every* aspect of the tariff in order for the Commission to order the Transmission Provider to file an entire OATT. Such an interpretation is inconsistent with the legislative history and antithetical to Congress' fundamental purpose in strengthening the Commission's authority to remedy undue discrimination under FPA Section 211A.

[111] Bonneville Answer at 16, 27-106.

The Commission initially gained authority to order unregulated transmitting utilities – including Bonneville, specifically – to provide open access transmission service under the Energy Policy Act of 1992.[112] These provisions enabled eligible customers to seek an FPA Section 211 order for transmission service from the Commission after submitting a Good Faith Request[113] for transmission service to the transmission provider, but being refused the requested service. The original FPA Section 211 process was cumbersome and time-consuming, and the Commission determined that requiring transmission customers to seek transmission service on a request-by-request basis, having to complete the lengthy Good Faith Request process each time, was hindering open access transmission.[114]

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112 *Energy Policy Act of 1992*, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

113 *Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Section 211(a) and 213(a) of the Federal Power Act, as Amended and Added by the Energy Policy Act of 1992*, FERC Stats. & Regs., Regulations Preambles, 1991-1996 ¶ 30,975 (1996); 18 C.F.R. § 2.20 (2011).

114 In Order No. 888 the Commission expressed concerns about the Good Faith Request process under FPA Section 211, stating "based on the mounting competitive pressures in the industry and rapidly evolving markets, we have concluded that section 211 alone is not enough to eliminate undue discrimination. . . . The significant time delays involved in filing an individual service request for bilateral service under section 211 place the customer at a severe disadvantage compared to the transmission owner and can result in discriminatory treatment in the use of the transmission system. It is an inadequate procedural substitute for readily available service under a filed non-discriminatory open access tariff." Order No. 888 at 31,646.

In 2005 Congress expanded the Commission's authority to order non-public utilities to provide comparable, non-discriminatory transmission access.[115] To that end, Congress created a streamlined alternative to the lengthy FPA Sections 210 and 211 processes, and promulgated FPA Section 211A, broadening the Commission's authority to ensure that non-public utilities provide non-discriminatory access to their transmission systems.[116]

Recognizing the expansive authority it received under FPA Section 211A, the Commission has concluded that the language of FPA 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-public utility to provide 'open access' transmission service, *i.e.*, service to all eligible customers."[117] Further, under FPA Section 211A, the Commission can require an unregulated transmitting utility to provide open access by generic rulemaking, specific order, or on a case-by-

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[115] In enacting Section 211A ("FERC Lite") Congress' stated intent was to grant FERC the discretion "to require unregulated transmitting utilities to provide open access to their transmission systems." S. Rep. No. 109-78, at 49 (June 9, 2005). *See also* 151 Cong. Rec. S7465 (daily ed. June 28, 2005) (statement of Sen. Kyl); statement of Jon Kyl also submitted Nov. 25, 2003, S15903 ("the Energy bill expands jurisdiction over those stakeholders in electric markets that were previously unregulated by the FERC. The 'FERC-lite' provision that addresses the Federal Energy Regulatory Commission's efforts to provide open access over all transmission facilities in the United States again, in my mind, strikes the right balance."). This purpose is consistent with:

(1) the characterization of the provision by the Commission's then-General Counsel Cynthia A. Marlette in her March 2005 written responses to questions posed by the House Subcommittee on Energy and Air Quality: "The provisions in section 1231 of the Discussion Draft would provide helpful authority to ensure that non-public utilities provide non-discriminatory access to their transmission systems similar to the requirements currently imposed on public utilities." H.R. Ser. No. 109-1, at 226 (2005) (Statement of Cynthia A. Marlette, General Counsel, Federal Energy Regulatory Commission); and

(2) The recommendations of the United States General Accounting Office (now the "Government Accountability Office") to Congress that they needed to expand FERC's jurisdiction to enable the Commission to require unregulated transmitting utilities to provide open access, in order to facilitate the Commission's efforts to expand wholesale power markets. U.S. Gen. Accounting Office, Lessons Learned from Electricity Restructuring: Transition to Competitive Markets Underway, but Full Benefits Will Take Time and Effort to Achieve 45-48 (2002), available at http://www.gao.gov/new.items/d03271.pdf (last accessed March 8, 2012).

[116] *See, e.g.*, Order No. 890 at PP 22, 164.

[117] *Id.* at P 164; *see also Preventing Undue Discrimination and Preference in Transmission Services*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,603 at P 104 (2006) ("Order No. 890 NOPR").

case basis through complaints, motions seeking enforcement, or *sua sponte* action by the Commission.[118]

The expansive means by which the Commission's FPA Section 211A authority can be triggered compels the conclusion that the Commission's actions under FPA Section 211A can likewise be expansive. Congress would not have authorized the Commission to institute rulemakings under FPA Section 211A if the Commission could not order comprehensive relief for undue discrimination. As such, it is beyond doubt that FPA Section 211A authorizes the Commission to order an unregulated transmitting utility to file an entire OATT. Furthermore, since the Commission can require filing of an OATT "by rule or order," it has the authority to require *all* unregulated transmitting utilities to file an OATT. To do so, it need not find that each unregulated transmitting utility is engaging in unduly discriminatory practices, and it certainly need not find that each unregulated transmitting utility is engaging in unduly discriminatory practices with respect to *every* aspect of transmission service. It can order an unregulated transmitting utility to file an OATT when it finds that doing so will advance the provision of comparable, not unduly discriminatory or preferential transmission service.

Bonneville's interpretation of the Commission's December 7 Order would dramatically reduce the Commission's 211A authority, and would replicate a similar burdensome process to that under 210 and 211 – requiring transmission customers to submit numerous complaints and requests for service.

The Commission's December 7 Order stated that it expected "the need to use this statutory authority would be rare."[119] Using Bonneville's unreasonably narrow interpretation of

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[118] Order No. 890 NOPR at P 105; *see generally Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 at PP 19, 815 (2011) ("Order No. 1000").

[119] December 7 Order at P 32.

the order – and thereby FPA Section 211A itself – usage of the authority would be rare only if transmission customers would give up on seeking Section 211A relief. If transmission customers did seek Commission action under FPA Section 211A, they would be forced to submit numerous piecemeal complaints for each and every incident of unduly discriminatory behavior, only to receive scattered relief in the form of multiple, disaggregated attachments to an unenforceable tariff. Such a result – assuming transmission customers even considered it worthwhile to pursue – is inefficient and burdensome both for aggrieved transmission customers as well as for the Commission.

The only logical result is that the Commission intended what it said in its December 7 Order – in addition to halting its unduly discriminatory curtailment policies, Bonneville must file an entire OATT with the Commission, and the Commission will review Bonneville's OATT to determine whether any deviations from the *pro forma* OATT are comparable and not unduly discriminatory or preferential.

2. Piecemeal Implementation of FPA Section 211A is Contrary to Congress' Intent and Would Create an Unmanageable Tariff Situation for the Commission

In response to the Commission's December 7 Order, Bonneville has filed a *proposal to propose* a temporary rate allocation methodology – a document that contains no discussion or reference to its impacts on the terms and conditions of Bonneville's transmission tariff and that patently disregards the Commission's December 7 Order. Further, inherent in Bonneville's proposal is the continuation of the same non-comparable treatment of non-Federal resources that the Commission rejected in its December 7 Order.

Under Bonneville's interpretation of the December 7 Order, a transmission provider subject to a 211A order does not need to submit the terms and conditions of its transmission

service to the Commission's 211A jurisdiction, but instead can just add "attachments" to a tariff document over which the Commission has no jurisdiction. Bonneville seems to imply that the Commission would have 211A jurisdiction over its "Attachment P" – but Attachment P does not contain any operable transmission tariff provisions – it simply describes Bonneville's creation of a curtailment cost curve and asserts broad displacement rights without discussing how such displacement interacts with Bonneville's tariff provisions.[120]

A piecemeal approach such as this conceals the impacts of the proposal on the OATT, preventing the Commission from seeing the Transmission Provider's deviations from the *pro forma* OATT, and enables the Transmission Provider to avoid explaining how such deviations are comparable and not unduly discriminatory or preferential. This is not consistent with FPA Section 211A, nor for that matter, with the Commission's typically deliberate and comprehensive response to instances of undue discrimination. Further, Bonneville's proposal would create administrative disarray, as numerous "211A attachments" accumulate in a Transmission Provider's tariff, while the tariff itself somehow remains "nonjurisdictional" and unable to be evaluated as a whole against the *pro forma* OATT. Such an approach simply does not make sense, and there is nothing in FPA Section 211A or the Commission's December 7 Order to suggest that Congress, or the Commission, intended to allow such a result.

The *pro forma* OATT is an integrated tariff structure that constitutes the minimum requirement for comparable, non-discriminatory transmission service,[121] and it is the baseline

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[120] Bonneville filed Attachment P as a jurisdictional attachment in this docket, and intends to attach it to a yet-to-be-submitted non-jurisdictional reciprocity tariff. It is unclear whether Bonneville will omit Attachment P from the otherwise non-jurisdictional reciprocity tariff it intends to submit – thus seeking to straddle jurisdictional and non-jurisdictional status within the same document – or whether it will include Attachment P in its reciprocity submission -- thus seeking to render it both jurisdictional and non-jurisdictional. Either way, the result is administratively and procedurally unclear. The appropriate and logical conclusion is that the entire OATT must be submitted in this jurisdictional docket under FPA Section 211A.

[121] Order No. 888 at 31,635; Order No. 890 at P 14; Order No. 1000 at P 16.

against which any 211A compliance filing must be compared. The Commission has stated that Bonneville does not have to file a *pro forma* OATT, but it must demonstrate how any requested deviations from *pro forma* are comparable and not unduly discriminatory or preferential.[122] Bonneville has fallen far short of meeting this requirement.

3. If the Commission Adopts Bonneville's Interpretation It Will Render FPA Section 211A Meaningless

The plain language of FPA Section 211A authorizes the Commission to require entities such as Bonneville to provide transmission service that is not unduly discriminatory or preferential.[123] The Commission's mandate to prevent unduly discriminatory and preferential transmission service is a fundamental statutory obligation – one that cannot be downplayed or minimized simply because the entity in control of a large part of the grid in a particular region of the country believes it can create its own rules. The Commission has concluded that its "discretion is at its zenith in fashioning remedies for undue discrimination."[124] In its December 7 Order, the Commission found that Bonneville's transmission services are non-comparable and unduly discriminatory and preferential. Accordingly, FPA Section 211A grants the Commission broad power to order Bonneville to conform its transmission services – *all of its transmission services* – to the FPA Section 211A standards.

The issue presented by the Complaint – the Commission's authority to remedy undue discrimination by an unregulated transmitting utility – is an issue of national importance. The Commission has the opportunity and responsibility to exercise its FPA Section 211A authority in a manner that will require Bonneville to provide comparable and nondiscriminatory service going forward, while also strongly encouraging other unregulated transmitting utilities to

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122 December 7 Order at n.101.

123 Order No. 888 at 31,635; Order No. 890 at P 14; Order No. 1000 at P 16.

124 Order No. 888 at 31,676.

voluntarily comply with the Commission's rules and reforms. If the Commission permits Bonneville to adopt a minimal, limited or voluntary form of response, the Commission will strike a harmful blow to its own authority, and to the effectiveness of its critical reforms across the nation.

Complainants strongly urge the Commission to stay the course and require Bonneville to file and maintain an entire OATT that meets FPA Section 211A standards going forward. Bonneville's past behavior has amply demonstrated that it cannot be relied upon to provide non-discriminatory open access voluntarily. Commission oversight through application of FPA Section 211A standards going forward is warranted and necessary in order to ensure that Bonneville will continue to provide transmission services that meet the Commission's minimum standards, and to prevent Bonneville from implementing business practices, operational protocols, and unilateral contract amendments that substantially erode or undermine open access transmission services.

