UNITED STATES OF AMERICA
U.S. DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION

2014 Oversupply Rate Proceeding	**)** **)** **)**	**Bonneville Docket No. OS-14**

INITIAL BRIEF OF IBERDROLA RENEWABLES, LLC

August 28, 2013 **OS-14-B-IR-01**

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STATUS OF PREFILED EXHIBITS

Pursuant to the OS-14 Hearing Officer's "Order on Procedures to Admit Evidence," OS-14-HOO-34, issued on August 12, 2013, the following exhibits were admitted into the record by declarations, found at OS-14-E-IR-04 and OS-14-E-IR-05, filed by Iberdrola Renewables, LLC on August 19, 2013:

EXHIBIT	**SUBJECT**
1. OS-14-E-IR-01	Direct Testimony of Iberdrola Renewables, LLC
2. OS-14-E-IR-02	Exhibit to Direct Testimony of Iberdrola Renewables, LLC
3. OS-14-E-IR-03	Rebuttal Testimony of Iberdrola Renewables, LLC

In addition, pursuant to the OS-14 Hearing Officer's "Order on Procedures to Admit Evidence," OS-14-HOO-34, issued on August 12, 2013, the following exhibits were admitted into the record by declarations, found at OS-14-E-IR-04 and OS-14-E-IR-05, filed by Iberdrola Renewables, LLC on August 19, 2013:

EXHIBIT	**SUBJECT**
1. OS-14-Q-IR-01	Qualification Statement of Laura Beane
2. OS-14-Q-IR-02	Qualification Statement of Gerald Froese

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1. INTRODUCTION

This brief is submitted on behalf of Iberdrola Renewables, LLC ("Iberdrola Renewables") in accordance with the Bonneville Power Administration's ("Bonneville" or "BPA") Rules of Procedure Governing Rate Hearings[1] and the applicable orders of the Hearing Officer in this proceeding. Iberdrola Renewables, with its affiliates and subsidiaries, is the second largest developer, operator, and seller of wind energy in the United States. Several of these Iberdrola Renewables' wind generation projects are located in the Pacific Northwest within the Bonneville Balancing Authority Area ("BAA").

A. Environmental Redispatch Policy

The origin of this proceeding can be traced back to May 13, 2011, when Bonneville issued the Interim Environmental Redispatch and Negative Pricing Policies, Administrator's Final Record of Decision ("Environmental Redispatch Policy"),[2] under which Bonneville used "environmental redispatch" to address fish and wildlife constraints at federal hydroelectric

[1] Procedures Governing Bonneville Power Administration; Rate Hearings, 51 Fed. Reg. 7611 (Mar. 1986).

[2] Baker, *et al.*, OS-14-E-JP03-02-AT01 (*BPA's Interim Environmental Redispatch and Negative Pricing Policies, Administrator's Final Record of Decision* (May 2011)) ("Environmental Redispatch Policy Final ROD").

projects by temporarily substituting federal hydropower, without charge, for wind power in its BAA. At the time, Bonneville asserted that it used environmental redispatch only when necessary, to ensure compliance with the Endangered Species Act ("ESA"), Clean Water Act ("CWA"), as well as Bonneville's other statutory responsibilities.[3] During environmental redispatch events, Bonneville Power Services issued dispatch orders to curtail non-federal generation in order to substitute energy from the hydroelectric system as a replacement to the curtailed non-federal generation, to serve load. Thus, utilities and consumers who purchased wind power continued to receive the amount of energy that was scheduled, but the energy originated from the Federal Columbia River Power System ("FCRPS") instead of the curtailed non-federal wind generators. In addition, Bonneville transmitted its hydroelectric energy to the curtailed wind generators' loads through use of the curtailed wind generators' firm transmission rights. All of Bonneville's actions were taken without the wind generators' consent and without compensation for the unilateral displacement of generation or use of firm transmission rights.

In June 2011, PacifiCorp, Iberdrola Renewables, LLC, EDP Renewables North America LLC, NextEra Energy Resources LLC, and Invenergy Wind North America LLC (collectively, "211A Petitioners") jointly filed with the Federal Energy Regulatory Commission ("Commission" or "FERC") a Complaint and Petition for Order under Section 211A of the Federal Power Act ("FPA") against Bonneville ("211A Petitioners' Complaint").[4] Among other things, and as relevant here, the 211A Petitioners' Complaint alleged that Bonneville's practices, including the implementation of the Environmental Redispatch Policy, were noncomparable and unduly discriminatory and preferential.

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[3] Environmental Redispatch Policy Final ROD at p. 12.