E. The Oversupply Management Protocol is Non-comparable and Fails to Address the Undue Discrimination in this Proceeding

1. Bonneville's Document Does Not Address the Terms and Conditions of its Transmission Service, Much Less the Unduly Discriminatory Practices at Issue in this Proceeding

Bonneville also seeks to sidestep the Commission's order by claiming that it has filed a "tariff revisions" under "section 211A," thereby complying with the Ordering Paragraph. But the December 7 Order required Bonneville to file a "tariff," not a separate "attachment" to a nonreciprocal, nonjurisdictional tariff. Bonneville's document does not govern the terms and conditions of Bonneville's provision of transmission service, much less address the multitude of unduly discriminatory practices at issue in this proceeding, as required by the Commission's

December 7 Order. In order to satisfy this directive, Bonneville must file an entire OATT that meets FPA Section 211A standards.

While Complainants believe there is an industry-wide understanding of the definition of the word "tariff," official guidance is also available. For instance, Bonneville's own LGIA defines "Tariff" as "the Transmission Provider's Tariff through which open access transmission service and Interconnection Service are offered, as filed with FERC, and as amended or supplemented from time to time, or any successor tariff."[125] In addition, Section 35.2 of the Commission's regulations includes the following inter-related definitions for electric service, tariff and service agreement:

> (a) Electric service. The term electric service as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. Electric service shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, electric service is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.
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> (c)(1) Tariff. The term tariff as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.
>
> (2) Service agreement. The term service agreement as used herein shall mean an agreement that authorizes a customer to take electric service under the terms of a tariff. A service agreement shall be in writing. Any oral agreement or

[125] Bonneville Standard Large Generator Interconnection Agreement, Article 1, Definitions; *see also* Large Generator Interconnection Procedures, Section 1, Definitions; Small Generator Interconnection Agreement, Glossary of Terms.

> understanding forming a part of such statement shall be reduced to writing and made a part thereof. A service agreement is designated with a Service Agreement number.[126]

These definitions make it clear that a tariff is a broad set of all the rates, terms and conditions governing the provision of interconnection and transmission service, as well as all classifications, practices, rules or regulations that in any manner affect or relate to the provision of that service, from application to termination.

Despite the certainty of the Commission's directive, Bonneville sought rehearing of the December 7 Order, claiming, among other things, that it is "unclear" as to whether it is supposed to file "tariff revisions" or an entire OATT.[127] Bonneville has filed neither of these things. However unclear Bonneville may be, it is unreasonable to interpret the Commission's order as permitting the filing of a temporary proposal to propose a cost allocation methodology that may or may not ever be adopted, and that continues the non-comparable curtailment scheme that has already been rejected by the Commission. Similarly, Bonneville's attempt to put the draft proposal in a new "Attachment P" to a tariff that is not on file with the Commission does not satisfy the requirement to file an OATT, or constitute a "tariff revision" even under the most generous of interpretations.

Bonneville's unduly discriminatory transmission practices affect many aspects of its transmission and LGIA services, and implementation of its Oversupply Management Protocol would conflict with or affect several OATT and LGIA provisions. Bonneville offers no proposed tariff deviations to accomplish this protocol or reconcile these conflicts, and by refusing to file an actual OATT, it avoids the need to explain how any such tariff provisions satisfy the FPA Section 211A standards.

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126 18 C.F.R. § 35.2 (2011) (italics removed) (emphasis added).

127 Bonneville Rehearing Request at 4, 8-9.

Filing a tariff attachment or tariff revisions in isolation from the rest of Bonneville's tariff does not and cannot respond to the Commission's directive. Such a filing is particularly non-responsive when the tariff language Bonneville has submitted does not actually obligate it to do anything other than create a cost curve and make an initial proposal in a future rate case. The deficient nature of the filing is further aggravated by the fact that the proposal itself is simply an indirect way for Bonneville to continue to unduly discriminate against wind generators by paying pursuant to a cost curve and then turning around and charging at least 50 percent, or more depending on Bonneville's future decision, of the costs back to the wind generators, all while continuing to implement non-comparable curtailments.

2. Bonneville Has Not Demonstrated that Its Proposal Is Comparable and Not Unduly Discriminatory or Preferential as Required by FPA Section 211A

Bonneville has refused to file an OATT, and has not made any attempt to demonstrate how its proposal meets the FPA Section 211A standards, or to explain how the non-comparable proposal does not result in the same undue discrimination the Commission found and ordered remedied in its December 7 Order. The Commission cannot determine whether Bonneville is providing transmission service – pursuant to its Oversupply Management Protocol or otherwise – that meets these standards unless and until Bonneville files an OATT.

While Bonneville's proposal might, if adopted, permit partial compensation of wind generators, the proposal contains the same curtailment practices as the Environmental Redispatch Protocol, which the Commission found to "result in non-comparable transmission service that is unduly discriminatory and preferential."[128] Specifically, Bonneville's Draft Oversupply Management Protocol states:

[128] December 7 Order at P 78.

> This attachment establishes requirements and procedures necessary to mitigate total dissolved gas ("TDG") levels in the Columbia River. All *non-Federal* Transmission Customers with generation in Transmission Provider's Control Area and all *non-Federal* Generators in Transmission Provider's Control Area (together referred to in this attachment as "Generator") shall follow Transmission Provider's directions to reduce generation below the amount of generation scheduled for the hour. Transmission Provider will deliver federal hydro power to replace such scheduled generation in order to meet the Transmission Customer's schedules.[129]

In Bonneville's March 6 Filing, Bonneville has removed the words "non-federal" in this section, but has not substantively changed the way it would implement its curtailments as between Federal and non-Federal generation. Deleting the words "non-federal" makes the proposal appear less unduly discriminatory on its face, obscuring the non-comparable application of curtailments. Bonneville will not apply its curtailments to the Federal hydro system resources – thereby treating others in a way that is not comparable to the way it treats itself.

Bonneville's proposal may be workable, however, if non-Federal generation *agreed* to be curtailed for a price, but that is not what Bonneville is proposing. It will curtail non-Federal generation with or without consent. Further, any "payments" for curtailment are simply charged back to transmission customers, 100 percent in the near term and 50 percent (maybe), after a rate case is completed. While Bonneville's proposal is positive to the extent it seeks to begin compensating generators for these curtailments, Bonneville does not have the agreement of its transmission customers to do this, and as such, it remains a unilateral curtailment protocol that accords unduly preferential treatment to Federal generation and does not fully compensate non-Federal generation that is displaced, nor does it provide any protection from future undue discrimination by Bonneville. Absent customer consent, partially mitigating the cost impact of

[129] Draft Oversupply Management Protocol at 1 and attached hereto as Attachment A.

these curtailments is insufficient to remedy the situation because the non-comparable curtailments continue to violate FPA Section 211A "[r]egardless of the magnitude of the loss."[130]

Bonneville offers little explanation of how its proposal meets the Commission's comparability standard,[131] instead asserting that the proposal "reconciles the standard of comparable and not unduly discriminatory or preferential transmission service with Bonneville statutory responsibilities, and . . . thereby achieves a reasonable balance of statutory responsibilities."[132] The "balancing" Bonneville refers to appears to be the balancing of "protection and enhancement of endangered species of salmon; supporting the growth of renewable resources; providing open access transmission service; and providing power at 'the lowest possible rates to consumers consistent with sound business principles.'"[133] As with 2011's Environmental Redispatch and Negative Pricing Policies, Bonneville's solution evidences a "balance" heavily tilted toward one objective – keeping rates low for its preference customers. In so doing, Bonneville not only gives inadequate consideration to its other objectives, but also continues its promulgation of policies that distort competitive markets.

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130 December 7 Order at P 63.

131 In accordance with the Commission's directives in the December 7 Order, Bonneville has the burden of proof regarding whether its proposal satisfies the FPA Section 211A standards. The Commission made it clear that, while it was not requiring Bonneville to file the *pro forma* OATT, 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. December 7 Order at n.101. To the extent Bonneville chose to file an OATT that deviates from the *pro forma* OATT, consistent with Section 211A, the Commission would consider whether deviations from the *pro forma* OATT result in Bonneville 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. *Id*. Complainants note that the Commission amended its regulations in Order No. 890 to make clear that an applicant in an FPA Section 211A proceeding against a non-public utility that has submitted an acceptable safe harbor tariff shall have the burden of proof to show why service under the safe harbor tariff is not sufficient and why an FPA Section 211A order should be granted. Order No. 890 at P 192 (amending 18 C.F.R. 35.28(e)(1)(ii)). Complainants in this proceeding satisfied that burden, the Commission issued an order granting their request for a Section 211A order, and the burden is now on Bonneville to comply with that order.

132 March 6 Filing at 26.

133 *Id.* at 5.

a. Bonneville is a Market Participant

Bonneville is the dominant energy market participant in the Northwest. Bonneville markets the wholesale electricity generated by the Federal Columbia River Power System to the region's utilities and some large industries, providing about one-third of all of the electricity used in the Northwest.[134] Bonneville sells a portion of this generation as surplus power both within and outside the region, with surplus power sales typically representing up to 25 percent of its net power revenues.[135]

In its recent Notice of Proposed Rulemaking on Electricity Market Transparency Provisions of Section 220 of the Federal Power Act, the Commission stated that non-public utilities with more than *de minimus* power sales are "market participants," and discussed the significant percentage of wholesale sales and market participation by non-public utilities in certain regions, including the Western Electricity Coordinating Council region.[136] The Commission also acknowledged that energy transactions by non-public utilities can have

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134 *See* Serving the People of the Northwest, Bonneville Power Administration, available at: http://www.bpa.gov/corporate/pubs/BPA-brochure.pdf (May 2009).

135 Pam Radtke Russell, *BPA Proposes Rate Hike on Wholesale Customers, the First One in Six Years, PLATTS ELECTRIC UTILITY WEEK*, Feb. 16, 2009, at 34.

136 *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, Notice of Proposed Rulemaking, 135 FERC ¶ 61,053 (2011). In this notice of proposed rulemaking, the Commission stated that:

> We interpret "any market participant" to include non-public utilities that fall under *FPA section 201(f)*. Such an interpretation of 'any market participant' is consistent with the broad mandate in *section 220* to "facilitate price transparency in the markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers." Furthermore, in EPAct 2005, Congress amended *section 201(b)(2) of the FPA* to provide that, "[n]otwithstanding *section 201(f)*," the entities described in *section 201(f)* shall be subject to the Commission's jurisdiction for purposes of carrying out certain provisions, including *FPA section 220*. Thus, reading *FPA section 201(b)(2)* in conjunction with *section 220*, EPAct 2005 granted the Commission authority to collect information concerning the availability and prices of wholesale electric energy and transmission service from entities that are not public utilities.

Id. at P 22 (emphasis in original).

significant impacts on wholesale electricity markets.[137] Bonneville is not an independent transmission provider, like an ISO or RTO, and its extensive participation in regional power markets should be taken into account when considering proposals that permit it to order non-Federal generation to shut down for reasons unrelated to reliability.

b. Bonneville's Filing Confirms the Premise of the Complaint: Environmental Redispatch Was About Money, Not Fish

Bonneville has consistently described its "need" for the oversupply protocols as being driven by fish and wildlife obligations, yet the regional fish and wildlife groups have consistently opposed both the Environmental Redispatch and Oversupply Management Protocols as being "imprudent and unnecessary" and an example of Bonneville "continu[ing] to use salmon as an excuse for policy decisions regarding wind curtailments, despite a lack of scientific evidence supporting its claims."[138] Further, Save Our Wild Salmon has maintained that it "believe[s] this policy is primarily based on economics and not the biological needs of Columbia and Snake River salmon."[139] In addition, Complainants note that the Oversupply Management Protocol is limited to paying wind generation in Bonneville's BAA, and Bonneville has not provided an adequate explanation for its refusal to look outside its BAA for additional solutions to alleviate oversupply situations. If its primary concern is protecting fish and wildlife, not economics, it is unclear why Bonneville will not consider alternatives outside its BAA.

c. Bonneville's Proposal Does Not Support the Growth of Renewable Resources

Bonneville claims the Oversupply Management Protocol is not unduly discriminatory toward new renewable resources, even though new entrants would receive less compensation

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137 *Id.* at 11.

138 "Comments on Bonneville Power Administration's Draft Oversupply Management Protocol" submitted by Save our Wild Salmon at 2 (Feb. 21, 2012).

139 *Id.*

than existing resources, and still would be required to curtail ahead of Federal generation. Bonneville explains that this is an acceptable distinction because new generation is now on notice of Bonneville's oversupply protocol and "[p]rospective contracts can be appropriately structured and priced to avoid these costs."[140]

The problem with Bonneville's explanation is that its policy *does* unduly discriminate against new entrants,[141] and simply making it known that a Transmission Provider intends to unduly discriminate does not constitute comparable or non-discriminatory transmission service. Bonneville expects new entrants to now be "on notice"[142] of its discriminatory policy and address the risks and costs associated with those policies in future deals. But these increased costs adversely affect any future deals, and the ability to "address" the costs does not mean the transmission customer or its counterparty should properly bear them.

Ironically, the very purpose of Order No. 888 was to stop public utilities from discriminating against competitors to forestall *new entry*[143]—not allow utilities to thwart new entry as long as they provided adequate notice of the undue discrimination. In an effort to support its policy of undue discrimination against market entrants through its proposed

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140 March 6 Filing at 27.

141 Bonneville's policy also unduly discriminates against *existing* generators based on an arbitrary definition of new entrants versus existing customers that bears no relationship to when those entities actually interconnected to Bonneville's system. In particular, Attachment P provides full compensation for lost PTCs and RECS and for lost contract revenues or penalties for the failure to generate renewable energy for power sales contracts executed on or before March 6, 2012. *See* March 6 Filing at 14-15, 27; Proposed Attachment P, Section 5(c). However, Bonneville reasons that power sales contracts executed after that date may be structured so that hydroelectric power may substitute for other power without penalty and without loss of revenue. *See* March 6 Filing at 14-15, 27. Therefore, as to the contracts executed after March 6, 2012, Attachment P provides less compensation, *i.e.*, Bonneville will provide compensation for lost PTCs and RECs sold unbundled from or at a separate price from energy, but not lost contract revenues because hydro power is delivered rather than renewable energy, or penalties because of the failure to generate. *See* March 6 Filing at 14-15, 27; Proposed Attachment P, Section 5(c). Thus, an *existing* customer who entered Bonneville's interconnection queue and interconnected with Bonneville's system prior to the March 6, 2012 date – even *years* prior to that date, long before Bonneville had ever mentioned the possibility of displacing their power with hydroelectric power –would nevertheless be treated as a new entrant who was put "on notice" and thus subject to a less favorable compensation structure for a contract executed after March 6, 2012.

142 March 6 Filing at 28.

143 Order No. 888 at 31,645.

Attachment P, Bonneville states that the Commission had previously "upheld a distinction between existing and new interconnection customers based on the customer's expectations at the time it entered into the interconnection queue,"[144] citing to *PJM Interconnection, L.L.C.*[145] ("*PJM*").

Bonneville's reliance on this case is misplaced. In *PJM*, the Commission does not speak to the tariff terms and conditions that should apply to *new* generators, nor does it address whether and under what circumstances it might be acceptable to treat existing and new customers differently. Rather, the order discusses the appropriate terms and conditions to apply to *existing* generators when the terms and conditions of the governing tariff have changed since the time those generators entered the queue.[146] The Commission ultimately held that the transmission provider should apply the terms and conditions of the tariff that was effective when the generator entered the queue.[147] Regulatory certainty is a key to any business decision and this policy allows for greater certainty because all parties know the cost expectations at the time a customer enters the queue and "[e]ach customer knows that the subsequent cost allocations will be determined by circumstances known at the time its System Impact Study is conducted."[148] In addition, it is worth noting that the policy in *PJM* had changed for the *better* since the time the customer entered the queue, *i.e.*, unlike the old policy, the new policy did not require customers to pay a share of network upgrades.

Here, Bonneville is attempting to stretch the *PJM* holding too far by using it to support a distinction in the tariff terms and conditions applicable to existing and new generators – terms

144 March 6 Filing at 27-28.

145 *PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,195 (2011) ("*PJM*").

146 *Id.* at P 31.

147 *Id.* at P 36.

148 *Id.* (quoting *FPL Energy Marcus Hook L.P.*, 118 FERC ¶ 61,169 at P 17 (2007).).

and conditions that have changed drastically and in an unduly discriminatory manner. Further, while new generators may be on notice that Bonneville has proposed to curtail their firm generation without compensation, unlike in *PJM*, proposed Attachment P offers no certainty based on which new generators can make informed business decisions. New generators, like existing generators, will struggle with the uncertainty of how much or how often they will be curtailed under Bonneville's Attachment P, as well as whether and which of the costs incurred as a result of those curtailments will ultimately be reimbursed.

The December 7 Order states the Commission's intent to foster development of new generation, not to discourage it through continued undue discrimination:

> [W]e 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.[149]

Bonneville's proposal does not support renewable generation – it simply makes clear that it intends to continue to displace renewable generation ahead of its own resources.

d. Bonneville's Proposal Does Not Provide Open Access Transmission Service

Bonneville's proposal does not demonstrate a commitment to open access transmission services, but rather, a strident refusal to be held to any such commitment. In its December 7 Order, the Commission took prospective action "requiring the filing of a tariff that will govern service provided by Bonneville in the future."[150] Instead of filing an OATT, Bonneville has sought to deny the Commission its authority to require open access by Bonneville, and by extension, by all unregulated transmitting utilities.

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149 December 7 Order at P 35.

150 *Id.* at P 30.

e. Bonneville's Oversupply Management Protocol Continues to Distort Competitive Markets in Order to Provide Economic Benefits to Bonneville's Preferred Customer Class

Bonneville proposes to give its transmission customers a choice regarding cost displacement and cost allocation: (1) receive compensation for certain generator displacement costs and pay a yet-to-be-determined share of the costs associated with Bonneville's oversupply events; or (2) receive no generator displacement costs and no allocation of the oversupply costs.[151] As a result, Bonneville is proposing to offset its payment of negative prices (*i.e.*, payment of certain displacement costs) by allocating the displacement costs back to the very generators it just "paid."

The non-comparable and unduly discriminatory effects of Bonneville's Oversupply Management Protocol are not limited to wind generators. With regard to the first option noted above, *i.e.*, that Bonneville proposes to propose to compensate generators for *certain* displacement costs, Bonneville has proposed to limit the displacement costs eligible for reimbursement to PTCs, RECs and losses under existing contracts.[152] Indeed, such a compensation methodology makes overly simplistic assumptions regarding the impact of the oversupply events on non-renewable, non-Federal generators – a fact made clear by the February 21, 2012 comments filed with Bonneville in response to its initial release of a draft version of the protocol and only briefly addressed by Bonneville's March 6 Filing.[153]

For instance, in its comments on the Draft Oversupply Management Protocol, Clark Public Utilities ("Clark PUD") explained that, "[w]hile it is *generally* true that thermal generators respond to offers of low-cost or free Federal hydropower and therefore are incented to

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151 March 6 Filing, Proposed Attachment P, Section 3.

152 March 6 Filing at 14-15, 27; Proposed Attachment P, Section 5(c).

153 March 6 Filing at 22 (concluding that thermal generators can avoid operational and reliability risks by submitting appropriate minimum generation levels and maximum ramp rates).

reduce generation during periods of oversupply[,] thermal generators may in fact not reduce generation at these times."[154] Clark PUD went on to describe the reliability, operational and contractual obligations that may supersede a thermal generator's ability to respond to daily market price signals and, thus, the thermal generator may be forced to run during certain circumstances regardless of whether prices reached zero or negative levels.[155]

In addition, TransAlta Energy Marketing Inc. ("TransAlta") explained that Bonneville has restricted reimbursement costs almost exclusively to lost PTCs and RECs, ignoring the fact that thermal generators can suffer from costs as well, such as reduced efficiency or contractual fuel/single point of delivery obligations that may be violated as a result of an oversupply redispatch and hydro power "replacement" under the protocol.[156] TransAlta pointed out that circumstances differ from generator to generator, and Bonneville is not qualified to predetermine "eligible" displacement costs or judge whether generator owners are likely to declare those costs.[157] Rather, in order to treat all generators comparably and mitigate displacement costs equitably, TransAlta believes Bonneville must expand displacement costs beyond PTCs and RECs.[158]

Further, in the comments of Sierra Pacific Industries, the owner of biomass fueled cogeneration facilities that produces energy that is consumed, in part, onsite, has concerns that Bonneville has not properly contemplated how their facility operates. Sierra Pacific Industries

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154 "Comments on the proposed Oversupply Management Protocol" submitted by Clark Public Utilities at 1 (Feb. 21, 2012).

155 *Id.* at 1-3.

156 "Comments on the proposed Oversupply Management Protocol" submitted by TransAlta at 3 (Feb. 21, 2012).

157 *Id.*

158 *Id.*; *see also,* "Comments on the proposed Oversupply Management Protocol" submitted by the Northwest & Intermountain Power Producers Coalition at 4 (Feb. 21, 2012) (stating that compensation paid to displaced generators – wind, thermal or otherwise – must include all costs incurred by displacement).

states that "the language in the [Oversupply Management] protocol is vague and in fact an admission that BPA has not figured out how to deal with [biomass cogeneration facility] situations."[159]

Bonneville makes no attempt to demonstrate how its proposal meets the FPA Section 211A standards, or to explain how the proposal does not result in the same undue discrimination the Commission rejected in its December 7 Order. Bonneville simply asserts "[t]he Oversupply Management Protocol treats system users comparably by covering legitimate displacement costs while allowing Bonneville to fulfill its environmental obligations at the lowest cost and risk to the region."[160]

Simply stating the protocol treats system users comparably does not make it so. Further, it is misleading for Bonneville to characterize its proposal as providing "significant compensation to renewable generators for the costs they incur from being displaced" when the intent all along is to allocate some or all of those costs right back to the displaced generators. The only difference between this protocol and the Environmental Redispatch Protocol is that Bonneville will in some cases pay negative prices to displace non-Federal generation, but Bonneville is proposing to allocate first 100 percent, then possibly 50 percent, of the costs back to the non-Federal generators through its cost allocation methodology. Bonneville provides no explanation of how the proposal meets the Commission's 211A standards or its directive to provide comparable, not unduly discriminatory or preferential transmission service now and in the future.

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159 "Comments on the proposed Oversupply Management Protocol" submitted by Sierra Pacific Industries at 3 (Feb. 21, 2012).

160 March 6 Filing at 7.

3. Bonneville's Unilateral LGIA Amendments are Unlawful and Create Unacceptable Uncertainty for the Northwest

Just as it did with its Environmental Redispatch Protocol, Bonneville has again proposed to implement its oversupply protocol by unilaterally amending its existing LGIAs. As discussed in the Complaint, Complainants' August Answer and the Commission's December 7 Order,[161] this approach violates existing contracts and Commission policy.