[4] Baker, *et al.*, OS-14-E-JP03-02-AT06 (*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) ("211A Petitioners' Complaint").

On December 7, 2011, the Commission issued an order granting 211A Petitioners' Complaint ("December 2011 Initial Order") and directing Bonneville to "submit a revised [Open Access Transmission Tariff ("OATT")], pursuant to section 211A,[5] 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] The December 2011 Initial Order found that the Environmental Redispatch Policy resulted in non-comparable transmission service for non-federal resources, and directed Bonneville to file tariff revisions that address the Commission's comparability concerns by providing for transmission service prospectively under terms and conditions that are comparable to those under which Bonneville provides transmission service to itself and that are not unduly discriminatory or preferential.[7]

B. Oversupply Management Protocol

In March 2012, Bonneville made a compliance filing ("Bonneville Compliance Filing")[8] in response to the December 2011 Initial Order, wherein it proposed a revised version of the Environmental Redispatch Policy, the Oversupply Management Protocol ("OMP"), as Attachment P to its tariff ("Interim Attachment P"). The 211A Petitioners protested the Bonneville Compliance Filing,[9] arguing, among other things, that the OMP suffered from many of the same or similar comparability and undue discrimination flaws as the Environmental

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5 16 U.S.C. § 824j-1(b) (2006).

6 *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, 137 FERC ¶ 61,185 at Ordering Paragraph (2011) ("December 2011 Initial Order").

7 *Id.* at P 65.

8 Baker, *et al.*, OS-14-E-JP03-02-AT12 (*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)("Bonneville Compliance Filing").

9 Baker, *et al.*, OS-14-E-JP03-02-AT09 (*Iberdrola Renewables, Inc.*, *et al. v. Bonneville Power Admin.,* Docket No. EL11-44-000, "Protest of Complainants to Compliance Filing by Bonneville Power Administration," dated Mar. 27, 2012) ("211A Petitioners' Protest to Bonneville Compliance Filing").

Redispatch Policy and, thus, failed to comply with the December 2011 Initial Order or satisfy the requirements of Section 211A of the FPA.

On December 20, 2012, the Commission issued two orders in the section 211A complaint proceeding. First, it issued an Order Denying Rehearing of its December 12 Initial Order ("December 2012 Order Denying Rehearing"),[10] affirming its prior determination that "the Commission has authority under section 211A to direct Bonneville to provide transmission service prospectively under terms and conditions that are comparable to those under which it provides transmission service to itself, and are not unduly discriminatory or preferential."[11] In addition, the Commission continued to find that "section 211A is an appropriate statutory tool in this instance to ensure transmission service on a comparable basis for all resources connected to Bonneville's transmission system," and that the Ninth Circuit's jurisdiction over final actions by Bonneville under the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act")[12] do not preclude the Commission from invoking its own independent statutory authority under section 211A.[13]

Second, the Commission issued an Order Conditionally Accepting Compliance Filing ("December 2012 Order on Compliance Filing"),[14] finding that, "taken together, the rates and non-rate terms and conditions of the OMP and the cost sharing arrangement proposed by Bonneville do not result in transmission service for generating resources at rates that are comparable to those Bonneville charges itself, and on terms and conditions that are comparable

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10 *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, 141 FERC ¶ 61,233 (2012) ("December 2012 Order Denying Rehearing").

11 *Id.* at P 19.

12 16 U.S.C. § 839, *et seq.*

13 December 2012 Order Denying Rehearing at PP 20-21.

14 *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, 141 FERC ¶ 61,234 (2012) ("December 2012 Order on Compliance Filing").

to those under which Bonneville provides to itself and that are not unduly discriminatory or preferential,"[15] and noted that it was "not persuaded that a 50/50 sharing of displacement costs results in comparable transmission service for displaced wind generators."[16] In addition, the Commission directed Bonneville to submit within 90 days of the order a compliance filing "setting forth a methodology to allocate displacement costs in a manner that equitably allocates such costs to all firm transmission customers based on their respective transmission usage during oversupply situations, or setting forth a different method altogether that ensures comparability in the provision of transmission service by Bonneville."[17] Several parties, including Bonneville and the 211A Petitioners, sought rehearing of the December 2012 Order on Compliance Filing.[18] In March of 2013, Bonneville filed proposed revisions to the Attachment P ("Revised Attachment P") with Commission,[19] which the 211A Petitioners and other parties protested.[20]

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15 *Id*. at P 45.

16 *Id*.

17 *Id*. at P 46.