In particular, Bonneville has proposed to unilaterally amend Appendix C of its existing LGIAs to add a specific reference to its proposed Attachment P containing the Oversupply Management Protocol.[162] Bonneville again argues that Article 9.3 of the LGIA gives Bonneville the unilateral right to amend Appendix C for operational and reliability reasons, citing to the same 2005 Commission order approving certain requested deviations to Bonneville's LGIA.[163] Bonneville has continued to overstate the application of this order and ignore both the well-settled Commission policy against making retroactive changes to LGIAs already in effect and the express language of the LGIAs, which require mutual consent to modify terms.

In the cited 2005 proceeding, Bonneville requested a deviation from the Commission's *pro forma* LGIA Article 9.4,[164] which requires, among other things, that interconnection customers operate their generation facilities and interconnection facilities in a safe and reliable manner and in accordance with the LGIA and all applicable requirements of the relevant Control

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161 *See, e.g.*, Complaint at 51-55; Complainants' August Answer at 38-40; December 7 Order at P 78.

162 March 6 Filing at 19-21.

163 *Id.* at 20 (citing *Bonneville Power Admin.*, 112 FERC ¶ 61,195 at P 20 (2005)). *See also* Environmental Redispatch ROD at 17, 38-40.

164 Article 9.4 states in full: "Interconnection Customer shall at its own expense operate, maintain and control the Large Generating Facility and Interconnection Customer's Interconnection Facilities in a safe and reliable manner and in accordance with this LGIA. Interconnection Customer shall operate the Large Generating Facility and Interconnection Customer's Interconnection Facilities in accordance with all applicable requirements of the Control Area of which it is part, as such requirements are set forth in Appendix C, Interconnection Details, of this LGIA. Appendix C, Interconnection Details, will be modified to reflect changes to the requirements as they may change from time to time. Either Party may request that the other Party provide copies of the requirements set forth in Appendix C, Interconnection Details, of this LGIA."

Area, as set forth in "Appendix C – Interconnection Details" of the LGIA. Bonneville requested approval to amend Article 9.4 to specify that Bonneville – and not the interconnection customer – will modify Appendix C in order to remove the potential for the interconnection customer to argue that it must agree to changes in the Control Area reliability requirements.

Nothing in the Commission's response to Bonneville's request granted any party the right to amend Appendix C to the LGIA unilaterally, and yet Bonneville hinges its entire argument on this language:

> An executed LGIA is a service agreement under a Transmission Provider's OATT and, as such, the Transmission Provider is primarily responsible for identifying the applicable reliability criteria. While the Interconnection Customer does have the right to agree to modifications to the agreement, the LGIA should be read as granting the Transmission Provider the right to determine the applicable reliability criteria. Moreover, under LGIA article 9.3 (Transmission Provider Obligations), the Transmission Provider has the responsibility for establishing the Interconnection Customer's operating instructions and operating protocols and procedures. Because these instructions, protocols, and procedures will include reliability requirements, article 9.3 already gives the Transmission Provider responsibility for modifications to Appendix C. The same provision gives the Interconnection Customer the right to propose changes for the Transmission Provider to consider, but not the right to make unilateral changes. In light of this provision, we conclude that BPA's proposed change is unnecessary and the Commission cannot find that BPA has a valid safe harbor tariff unless it removes this proposed modification.[165]

In its order, the Commission merely indicates that the "Transmission Provider has the responsibility for establishing the Interconnection Customer's operating instructions and operating protocols and procedures." Nothing in this statement provides Bonneville a right to amend Appendix C to the LGIA unilaterally, particularly when an amendment to implement the proposed Oversupply Management Protocol would not concern reliability criteria, operating instructions or operating protocols or procedures. That is, similar to the Environmental Redispatch Protocol, the Oversupply Management Protocol attempts to cloak its proposals as

[165] *Bonneville Power Admin.*, 112 FERC ¶ 61,195 at P 20 (2005).

necessary and lawful due to "reliability" requirements or to statutory fish and wildlife obligations,[166] but the true nature of the proposal is evident – shifting Federal hydro system costs to wind generators. Bonneville has once again stretched this false reliability-related justification even further in an attempt to give itself the authority to unilaterally amend LGIA Appendix C to "clarify" its "existing" right to implement the Oversupply Management Protocol.

Not only is Bonneville's application of the Commission's 2005 order misplaced, but Bonneville also ignores the language of the Complainants' LGIAs and well-established Commission precedent when it claims it has the authority to modify interconnection agreements unilaterally. Of particular relevance here, LGIA Article 30.9 states "[t]he Parties may by *mutual agreement* amend this LGIA by a written instrument duly executed by the Parties," and LGIA Article 30.10 states "[t]he Parties may by *mutual agreement* amend the Appendices to this LGIA by a written instrument duly executed by the Parties. Such amendment shall become effective and a part of this LGIA upon satisfaction of all Applicable Laws and Regulations."[167] Further, the Commission has a well-established policy not to make retroactive changes to interconnection agreements that are already in effect.[168]

Not only does Bonneville's second attempt to unilaterally modify its LGIA fly in the face

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166 *See, e.g.*, March 6 Filing at 21 (Bonneville states that unilaterally amending its LGIAs to incorporate its Oversupply Management Protocol is "necessary to ensure that reliability requirements and Bonneville's environmental responsibilities are met…").

167 Emphasis added.

168 *See, e.g.*, *Integration of Variable Energy Resources*, 133 FERC ¶ 61,149 at P 64 (2010) (not allowing retroactive changes to interconnection agreements currently in effect); *Interconnection for Wind Energy*, Order No. 661, FERC Stats. & Regs. ¶ 31,186 at PP 1, 111-116, 120 (2005) (not allowing retroactive changes to interconnection agreements that are already in effect when adopting standard procedures and technical requirements for the interconnection of large wind plants and allowing for a transition period, over Bonneville's objection, in order to have the proposed changes apply to interconnection agreements executed some time after FERC issuance of its final rule); *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at PP 910-11 (2003); *Cities of Anaheim, Azusa, Banning, Colton and Riverside, California v. California Independent System Operator Corporations, Salt River Project Agricultural Improvement and Power District v. California Independent System Operator Corporations, California Independent System Operator Corporations*, 102 FERC ¶ 61,274 at P 43 (2003) (rejecting an Offer of Settlement because it effected a retroactive tariff revision against a non-settling party).

of well-established Commission precedent and the terms of the LGIA itself, but it completely ignores the Commission's December 7 Order. The Commission's order included an entire section on this issue, entitled "Implementation of the Environmental Redispatch Policy Through Unilateral Modification to Existing LGIAs,"[169] which concludes that, having found that Bonneville must provide comparable transmission service that is not unduly discriminatory or preferential, the Commission must "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."[170]

Bonneville is now proposing a new curtailment scheme that is virtually identical to its Environmental Redispatch Protocol -- a scheme that conflicts with all the same LGIA provisions as its prior proposal -- and is again seeking to unilaterally amend its LGIAs to authorize such curtailments. Bonneville relies on the very same arguments that the Commission rejected in its December 7 Order. Complainants repeat their arguments in opposition to this action, and note that Bonneville is again disregarding the Commission's December 7 Order.

If Bonneville wishes to propose an amendment to existing LGIAs to implement its Oversupply Management Protocol, or any other curtailment scheme, then it must work with its interconnection customers to reach mutually-acceptable terms. Without mutual agreement, Bonneville cannot make such changes. Bonneville's only other recourse would be to propose amendments to its *pro forma* LGIA to allow it to implement its Oversupply Management Protocol in agreements going forward. In order to do so, Bonneville must follow the proper procedure for such changes, *i.e.*, it must file such proposed changes with the Commission and request that the Commission find the changes satisfy the standards set forth in FPA Section

169 December 7 Order at PP 67-73.

170 December 7 Order at P 73.

211A.

Bonneville's new attempt to unilaterally amend existing LGIAs further underscores the need for Commission approval of any proposed changes to Bonneville's transmission terms and conditions. Transmission customers will have no certainty if Bonneville can unilaterally alter binding contracts that, by their terms, do not permit unilateral amendment. In the December 7 Order, the Commission said:

> [W]e find a compelling case here to exercise [211A] 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.*[171]

If Bonneville can unilaterally amend its contracts, industry will have no certainty and no confidence to invest in generation in the Northwest – there is simply too much risk involved when the owner of 80 percent of the transmission in the region can, without any regulatory oversight, change the rules of the game at any time. This behavior is unlawful, not comparable, and it creates an unworkable business environment for all market participants.

4. Bonneville's Proposed Solutions to Oversupply Issues Are Non-comparable and Inadequate

Not only does Bonneville's March 6 Filing ignore the impacts that its proposed oversupply solution has on many aspects of the OATT and LGIA, but it contains many of the same flaws as the Environmental Redispatch Protocol, plus several new flaws. Bonneville must explain how its oversupply proposal will fit into the broader construct of the provision of transmission service that is comparable and not unduly discriminatory and embodied in an OATT filed under FPA Section 211A.

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[171] December 7 Order at P 32 (emphasis added).

a. The Undue Discrimination Associated with Both the Environmental Redispatch Protocol and the Oversupply Management Protocol Implicates Many Aspects of the OATT and LGIA

Even if the Complaint was focused mainly on oversupply issues—which was not the case, as discussed previously—Bonneville's own filing illustrates how a solution to those issues cannot simply be plucked out of the tariff context and remedied through filing a separate tariff "attachment." Rather, the Environmental Redispatch and the proposed Oversupply Management Protocols implicate numerous tariff provisions. Bonneville has made no effort to identify, reconcile, or seek deviations for any of the tariff provisions that conflict with the Oversupply Management Protocol. Bonneville has, however, stated in its March 6 Filing that as part of implementing its Oversupply Management Protocol, it will unilaterally amend existing LGIAs to "clarify" its ability to implement the curtailments.[172] Bonneville cannot simply add an attachment to its non-jurisdictional tariff describing the proposal and declare that this addresses or resolves all the tariff issues presented by its curtailment protocols, nor can Bonneville's unlawful unilateral amendments resolve these matters. The current Bonneville tariff and LGIA provisions affected by Bonneville's curtailment protocols include, without limitation:

- **Tariff Section 1.8, Curtailment**

  ("Curtailment" is defined as "A reduction in firm or non-firm transmission service in response to a transfer capability shortage as a result of system reliability conditions.")
- **Tariff Section 13.5, Transmission Customer Obligations for Facility Additions or Redispatch Costs**

[172] March 6 Filing at 19-20.

("Any redispatch, Network Upgrade or Direct Assignment Facilities costs to be charged to the Transmission Customer on an incremental basis under the Tariff will be specified in the Service Agreement prior to initiating service.")

- **Tariff Section 13.6, Curtailment of Firm Transmission**

  ("In the event that a Curtailment on the Transmission Provider's Transmission System, or a portion thereof, is required to maintain reliable operation of such system and the system directly and indirectly interconnected with Transmission Provider's Transmission System, Curtailments will be made on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint.")

  ("If multiple transactions require Curtailment, to the extent practicable and consistent with Good Utility Practice, the Transmission Provider will curtail service to Network Customers and Transmission Customers taking Firm Point-to-Point on a basis comparable to the curtailment of service to the Transmission Provider's Native Load Customers.")

  ("All Curtailments will be made on a non-discriminatory basis . . . ")

- **Tariff Section 13.7(c), Classification of Firm Transmission Service**

  ("The Transmission Provider shall provide firm deliveries of capacity and energy from the Point(s) of Receipt to the Point(s) of Delivery.")

- **Tariff Section 14.7, Curtailment or Interruption of Service [Nonfirm]**

  ("The Transmission Provider reserves the right to Curtail, in whole or in part, Non-Firm Point-To-Point Transmission Service provided under the Tariff for reliability reasons when an emergency or other unforeseen condition threatens to impair or degrade the

reliability of its Transmission System or the systems directly or indirectly interconnected with Transmission Provider's Transmission System.")

- **Tariff Section 22.1, Modifications on a Non-Firm Basis**

  ("The Transmission Customer taking Firm Point-to-Point Transmission Service may request the Transmission Provider to provide transmission service on a non-firm basis over Receipt and Delivery Points other than those specified in the Service Agreement . . .")

- **Tariff Section 27, Compensation for New Facilities and Redispatch Costs**

  ("Whenever a System Impact Study performed by the Transmission Provider identifies capacity constraints that may be relieved by redispatching the Transmission Provider's resources to eliminate such constraints, the Transmission Customer shall be responsible for the redispatch costs to the extent consistent with Commission policy.")

- **LGIA Section 9.7.2, Interruption of Service**

  ("If required by Good Utility Practice to do so, Transmission Provider may require Interconnection Customer to interrupt or reduce deliveries of electricity if such delivery of electricity could adversely affect Transmission Provider's ability to perform such activities as are necessary to safely and reliably operate and maintain the Transmission System.")

Bonneville has not mentioned these tariff provisions, nor discussed how it intends to address the conflicts that would occur with these provisions in the event it actually implements its Oversupply Management Protocol beginning March 31, 2012. Bonneville seeks to use an unlawful unilateral LGIA amendment to resolve its LGIA conflicts – an approach that will only lead to further costly litigation and uncertainty for the region. Bonneville intends only to submit

a reciprocity tariff, so under Bonneville's preferred approach, the Commission will have no jurisdiction over these OATT and LGIA provisions and Bonneville will proceed to unilaterally amend them or promulgate contravening business practices and operating protocols. In its December 7 Order, the Commission said:

> 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.[173]

Bonneville's new proposal is virtually identical to its Environmental Redispatch protocol with respect to comparability and curtailments – under both protocols, Bonneville displaces non-Federal generation, with or without the generator's consent, and does not subject its own Federal generation to the same treatment. Bonneville has not explained how its proposed policy can be reconciled with its current tariff language or how its proposed policy constitutes comparable and not unduly discriminatory or preferential transmission service, and Bonneville has not filed an OATT with the Commission that satisfies FPA Section 211A standards.

b. The Oversupply Management Protocol Perpetuates Bonneville's Undue Discrimination Against Non-Federal Generators

There is one essential difference between Bonneville's Environmental Redispatch Protocol and its proposed temporary Oversupply Management Protocol: under the Environmental Redispatch Protocol, wind generators were responsible for 100 percent of the costs of Bonneville's oversupply situations, and under the proposed Oversupply Management Protocol, if it is adopted, wind generators would be responsible for roughly 50 percent of the

[173] December 7 Order at P 78 (emphasis added).

costs of Bonneville's oversupply situations through March 30, 2013. Accordingly, Bonneville has argued that providing some level of compensation to wind generators addresses the Commission's comparability and undue discrimination concerns. The proposal, however, continues to subject non-Federal generation to non-consensual curtailments, while Federal generation is not similarly curtailed. Providing the opportunity to regain some of the lost costs may be a modest improvement, but the protocol itself contains the same comparability and undue discrimination issues as its predecessor. Even if one were to argue that the potential opportunity to be partially compensated somehow lessened the unduly discriminatory impacts, the Commission did not direct Bonneville to do something *less* unduly discriminatory; it directed them to do something that was *not* unduly discriminatory.

Bonneville's proposal is non-comparable by its terms and in its intended application, applying the same Environmental Redispatch-style curtailment protocols to only non-Federal generation, and replacing the curtailed non-Federal generation with Federal hydropower. Bonneville has made no attempt to distinguish these curtailments from the curtailments the Commission found to be non-comparable, unduly discriminatory and preferential in the December 7 Order, and indeed they are indistinguishable. To address the Commission's December 7 Order, Bonneville offers only that its cost curve and proposal to propose to allocate 50 percent instead of 100 percent of curtailment costs to wind generators is "arguably a reasonable and fair allocation of costs and alignment of costs and benefits because it recognizes all of these arguments, and it is not unreasonable for Bonneville to advance it as a proposal at the opening of Bonneville's ratemaking process."[174] Bonneville's general assertions of "reasonableness" cannot overcome its failure to demonstrate comparability.

[174] March 6 Filing at 22.

The proposed cost allocation embodied in Bonneville's Oversupply Management Protocol also contains additional rate allocation flaws that render it unlawful absent the express consent of the impacted transmission customers.[175] Given Bonneville's past tariff practices, Complainants cannot consent to any allocation of these costs absent Bonneville's filing of an enforceable 211A OATT with the Commission.

The Complainants acknowledge that oversupply cost allocation may be *part of* the solution to the undue discrimination that has resulted from Bonneville's transmission practices. The most important part of the solution, however, is Bonneville's filing of an enforceable FPA Section 211A OATT with the Commission. Once the Commission has ensured Bonneville's transmission practices are not unduly discriminatory going forward, the region may then undertake a rate case to consider and attempt to resolve the allocation of oversupply costs among Bonneville's customers.[176]

[175] Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §839e(g) ("[T]he Administrator shall equitably allocate to power rates, in accordance with generally accepted ratemaking principles and the provisions of this chapter, all costs and benefits not otherwise allocated under this section, including, but not limited to, conservation, fish and wildlife measures, uncontrollable events, reserves, the excess costs of experimental resources acquired under section 839d of this title, the cost of credits granted pursuant to section 839d of this title, operating services, and the sale of or inability to sell excess power."); 16 U.S.C. §839e(i) (setting out procedures for establishing a rate.).

[176] Complainants note that, under normal circumstances, Complainants and other wind generators in the Bonneville balancing authority would have no obligation to shoulder any burden of what is clearly a *power-related*, rather than a *transmission-related*, cost. However, in an effort to develop a regional solution that is not unduly discriminatory, the Complainants may be willing to bear some costs, provided that the costs are incurred as a result of curtailments ordered pursuant to an enforceable, Commission-approved 211A OATT.

IV. CONCLUSION

Based on the foregoing, Complainants respectfully request that the Commission reject Bonneville's March 6 Filing and order Bonneville to promptly file an OATT pursuant to FPA Section 211A, and to demonstrate that any proposed deviations from the *pro forma* OATT are comparable and not unduly discriminatory or preferential.

Respectfully Submitted,

/s/ Lara L. Skidmore
Lara L. Skidmore
Karen J. Kruse
TROUTMAN SANDERS LLP
805 SW Broadway
Suite 1560
Portland, OR 97205
Phone: (503) 290-2310
Fax: (971) 238-1684
lara.skidmore@troutmansanders.com

W. Benjamin Lackey
Christian G. Yoder
Toan-Hao B. Nguyen
Office of the General Counsel
Iberdrola Renewables, Inc.
1125 NW Couch Street
Suite 700
Portland, OR 97209
Phone: 503-796-7000
Fax: 503-478-6395

Counsel for Iberdrola Renewables, Inc.

/s/ Joseph T. Kelliher
Joseph T. Kelliher
Gunnar Birgisson
NextEra Energy Resources, LLC
801 Pennsylvania Ave., NW
Suite 220
Washington, DC 20004
Phone: 202-347-7082
Fax: 202-347-7076

Counsel for NextEra Resources, LLC

/s/ *Jeffery B. Erb*
Dean S. Brockbank,
Vice President and General Counsel, by
Jeffery B. Erb,
Assistant General Counsel
PacifiCorp
825 N.E. Multnomah
Suite 600
PORTLAND, OR 97232
Phone: (503) 813-5029
Fax: (503) 813-6761

Counsel for PacifiCorp

/s/ Leslie A. Freiman
Leslie A. Freiman, Esq.
General Counsel
Meredith Berger Chambers
Associate General Counsel
EDP Renewables North America LLC
808 Travis Street, Suite 700
Houston, TX 77002
Phone: (713) 265-0350
Fax: (713) 265-0365
Leslie.Freiman@edpr.com
Meredith.chambers@edpr.com

Margaret A. Moore
Jessica C. Friedman
Van Ness Feldman, P.C.
1050 Thomas Jefferson St., N.W.
Washington, D.C. 20007
Tel: (202) 298-1800
Fax: (202) 338-2416
mam@vnf.com
jcf@vnf.com

Counsel for EDP Renewables North America LLC

/s/ Joseph Condo
Joseph Condo
Vice President and General Counsel
William Borders
Deputy General Counsel
Invenergy Wind North America LLC
One South Wacker Drive
Suite 1900
Chicago, IL 60606
Phone: (312) 224-1400
Fax: (312) 224-1444

Counsel for Invenergy Wind North America LLC

Dated: March 27, 2012

ATTACHMENT A

Draft Oversupply Management Protocol

Oversupply Management Protocol

This Oversupply Management Protocol will apply when Transmission Provider must displace non-federal generation in its Control Area with generation from the federal hydro system in order to mitigate total dissolved gas levels in the Columbia River. When the total dissolved gas levels measured by the U.S. Army Corps of Engineers exceed Oregon and Washington water quality standards at projects that are spilling past unloaded turbines, the Transmission Provider has the right to initiate the Oversupply Management Protocol in Attachment P. All non-Federal Transmission Customers with generation in Transmission Provider's Control Area and all non-Federal Generators in Transmission Provider's Control Area shall submit information to the Transmission Provider and follow Transmission Provider's directions to reduce generation in accordance with the Oversupply Management Protocol in Attachment P. Attachment P shall not apply to curtailments under sections 13.6, 14.7, or 33.

Attachment P

Oversupply Management Protocol

This attachment establishes requirements and procedures necessary to mitigate total dissolved gas ("TDG") levels in the Columbia River. All non-Federal Transmission Customers with generation in Transmission Provider's Control Area and all non-Federal Generators in Transmission Provider's Control Area (together referred to in this attachment as "Generator") shall follow Transmission Provider's directions to reduce generation below the amount of generation scheduled for the hour. Transmission Provider will deliver federal hydro power to replace such reduced generation in order to meet the Transmission Customers' schedules. The Oversupply Management Protocol will proceed as follows:

1. The term of this Attachment P shall be March 6, 2012 through December 31, 2015. However, for 2013 and subsequent years, this Attachment P shall be void and have no force or effect unless Transmission Provider establishes rates to allocate the costs incurred under this Attachment P through a rate case conducted under section 7(i) of the Pacific Northwest Electric Power Planning and Conservation Act, and such rates are approved by the Federal Energy Regulatory Commission.

2. Transmission Provider will use a Least-Cost Displacement Cost Curve ("Cost Curve") to displace generation located in Transmission Provider's control area in order to mitigate TDG levels in the Columbia River. The Cost Curve will list each generator's cost of displacement. Transmission Provider will displace generation in order of cost, from the least-cost resource to the highest-cost resource, until the required displacement quantity as determined by Transmission Provider is achieved.