18 *See e.g., Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, Docket No. EL11-44-002, "Request for Clarification or, in the Alternative, Rehearing of Complainants, Northwest and Intermountain Power Producers Coalition, and TransAlta Energy Marketing (U.S.) Inc.," dated Jan. 22, 2013; *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, Docket No. EL11-44-002, "Bonneville Power Administration's Request for Rehearing and Request for Stay and Expedited Consideration," dated January 22, 2013. 211A Petitioners, along with others, filed an answer not opposing Bonneville's request for stay. *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, Docket No. EL11-44-004, "Answer of Complainants, Northwest and Intermountain Power Producers Coalition, and TransAlta Energy Marketing (U.S.) Inc. to Request for Stay," dated Feb. 6, 2013. Certain parties are continuing their challenged of the Commission's Orders at the United States Court of Appeals for the Ninth Circuit. *See Northwest Requirements Utilities, et al., v. Federal Energy Regulatory Commission*, consolidated, case no. 13-70391.

19 *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.,* Docket No. EL11-44-006, "Bonneville Power Administration's Request for Approval of Revised Oversupply Management Protocol" dated Mar. 1, 2013.

20 *See e.g., Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.,* Docket No. EL11-44-006, "Protest of Complainants, Northwest and Intermountain Power Producers Coalition, American Wind Energy Association, Renewable Northwest Project, and TransAlta Energy Marketing (U.S.) Inc." dated Mar. 26, 2013. Iberdrola Renewables and other parties are continuing their challenge of Bonneville's Environmental Redispatch Policy Final ROD, the OMP, and the Revised OMP at the United States Court of Appeals for the Ninth Circuit in the following proceedings: *Cannon Power Group, LLC, et al., v. Bonneville Power Administration*, consolidated, case no 11-72059; *Public Power Council, et al., v. U.S. Department of Energy, Bonneville Power Administration*, consolidated, case no. 12-71634; and Benton Rural Electric Power Association, et al., v. *U.S. Department of Energy, Bonneville Power Administration*, consolidated, case no. 13-71573.

On June 26, 2013, subsequent to the start of the current rate case, the Commission issued a new order denying rehearing of its December 2012 Order on Compliance Filing ("June 2013 Order Denying Rehearing")[21] wherein it clarified that "the Commission did not make any findings with regard to a cost allocation methodology based on transmission usage during oversupply conditions. Rather, the Commission suggested just one possible approach as an option that may result in an equitable allocation of costs, and also recognized that other approaches are possible."[22] The Commission went on to state that the December 2012 Order on Compliance Filing "provided guidance regarding a possible alternative cost sharing method, but did not make any determination on an appropriate cost allocation methodology,"[23] and further reiterated "the Commission did not direct Bonneville to allocate displacement costs in a particular manner."[24]

C. OS-14 Rate Proceeding

On November 14, 2012, Bonneville filed its Initial Proposal in the OS-14 Rate Proceeding to establish new rates to recover the costs associated with the OMP. In its initial proposal ("Initial Proposal"), Bonneville proposed that the OS-14 rates would recover displacement costs (*i.e.*, the costs paid to generators pursuant to the OMP) and administrative costs (*i.e.*, the costs paid to an independent third party evaluator).[25] Bonneville proposed to

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21 *Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, 143 FERC ¶ 61,274 (2013) ("June 2013 Order Denying Rehearing").

22 June 2013 Order Denying Rehearing at P 39.

23 *Id.* at P 41.

24 *Id.* at P 42.

25 *See* Fredrickson, *et al.*, OS-14-E-BPA-01 at p. 1, lines 13-15.

functionalize 50% of those costs to power rates and 50% of those costs to the transmission rates.[26]

Responding to the Commission's statement in the December 2012 Order on Compliance Filing that it was "not persuaded that a 50/50 sharing of displacement costs results in comparable transmission service for displaced wind generators,"[27] on April 12, 2013, Bonneville filed a supplemental proposal ("Supplemental Proposal")[28] in the OS-14 Rate Proceeding, proposing instead "to functionalize all oversupply costs to the transmission function and to charge the costs to transmission customers proportional to their use of the transmission system during oversupply event hours."[29]

Later, in rebuttal testimony, after the Commission issued the June 2013 Order Denying Rehearing, Bonneville proposed yet another framework for the allocation of oversupply costs ("Rebuttal Proposal").[30] In the Rebuttal Proposal, Bonneville proposes to assign the costs of the OMP to certain generators within the Bonneville BAA proportional to their scheduled generation for the hour during oversupply event hours.[31] Among other exclusions, the Rebuttal Proposal would not assign costs to Bonneville's use of the transmission system to deliver Federal hydroelectric energy that is supplanting displaced wind generator loads. Bonneville believes that this third option "allocates costs to those customers that are directly causing those costs by scheduling generation in BPA's balancing authority area for the hours of oversupply events." [32]

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26 *See id.* at p. 7, lines 22-26; p. 8, lines 7-9 and p. 11, lines 11-14.