3. By April 1, 2012 and by February 1 in all subsequent years, each Generator shall submit the generator's installed generating capacity and costs of displacement ($/MWH) each year. If a Generator does not incur any costs of displacement or does not submit its costs of displacement to Transmission Provider, the Generator's costs of displacement shall be deemed to be $0/MWH.
    a. For Generators that achieve commercial operation (that is, begin generating electricity for sale) prior to March 6, 2012, costs of displacement shall include:
        i. the production tax credit the Generator would have been entitled to under 26 U.S.C. § 45 or its successor but will not receive because of the displacement;
        ii. the following amounts for Renewable Energy Credits (RECs) unbundled from the sale of power:
            A. with respect to executed contracts for the sale of RECs unbundled from the sale of power, the amount that the Generator is not paid by its contracting party because of its failure to deliver RECs and the amount, if any, the Generator must pay its contracting party as a penalty for its failure to deliver RECs; and
            B. with respect to the amount of displaced generation for which the Generator has not yet entered into a contract to sell the RECs at the time of displacement, the market value of the RECS as determined annually by Transmission Provider by using the average of the bid offer price of three brokerage quotes (or as many brokerage quotes as Transmission Provider is able to obtain if it is unable to obtain three; if Transmission Provider is unable to obtain any bids that meet the criteria for a given facility it shall compensate Generator for RECs at $10 per REC) for RECs that are associated with generation by a facility that i) generates power using the same fuel source as the Generator, ii) is located in Oregon or Washington, and iii) has the same or a later commercial operation date as the Generator's facility. For 2012, the Transmission Provider will post the market value on Transmission Provider's website by March 15, and shall obtain quotes between February 1 and March 15. For subsequent years, Transmission Provider will post the market value on Transmission Provider's website by January 15, and shall obtain quotes between December 1 and January 15; and
        iii. for power sales agreements for the bundled sale and purchase of both RECs and energy, the power sales price, if the Generator is not entitled to payment for any hour in which the Generator does not generate; and the amount, if any, the Generator must pay its contracting party as a penalty for its failure to generate.

b. Generators that achieve commercial operation after March 6, 2012, shall make a one-time election by selecting one of the following two options to determine the costs of displacement:
    i. costs of displacement shall be $0/MWH, in which case the Generator shall not be subject to cost allocation for costs incurred under this Attachment P; or
    ii. costs of displacement shall be [0% to 50%] of the PTC as determined under section 3(a)(i) and 50% of the market value of RECs as determined under section 3(a)(ii)(B) of this Attachment P, in which case the Generator shall be subject to cost allocation for costs incurred under this Attachment P.

c. The costs of displacement submitted by a Generator under this Attachment P shall be subject to audit by a third-party. Transmission Provider shall select an audit firm that has electric utility audit experience and that is ranked in the top five nationally based on annual billings. Up to 10 Generators shall be subject to audit each year, as determined by Transmission Provider. Audits will take place as follows:
    i. For 2012, costs of displacement will be audited after July 31, 2012. Transmission Provider will use the costs submitted by Generators for implementation of the Cost Curve. Subsequent to the audit, all compensation to audited Generators under this Attachment P will be trued-up based on the audited costs.
    ii. For all subsequent years, costs of displacement will be audited prior to inclusion in the Cost Curve. For Generators that have not been audited, costs of displacement shall be the submitted costs. For Generators that have been audited, Transmission Provider will use the audited costs for the Cost Curve, if such costs differ from the submitted costs.
    iii. If the costs of displacement a Generator submits exceed the audited costs by more than $5/MWH, Generator shall pay Transmission Provider a penalty of the difference between the costs Generator submitted and the audited costs, multiplied by 1,000. Transmission Provider shall use all penalty revenues to offset future costs of displacement.

d. Transmission Provider shall not use any information submitted by a Generator under this Attachment P for any other purpose other than that specified under this Attachment P. In addition, Transmission Provider will not disclose such information to any person not employed by Transmission Provider or any of its Marketing Function Employees, as defined by the Standards of Conduct.

4. For each hour of displacement, Transmission Provider will compensate each displaced Generator with its costs of displacement ($/MWH) multiplied by the difference between the i) MW of scheduled generation for the hour, and ii) the MW of generation that Transmission Provider has ordered the Generator to reduce to under this Attachment P.

5. Transmission Provider shall establish in a business practice the communication protocols through which Transmission Provider will notify Generators when Transmission Provider implements this Attachment P.

6. If, for reliability purposes or other factors, a Generator is prevented from reducing generation below a certain level or deviating from a certain ramp rate, the Generator may submit a minimum generation level or a maximum ramp rate to Transmission Provider. Transmission Provider will not direct a Generator to reduce generation below its minimum generation level, or at a ramp rate that exceeds the maximum ramp rate. If a Generator does not submit a minimum generation level or a maximum ramp rate, Transmission Provider will direct the Generator to reduce generation to zero. Transmission Provider shall establish in a business practice the factors that Generators may consider in establishing minimum generation levels and ramp rates. For reliability purposes, Generators providing ancillary services (i.e. regulating reserves, load following reserves and contingency reserves) to another balancing authority will be allowed to continue to provide those services at Generator's sole discretion and designate them as part of the Generator's minimum generation requirement.

7. Transmission Provider will not charge or compensate the Generator for generator imbalance service under Transmission Provider's applicable generation imbalance rate schedules in any hour in which Transmission Provider directed the Generator to reduce generation below the amount of generation scheduled under this Attachment P.

8. Generator shall remain responsible for loss return and Operating Reserve obligations incurred for schedules submitted for hours in which Transmission Provider implements this Attachment P.

9. Transmission Provider shall post on its website an annual report stating the MWH of energy displaced and the cost of displacement pursuant to this Attachment P.

ATTACHMENT B

BPA Principles Relating to Planning, Operations and Commercial Practices Affecting the Federal Columbia River Power and Transmission Systems

BPA Principles Relating to Planning, Operations and Commercial Practices Affecting the Federal Columbia River Power and Transmission Systems

[Final 4/27/11]

The Bonneville Power Administration (BPA) Power Services (PS) and Transmission Services (TS) agree to follow these principles to govern BPA's planning, operations and management of the Federal Columbia River Power System (FCRPS) and Federal Columbia River Transmission System (FCRTS) to serve customers, including Network Integration Transmission Service (NT) customers, and to meet BPA's needs.

A. The purpose of these principles is to ensure that PS and TS have a common understanding of how to implement BPA's organic statutes, which provide BPA with a priority access right to available network and intertie transmission capacity needed to transmit Federal power and to meet its power marketing needs. BPA will make capacity available to third parties pursuant to its Open Access Transmission Tariff (OATT) if the transmission capacity:

a. "is not required for the transmission of Federal energy" 16 U.S.C. § 837e;
b. is in "excess of the capacity [that the Administrator determines is] required to transmit electric power generated or acquired by the United States" 16 U.S.C. § 838d;
c. "is not in conflict with the Administrator's other marketing obligations" 16 U.S.C. § 839f(i)(1)(B); and
d. can be provided "without substantial interference with [the Administrator's] power marketing program." 16 U.S.C. § 839f(i)(3).

B. The scope of this document is to establish a set of overarching principles to govern planning, operations and commercial practices between PS and TS for the following areas:

(a) The Memorandum of Agreement for the Management of Network Integration Transmission Service for Delivery of Federal Power to Network Customer Loads (NT MOA);
(b) Available Transmission Capacity Methodology;
(c) BPA's OATT, including schedules, attachments and related business practices,
(d) Network Open Season implementation;
(e) Planning studies related to system expansion; and
(f) Development and implementation of operational procedures.

C. PS and TS recognize that these principles are not static and shall be interpreted and updated to reflect future regulatory requirements, operational requirements and policy changes. Either business line may propose changes to these principles, or may propose the addition or deletion of principles in the future to address policy, operational and regulatory changes that impact BPA's approach to serving NT and other customers, and to managing the FCRPS and FCRTS. PS and TS agree to work in good faith to update these principles to accommodate such future changes.

D. PS and TS shall agree to practices and protocols to ensure these principles are met.

E. PS and TS shall comply with the applicable Standards of Conduct when implementing these principles.

F. PS and TS recognize that it is not technically possible or fiscally responsible for BPA to plan, develop, manage and operate the FCRTS to provide complete reliability and total operational flexibility in all circumstances, or to attempt to accommodate every potential FCRPS generation dispatch assumption or operational contingency. TS shall plan, develop, manage and operate the FCRTS in a reliable manner consistent with sound business principles, applicable reliability criteria, relevant statutes, regulatory requirements, and prudent utility practice, in consideration of FCRPS and FCRTS operational requirements and capabilities.

I. General Principles.

1. In order to ensure that adequate capacity is available to transmit electric power generated or acquired by PS to meet BPA's statutory and contractual obligations, PS and TS agree that TS shall use multiple generation dispatch and transmission scenarios and evaluate their transmission impacts when making planning and operations decisions for the FCRTS and determining inventory for sales that impact firm transmission inventory. If PS and TS disagree on the reasonableness of generation dispatch scenarios, they will jointly develop an agency decision document, containing costs and benefits, for the Administrator.

2. TS and PS agree that violating non-power constraints and implementing load shedding shall be relied upon as a last resort to maintain system reliability during an emergency in real-time operations, and shall not be relied upon for long-term planning or for planning the operation of the system consistent with mandatory reliability standards, including to withstand required contingencies (e.g. to meet NERC and WECC criteria).

3. PS and TS are committed to sharing emergency operational information and sharing draft operational procedures to ensure such procedures work within the operational limits of the FCRPS and work within the limits of the BPA transmission system.

4. BPA has an Open Access Transmission Tariff. PS and TS shall comply with BPA's OATT terms and conditions when managing the transmission arrangements for NT service from BPA Network Resources. If PS or TS identify actual or potential conflicts between the OATT, or related business practices, and applicable statutes, judicial orders, or regulatory requirements, PS and TS agree to work together to resolve such actual or potential conflicts, which may include modifying the OATT or business practices. BPA shall follow the applicable processes to modify the OATT and business practices.

II. Principles Specific to BPA Network Resources that Serve MOA Network Load:

5. During a transmission constraint which TS determines may impair the reliability of the Transmission System, the BPA Network Resources shall be made available by PS, subject

to resource availability, [1] to provide NT Redispatch to maintain service to any or all of BPA's Network Loads including those Network Loads not served by BPA Network Resources. Prior to NT redispatch, TS shall curtail nonfirm schedules that are determined to provide relief to the specific transmission constraint. PS and TS shall agree on how TS shall compensate PS for NT redispatch Hydro Operations and Dispatch will determine how to allocate limited NT redispatch over a time horizon to best preserve system reliability and non-power constraints.

6. As long as there are no transmission constraints on the system, the operation of the BPA Network Resources shall not be restricted when meeting NT MOA Network Load obligations and non-power constraints.

7. After processes are established and business practices and systems are in place, all available NT resources with the potential to resolve a transmission system constraint will be called on for NT Redispatch prior to BPA-TS declaring a system emergency and calling on Emergency Redispatch.

Processes for redispatch of non-federal resources are not currently in place to implement NT Redispatch from both federal and non-Federal NT Resources. TS in coordination with PS and NT Customer stakeholders will develop processes to implement NT Redispatch from both federal and non-Federal NT Resources and any necessary load shedding procedures, and have such processes and procedures completed as soon as practicable.

PTP firm curtailments/NT Redispatch may not be effective or applicable in resolving a system constraint. If TS declares an emergency as defined by NERC[2], BPA-TS shall, consistent with WECC RC Reliability Directives, take whatever other measures are necessary, including emergency requests for Interchange adjustments and ordering changes to all FCRPS generation and non-federal generation, including changes that may violate mandatory non-power obligations including ESA/CWA (for federal generation this would be Attachment M Emergency Redispatch), to preserve the reliability and stability of the FCRTS and adjacent interconnections and mitigate the emergency-prior to shedding load. BPA-TS and the NT customers are responsible to implement load shedding as a last resort pursuant to established procedures, including where applicable, procedures under Network Operating Agreements.

8. To the extent practicable, if TS anticipates that a transmission system emergency could occur in a future hour or hours, prior to declaring such transmission system emergency TS will take actions within its authority and ability to adjust the FCRTS, including actions to avoid or minimize adverse conditions that would cause BPA to violate FCRPS mandatory non-power obligations and/or shed load.

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[1] PS may not be able to provide NT Redispatch when such a redispatch would violate ESA obligations or other non-power constraints such as flood control requirements or there is not adequate machine capability to provide the redispatch.

[2] NERC defines ***Emergency*** or ***Bulk Electric System Emergency*** as "Any abnormal system condition that requires automatic or immediate manual action to prevent or limit the failure of transmission facilities or generation supply that could adversely affect the reliability of the Bulk Electric System," as may be modified by NERC from time to time.

9. Information sharing (subject to information availability and the development of mutually agreed processes for exchanging information):

a. PS shall provide TS with generation information[3] for the BPA Network Resources as needed for TS to plan and operate a reliable transmission system. PS shall notify TS of material operational levels, limits, including non-power constraints, and changes to the BPA Network Resources that could impact the BPA transmission system.

b. TS shall provide PS with information[4] on the potential likelihood of generation restrictions and/or redispatch requests as needed for PS to establish and maintain generation plans to meet load obligations and provide ancillary and control area services to the BPA Balancing Authority Area.

10. As part of its review process of new requests for long-term firm transmission service across the FCRTS, Transmission Services shall examine the potential that the new long-term transmission service requests could impede the ability of existing FCRPS generation to meet non-power constraints. If generation associated with a new long-term firm transmission service request is co-located with existing FCRPS generation in a sub-grid area, Transmission Services will analyze simultaneous operation with the FCRPS generation to ensure non-power constraints can be met. Such examination shall be included as part of Transmission Services routine requirement for processing long-term firm transmission service requests.

11. PS and TS shall consult prior to developing new or revised policies, power products, or transmission products that may impact service to MOA Network Loads, to determine the impacts of such policies or products on other policies, processes, and OATT obligations. PS and TS shall work collaboratively to determine if, in light of BPA statutory obligations, an OATT modification is needed to accommodate such new or revised policies or products.

12. TS may, in the case of planned or forced transmission system outages, temporarily reduce or interrupt transfer capability on the FCRTS resulting in stranding NT load directly connected to the FCRTS or served by transfer service through another (non-BPA) transmission provider. TS, to the extent practicable, shall notify PS of such stranded NT load, and request PS to acquire reasonable alternative transmission service arrangements over adjacent systems at TS' cost in order to serve such NT load.

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[3] Examples of such generation information would include operating restrictions such as minimum loading levels, ramp rates, maintenance schedules, restricted periods of operations throughout the year, any must-run requirements, and redispatch pricing information. Information may be provided on a yearly or periodic two weeks basis and updated, if necessary, on an hourly and daily basis. PS and TS will work together to develop a reasonable range of dispatches for use in determining ATC.

[4] Examples of such information would include planning information on the likelihood, MW range of magnitude, potential duration and geographic needs for NT redispatch resulting from reduced limits due to system topography, unusual load or generation patterns or other transmission system commitments.

ATTACHMENT C

Overview of BPA's Statutory Priorities to Available Transmission Capacity

Introduction

BPA values its strong and collaborative relationship with its transmission customers. The objective for the upcoming priority access discussion on September 14 is to provide for an open and constructive dialogue on BPA's need to apply certain statutory provisions for priority access to Federal transmission in a way that allows BPA to continue to manage its transmission system for the entire region's benefit. BPA has prepared an overview of its statutory rights in order to facilitate the discussion of which rights should be recognized in its open access transmission tariff.

BPA will have an executive team lead the discussions. BPA Executive Vice President and General Counsel Randy Roach will discuss BPA's statutory framework. Cathy Ehli, Vice President of Transmission Marketing and Sales, and Steve Oliver, Vice President of Generation Asset Management, will describe how BPA is considering integrating certain narrowly tailored rights in the tariff in order to ensure that BPA can continue to fulfill its statutory obligations. BPA understands that this issue affects a broad range of regional stakeholders and hopes to engage in discussions commensurate with the significance of the issue.

Overview Of BPA's Statutory Priorities to Available Transmission Capacity

This paper summarizes BPA's statutory priority to the Federal transmission system. BPA is currently considering its current and reasonably foreseeable transmission needs, and consequently the extent to which it might need to re-visit its Open Access Transmission Tariff to ensure it continues to accommodate those needs. We will present any proposals for revisions to customers for further discussion.

A. BPA has a statutory priority to *available* [1] BPA transmission capacity to transmit Federal power (generated or acquired by BPA), and for other limited purposes[2] -- Bonneville Project Act (§2(b), Regional Preference Act (§6), Transmission System Act (§6), Northwest Power Act (§9(i)(1)(B), §9(i)(3)).

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[1] BPA's priority right applies only to *available* transmission capacity. Capacity that has already been contractually granted on a firm basis to a customer is not subject to the statutory priority, except to the extent of any reservation of rights expressed in the contract.

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

16 U.S.C. §837e (Regional Preference Act). The energy described in Section 837h refers to the downstream power benefits to which Canada is entitled under the treaty between Canada and the United States relating to the cooperative development of the water resources of the Columbia River Basin, signed at Washington, July 17, 1961, and energy or capacity disposed of to Canada in any exchange pursuant to paragraph 1 or 2 of article VIII thereof. .

[2] For example, U.S. treaty obligations and Congressional directives to deliver reserved power and energy to irrigation districts.

1. **Congress has repeatedly directed that BPA transmission capacity be made available to third parties only**:
   a. if the capacity "is not required for the transmission of Federal energy;"[3]
   b. if the capacity is in "excess of the capacity [that the Administrator determines is] required to transmit electric power generated or acquired by the United States;"[4]
   c. subject to "(1) any contractual obligations of the Administrator; (2) any other obligations under existing law; and (3) the availability of capacity in the Federal transmission system;"[5]
   d. if it can be provided "without substantial interference with [the Administrator's] power marketing program, applicable operating limitations or existing contractual obligations."[6]

2. **BPA statutory priority confirmed by the Ninth Circuit:**
   California Energy Comm'n v. Bonneville Power Admin., 909 F.2d 1298, (9th Cir. 1990), *cert. denied* 500 U.S. 904, 111 S.Ct. 1682, 114, L.Ed.2d 77(1991)("*CEC II*").

   > "[T]ransmission [of non-federal power] must not be in conflict with BPA's other marketing obligations, applicable operating limitations or existing contractual obligations. 16 U.S.C. §839f(i)(3)." *CEC II at* 1303 .
   >
   > "BPA may make the federal Intertie available to non-federal utilities if: 1) its assistance is at the expense of those entities whose power is transmitted, 16 U.S.C. §839(f)(i)(1); 2) the transmissions are "not in

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[3] "Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, 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." 16 U.S.C. § 837e.

[4] "The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States." 16 U.S.C. §838d. The priority is "to the needs of the Government." H. R. Rep. No. 93-1375, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News at 56.

[5] Section 9(d) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839f(d), provides:

> No restrictions contained in subsection (c) of this section shall limit or interfere with the sale, exchange or other disposition of any power by any utility or group thereof from any existing or new non-Federal resource if such sale, exchange or disposition does not increase the amount of firm power the Administrator would be obligated to provide to any customer. In addition to the directives contained in subsections (i)(1)(B) and (i)(3) and subject to:
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> (1).any contractual obligations of the Administrator,
> (2).any other obligations under existing law, and
> (3).the availability of capacity in the Federal transmission system,
>
> the Administrator shall provide transmission access, load factoring, storage and other services normally attendant thereto to such utilities and shall not discriminate against any utility or group thereof on the basis of independent development of such resource in providing such services.

[6] "The Administrator shall furnish services including transmission, storage, and load factoring unless he determines such services cannot be furnished without substantial interference with his power marketing program, applicable operating limitations or existing contractual obligations." 16 U.S.C. §839f(i)(3).

> conflict with [BPA's] other marketing obligations," 16 U.S.C. §839f(i)(1)(B); and 3) the transmission does not cause a "substantial interference with [BPA's] power marketing program." 16 U.S.C. §839f(i)(3). BPA's statutory obligations include 1) collecting sufficient revenues on sales of federal power to recover its costs and repay the Treasury, while 2) fixing rates "with a view toward encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles." 16 U.S.C. §§838g and 839e(a)(1)." *CEC II* at 1307-1308.
>
> "BPA is statutorily required to satisfy its own needs before providing access to other utilities and to furnish transmission only as long as it does not interfere with its power marketing program. 16 U.S.C. §839f(i)(3). BPA's power marketing program includes its responsibility to recover its costs and to repay the Treasury." *CEC II* at 1312.

Dep't of Water & Power v. BPA, 759 F.2d 684, 693 (9th Cir. 1985)("*LADWP*").

> "These four statutes [Bonneville Project Act, Regional Preference Act, Transmission System Act and Northwest Power Act] show repeated Congressional insistence that BPA have preference in using Intertie capacity . . . ."

B. Administrator's Discretion to Assert Priority

The Administrator has broad discretion to assert less than the full BPA priority, provided that the Administrator demonstrates that BPA's core financial and power marketing needs are met and the decision reasonably balances all relevant factors. Three Ninth Circuit cases addressed challenges to BPA's decision *not* to fully assert its priority rights to transmission capacity.

1. ***Cal. Energy Res. Cons. & Dev. V. Bonneville Power*, 831 F.2d 1467 (9th Cir. 1987), *cert. denied* 488 U.S. 818, 109 S.Ct. 58, 102 L.Ed.2d 36 (1988)**("*CEC I*"). In *CEC I*, the Ninth Circuit reviewed a challenge to BPA's rejection of a customer proposal for BPA to reserve all Intertie capacity needed to sell available BPA power in order to generate maximum revenues. Instead, BPA elected to share available Intertie capacity with other Pacific Northwest sellers of nonfirm power under its Near Term Intertie Access Policy. The court found BPA's decision to be reasonable based on BPA's determinations that it could satisfy its revenue obligations without adopting "such an extreme policy" and that its role as a Federal steward for transmission services would be best served by sharing the Intertie with Pacific Northwest producers. *Id.* at 1476

2. ***CEC II.*** In the subsequent *CEC II* case, the Ninth Circuit rejected similar claims of BPA's direct service industrial customers and the Western Public Agency

Group that BPA's final Long Term Intertie Access Policy (LTIAP) was inconsistent with BPA's governing statutes because it did not fully satisfy BPA's ability to use Intertie capacity before providing access to non-Federal utilities and failed to maximize BPA returns.

> "BPA may make the federal Intertie available to non-federal utilities if: 1) its assistance is at the expense of those entities whose power is transmitted, 16 U.S.C. §839(f)(i)(1); 2) the transmissions are "not in conflict with [BPA's] other marketing obligations," 16 U.S.C. §839f(i)(1)(B); and 3) the transmission does not cause a "substantial interference with [BPA's] power marketing program." 16 U.S.C. §839f(i)(3). BPA's statutory obligations include 1) collecting sufficient revenues on sales of federal power to recover its costs and repay the Treasury, while 2) fixing rates "with a view toward encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles." 16 U.S.C. §§838g and 839e(a)(1)."

Id. at 1307-1308. The court upheld BPA's decision to share valuable intertie transmission capacity because of BPA's consideration of all factors, including impacts on BPA revenues, impacts on its transmission customers, impacts on rates and because of the 'sound business principles' directive in BPA statutes.

> [BPA's statutes] afford BPA a measure of discretion which it has exercised reasonably.
>
> * * *
>
> BPA reasonably concluded that a federal–first policy is not consistent with sound business principles.

Id. at 1308.

> [Section 2(b) of the Bonneville Project Act] authorizes the Administrator to operate Bonneville Project transmission lines as he finds necessary, desirable, or appropriate to transmit energy. This delegation of authority is broad, allowing the Administrator substantial discretion. This discretion is tempered only by the implied limitation that the Administrator's action not be inconsistent with other congressional decrees.