27 December 2012 Order on Compliance Filing at P 45.

28 Parker, *et al.*, OS-14-E-BPA-02.

29 *Id*. at p. 4, lines 8-10.

30 *See* Metcalf, *et al.,* OS-14-E-BPA-03, at p. 3, line 22-p. 5, line 26.

31 *See id.* at p. 4, lines 25-26.

32 *Id*. at p. 4, lines 10-13.

The OS-14 procedural schedule did not provide parties an opportunity to submit surrebuttal testimony or otherwise comment upon Bonneville's Rebuttal Proposal.[33] Bonneville did not withdraw its Supplemental Proposal when it offered the Rebuttal Proposal, so both the Supplemental Proposal and Rebuttal Proposal remain before the Administrator for consideration.

2. THE POLICY PRINCIPLES AND LEGAL STANDARDS AT ISSUE IN THIS CASE ARE FUNDAMENTALLY IMPORTANT TO WIND GENERATORS AND TRANSMISSION CUSTOMERS

This case continues a process set in motion over two years ago, when Bonneville made the initial decision to adopt its Environmental Redispatch Policy. That decision was determined to be unlawful, and substantial amounts of time and effort have been expended in the region arguing about the appropriate action for Bonneville to take in the wake of the Commission's Federal Power Act Section 211A order. Bonneville's decision to adopt the Environmental Redispatch Policy was a mistake, and Bonneville should not compound that mistake by advancing additional, similarly flawed oversupply rate proposals.

The various oversupply cost allocations proposed in this proceeding violate Northwest Power Act and Transmission System Act rate directives, fail to satisfy Federal Power Act Section 211A comparability standards, and are inconsistent with Bonneville's statutory obligations to operate in accordance with sound business principles. Bonneville has offered no principled argument or theory for its proposals, and in many cases has simply ignored or avoided discussing the legal issues presented by its proposals.

There is a rational and lawful solution to Bonneville's oversupply problem: Bonneville should negotiate mutually agreeable bilateral arrangements with parties for displacement during oversupply events, and pay negative prices as necessary, then allocate those costs to power rates

[33] *See* "Order Granting BPA Motion to Amend the Procedural Schedule," OS-14-HOO-33 (Aug. 12, 2013).

in accordance with Northwest Power Act Section 7(g). Iberdrola Renewables encourages Bonneville to adopt this solution, and to cease expending the region's resources and goodwill over this matter. While the amounts of money at issue in this dispute appear to be much smaller than Bonneville originally estimated, the legal principles at issue in this proceeding are not small. They are, in fact, paramount for wind generators and transmission customers – comparable treatment and open access transmission to services must be assured, and the door must not be opened to the unlawful inclusion of fish and wildlife or other power costs in transmission rates. Bonneville's approach to oversupply is at odds not only with its statutes,[34] but with the policy direction of Congress,[35] the Obama Administration,[36] the Department of Energy,[37] the Commission[38] and Pacific Northwest state public utility commissions.[39] The continued pursuit

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[34] 16 U.S.C. § 839(1)(B) (stating that one of the purposes of the Northwest Power Act is for Bonneville, through the unique opportunity provided by the Federal Columbia River Power System, to encourage "the development of renewable resources within the Pacific Northwest.")

[35] 26 U.S.C. § 45. As originally enacted by the "Energy Policy Act of 1992," Public. Law 102-486, 106 Stat. 2776, the Production Tax Credit ("PTC") was subsequently extended through the end of 2001 by the "Ticket to Work and Work Incentives Improvement Act of 1999," Pub. L. No. 106-170, 113 Stat. 1860, in December 1999. The PTC was extended again in March 2002 as part of the "Job Creation and Worker Assistance Act of 2002"' Pub. L. No. 107-147, 116 Stat. 21. The PTC was renewed as part of H.R. 1308, the "Working Families Tax Relief Act of 2004," Pub. L. No. 108-311, 118 Stat. 1166, which extended the credit through December 31, 2005. The "Energy Policy Act of 2005," Pub. L. 109-58, 119 Stat. 594, modified the credit and extended it through December 31, 2007. In December 2006, the PTC was extended by the "Tax Relief and Health Care Act of 2006," Pub.L. 109–432, 120 Stat. 292. In January 2013, the PTC was again extended by the "American Tax Payer Relief Act of 2012," Pub.L. 112-240, H.R. 8, 126 Stat 2313.