Id.at 1314, n. 17.[7]

[7] Section 2(b), 16 U.S.C. § 832a(b), states:
In 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 substations, and facilities and structures appurtenant thereto, as he finds necessary, desirable, or appropriate for the purpose of transmitting electric energy, available for sale, from the Bonneville project to existing and potential markets, and,

3. ***Ass'n of Pub. Agency Customers v. Bonneville Power*, 126 F.3d 1158 (9th Cir. 1997)("*APAC*").** In *APAC*, the Ninth Circuit upheld BPA's decision to provide firm long-term transmission service to DSIs and rejected arguments of several parties who argued that providing such service would result in BPA making less revenue.

C. Mandates to Assert Priority

1. Consistent with BPA's statutory responsibility to cover its costs and repay Treasury, the Ninth Circuit has indicated that BPA would be required to assert its transmission priority to available transmission capacity "to the extent it is needed to mitigate projected deficits." *LADWP*, 759 F.2d at 693.

2. Another circumstance in which BPA might have a statutory obligation to assert its priority to available transmission capacity involves the delivery of Federal power to utilities entitled to the power under section 5(b) of the Northwest Power Act, 16 U.S.C. § 839c(b). Providing Federal power to BPA's utilities with a statutory right to the power is central to BPA's marketing obligations and power marketing program, which are two of the defining criteria for the transmission priority accorded BPA in section 6 of the Transmission System Act.[8]

Section 217(a)(1) of the Federal Power Act, 16 U.S.C. § 824q(a)(1), defines distribution utilities as "electric utilit[ies] that [have] a service obligation to end-users." BPA's utility customers entitled to power service from BPA under section 5(b) of the Northwest Power Act, 16 U.S.C. § 839c(b), are distribution utilities. Section 217 provides in pertinent part:

> **(a)(3)** The term 'service obligation' means a requirement applicable to, or the exercise of authority granted to, an electric utility under Federal, State, or local law or under long-term contracts to provide electric service to end-users or to a distribution utility."
>
> **(b)(1)** Paragraph (2) applies to any load-serving entity[9] that, as of August 8, 2005—

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for the purpose of interchange of electric energy, to interconnect the Bonneville project with other Federal project and publicly owned power systems constructed on or after August 20, 1937.

[8] While BPA's obligations are expressed in section 5(b), BPA also has the discretion to assert priority for sales of Federal power to other customers such as federal agencies and direct service industries.

[9] 16 U.S.C. §824q(a)(2) defines "load-serving entity" as "a distribution utility or an electric utility that has a service obligation." 16 U.S.C. § 796(22) defines an "electric utility" as follows:

> **(22) Electric utility.—**
> **(A)** The term "electric utility" means a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy.
> **(B)** The term "electric utility" includes the Tennessee Valley Authority and each Federal power marketing administration.

> **(A)** owns generation facilities, markets the output of Federal generation facilities, or holds rights under one or more wholesale contracts to purchase electric energy, for the purpose of meeting a service obligation; and
> **(B)** by reason of ownership of transmission facilities, or one or more contracts or service agreements for firm transmission service, holds firm transmission rights for delivery of the output of the generation facilities or the purchased energy to meet the service obligation.
>
> **(2)** Any load-serving entity described in paragraph (1) is entitled to use the firm transmission rights, or, equivalent tradable or financial transmission rights, in order to deliver the output or purchased energy, or the output of other generating facilities or purchased energy to the extent deliverable using the rights, to the extent required to meet the service obligation of the load-serving entity.

Section 217(k)[10] goes on to provide:

> An entity that to the extent required to meet its service obligations exercises rights described in subsection (b) of this section shall not be considered by such action as engaging in undue discrimination or preference under this chapter.

3. Another instance where an obligation may exist to assert the BPA priority involves transmission capacity needed for BPA's compliance with statutory or judicial requirements related to environmental responsibilities. Not only does BPA have a priority right to available Federal transmission capacity, it also has the authority to allocate available capacity based on "applicable operating limitations" of the Federal system.[11] Operational requirements of a biological opinion or other mandate become operating limitations on the Federal system.

D. BPA Priority Not Affected by Federal Power Act Sections 211 and 211A.
Sections 211 and 211A of the Federal Power Act authorize the Federal Energy Regulatory Commission (FERC), subject to specified criteria, to order BPA to provide transmission service to third parties. It is BPA's view that neither Section 211 nor Section 211A authorizes FERC to order BPA to provide transmission service to an applicant that conflicts with BPA's assertion of a statutory priority.

[10] Section 824q(k)
[11] 16 U.S.C. §839f(i)(3). BPA has authority to protect fish and wildlife by imposing restrictions on transmission access. *California Energy Res. Conservation and Dev. Comm'n v. Bonneville Power Admin.*, 831 F.2d 1467, 1477-78 (9th Cir. 1987), *cert denied*, 488 U.S. 818 (1988).

ATTACHMENT D

Bonneville's PowerPoint presentation on Priority Access to Transmission

Priority Access to Transmission

Bonneville Power Administration
Open Access Transmission Tariff Meeting

September 29, 2011

Introduction

- What does “priority access to transmission” mean?
  - “Priority access” refers to BPA’s statutory priority to *available* BPA transmission capacity 1) in order to transmit Federal power, and 2) for other limited purposes, such as fulfilling U.S. treaty obligations to Canada and meeting Congressional directives to deliver reserve power and energy to irrigation districts.*
  - “Priority access” does not apply to transmission capacity that BPA has already sold to a customer on a firm basis unless BPA reserves the contractual right to interrupt in specified circumstances.
- Why is priority access to transmission an issue right now?
  - Since March, Transmission Services has been conducting a public process (known as the BOATT process) to determine how to resolve a number of tariff issues.
  - Due to a changing NW power market and changing regulations BPA identified priority access to available transmission capacity as an issue that it needed to discuss in this process.

*Please see BPA’s “Priority Access Overview” (posted on BPA’s BOATT website) for a more complete description of BPA’s statutory framework.

Introduction (Continued)

- BPA's principles for using priority access
  - BPA seeks to reserve a limited right to assert priority access in its OATT.
  - BPA only intends to use priority access as a backstop, not as a replacement for good planning and good utility practice.
  - BPA plans to continue to operate based on Open Access principles.
  - BPA values clarity in its tariff.
  - BPA continues to operate its transmission system to benefit the region.
- BPA wants to discuss two primary issues regarding priority access and intends a constructive dialogue.
  - Issue 1: Which transmission requests would be subject to BPA's priority access?
  - Issue 2: Which statutory responsibilities warrant, in light of current and foreseeable circumstances, that BPA assert priority access to available transmission capacity in its open access transmission tariff?

Issue 1

Which transmission requests would be subject to BPA's priority access?

Transmission requests over which BPA would have priority

- Priority would be exercised over all requests in the queue but ***not*** over rollover requests
  - When BPA asserts a priority to available transmission capacity, its request (based on the priorities described below) would in effect move to the head of the queue, in front of all other requests except rollover requests. Rollover requests would not be subject to the assertion of priority access. As a result, a request that is moved to the head of the queue would compete with a rollover request per Section 2.2 of BPA's OATT, assuming both requests needed the same capacity.

Issue 2

Which statutory responsibilities warrant, in light of current and foreseeable circumstances, that BPA assert priority access to available transmission capacity and recognize it in its open access transmission tariff?

Statutory responsibilities for which BPA would modify its tariff to assert a priority to available transmission capacity

- (A) For the delivery of Federal power *(power generated or acquired by BPA)* to Northwest Power Act section 5(b) loads
  - Details on slides 8
- (B) For the delivery of Federal power to comply with environmental obligations
  - Details on slide 9
- (C) For the delivery of Canadian Treaty power and of reserve power to Bureau irrigation loads
  - Details on slide 10

(A) Priority to available transmission capacity for the delivery of Federal power to Northwest Power Act section 5(b) loads

- This priority would be limited to delivering Federal power to new 5(b) customers and to existing 5(b) customers that acquire new 5(b) load through annexation or condemnation.
  - BPA would only intend to assert this priority as a backstop when other planning processes will not adequately ensure delivery to these new 5(b) loads.
  - BPA would only consider asserting the priority after the 5(b) customer has established a legal right to serve the load.
  - BPA believes that the NT planning processes will be sufficient to accommodate existing 5(b) customers' load growth without having to assert a priority.

(B) Priority to available transmission capacity for the delivery of Federal power to comply with environmental obligations in a cost effective manner

- This priority would be limited to instances where there is a legal environmental obligation that results in, for example:
  - 1) new generation becoming part of the FCRPS,
  - 2) spill limitations, or
  - 3) any other changes to generation operations that result in an increase in generation from the FCRPS.
- For example, this priority could be exercised in the short term market to export excess generation during high flows/low NW load scenarios where the FCRPS must generate in order to avoid spill and meet set flow levels.
- BPA would only intend to use this as a backstop. As such, BPA would continue to plan to meet its known and long-term environmental obligations without relying on priority access; however, this priority would be exercised when the Administrator determines, through a decision document, that priority access is the most appropriate solution available to BPA.

(C) Other areas in which BPA should modify its tariff to reflect a statutory obligation

- Delivery of Canadian Treaty power: On 10 years' notice, the current Treaty may expire as soon as 2024. BPA needs a provision in the tariff to prevent that capacity from being converted to ATC upon issuance of such a notice and offered under open access while a new treaty is being negotiated.
- Delivery of reserve power to Bureau irrigation load: BPA needs a provision in the tariff that clarifies BPA's continuing statutory obligations to deliver reserve power to Bureau irrigation load over the federal transmission system.

ATTACHMENT E

New Section 1A – Draft Common Services Provisions

New Section 1a – Draft
Common Services Provisions

Draft Tariff Language

Posted January 17, 2012

1. COMMON SERVICE PROVISIONS

1A. Standard of Development, Interpretation, and Change

The Transmission Provider's organic statutes provide, among other things, that the Transmission Provider shall make transmission available to third parties on a fair and nondiscriminatory basis but only if the Transmission Provider's transmission capacity:

- is in "excess of the capacity required to transmit electric power generated or acquired by the United States," 16 U.S.C. § 837d,
- "is not required for the transmission of Federal energy," 16 U.S.C. § 837e,
- is made available subject to "(1) any contractual obligations of the Administrator; (2) any other obligations under existing law; and (3) the availability of capacity in the Federal transmission system," 16 U.S.C. § 839f(d),

and the transmission service:

- "is not in conflict with the Administrator's other marketing obligations and the policies of [the Northwest Power Act] and other applicable laws," 16 U.S.C. § 839f(i)(1),

and can be provided

- "without substantial interference with [the Administrator's] power marketing program, applicable operating limitations or existing contractual obligations," 16 U.S.C. § 839f(i)(3).

In addition, acting pursuant to section 211A of the Federal Power Act, the Federal Energy Regulatory Commission may require the Transmission Provider to provide transmission services on terms and conditions that are comparable to those under which the Transmission Provider provides transmission services to itself and that are not unduly discriminatory or preferential. 16 U.S.C. § 824j-1(b).

Under the Transmission Provider's organic statutes, "[n]o 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 requirements for transmission of Federal energy, the energy described in section 9 [of the Transmission System Act, dealing with downstream power benefits available to Canada by treaty], or other electric energy." 16 U.S.C. § 837e.

The Transmission Provider is subject to a variety of other statutes, including environmental statutes such as the National Environmental Policy Act, Endangered Species Act, and Clean Water Act.

The Transmission Provider has adopted this Tariff in the belief that it satisfies the statutory requirements set forth above. In the event the Transmission Provider determines that it can no longer meet its statutory requirements under this Tariff, the Transmission Provider reserves its right to revise this Tariff in accordance with the procedures set forth in the Tariff.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2012, I served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Jasmine C. Hites
Jasmine C. Hites
TROUTMAN SANDERS LLP
805 SW Broadway, Suite 1560
Portland, Oregon 97205