[36] *See, e.g.,* Fact Sheet: President Obama's Blueprint for a Clean and Secure Energy Future (Mar. 15, 2013), available at http://www.whitehouse.gov/the-press-office/2013/03/15/fact-sheet-president-obama-s-blueprint-clean-and-secure-energy-future (last accessed Aug. 27, 2013); Obama, State of the Union Address (Feb. 12, 2013), available at: http://www.whitehouse.gov/the-press-office/2013/02/12/president-barack-obamas-state-union-address (last accessed Aug. 27, 2013).

[37] *See, e.g.*, Energy Dept. Reports: U.S. Wind Energy Production and Manufacturing Reaches Record Highs, U.S. Department of Energy Press Release, Aug. 6, 2013, *available at*: http://www.doe.gov/articles/energy-dept-reports-us-wind-energy-production-and-manufacturing-reaches-record-highs; President's 2014 Budget Proposal Makes Critical Investments in Innovation, Clean Energy and National Security Priorities, U.S. Department of Energy Press Release, Apr. 10, 2013, *available at*: http://www.doe.gov/articles/president-s-2014-budget-proposal-makes-critical-investments-innovation-clean-energy-and (last accessed Aug. 27, 2013).

[38] *See Integration of Variable Energy Resources*, Order No. 764, 139 FERC ¶ 61,246 (2012) ("Order No. 764"), *order on reh'g*, 141 FERC ¶ 61,232 (2012) ("Order No. 764-A").

[39] *See e.g., Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.*, Docket No. EL11-44-002, "Comments of the Public Utility Commission of Oregon," dated Mar. 27, 2012; *In re PacifiCorp, dba Pacific*

of unlawful actions that discourage renewable resource development in the Pacific Northwest is a poor and unnecessary choice. It is not too late for Bonneville to do the right thing and put an end to this regrettable controversy.

3. BONNEVILLE'S OVERSUPPLY MANAGEMENT COSTS ARE FISH AND WILDLIFE COSTS AND COSTS ASSOCIATED WITH THE INABILITY TO SELL EXCESS ELECTRIC POWER

Despite the various, and sometimes conflicting, causes of oversupply offered by Bonneville since 2011, its oversupply management costs are – by Bonneville's own admission – fish and wildlife costs and costs associated with the inability to sell excess electric power. This is a significant point because, as will be discussed, Section 7(g) of the Northwest Power Act prohibits Bonneville from allocating to transmission rates (1) the costs of fish and wildlife measures, or (2) the costs associated with Bonneville's sale of or inability to sell excess electric power.[40] Any attempts by Bonneville or other parties to recharacterize the cause of such costs as related to open access policies, transmission usage, reliability, system redispatch or wind generators' unwillingness to displace for free are untenable assertions, manufactured to avoid the consequences of Section 7(g); namely, the mandatory allocation of oversupply costs to power customers.

A. Bonneville Has Repeatedly Acknowledged that Oversupply Costs Are Fish and Wildlife Costs

Bonneville has consistently represented that the costs of oversupply management, as well as the costs associated with its predecessor Environmental Redispatch Policy, are costs

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Power, 2009 Renewable Portfolio Standard Implementation Plan, Order No. 10-172, Docket No. UM 1467 (May 4, 2010) (Oregon PUC order approving PacifiCorp's RPS Plan); OAR 860-083-0005 - 0500 (Oregon Public Utility Commission rules implementing state RPS requirements); Washington Utilities and Transportation Commission, Approved Resource Plans By Company, available at http://www.utc.wa.gov/regulatedIndustries/utilities/energy/Pages/resourcePlansByCompany.aspx (last accessed Aug. 28, 2013); WAC 480-100-238, 480-90-238 (Washington Utilities and Transportation Commission rules implementing state RPS requirements).

[40] Northwest Power Act § 7(g), 16 U.S.C. § 839e(g).

associated with Bonneville's fish and wildlife program. This is a common-sense proposition, as the chain of oversupply events stems from Bonneville's need to generate additional hydro power to protect fish from the consequences of "spill." This extra hydro generation is power no buyer wants or needs (hence, "oversupply"). For instance, in its Final Record of Decision on its Interim Environmental Redispatch and Negative Pricing Policies, Bonneville made it clear that oversupply costs are fish and wildlife costs with statements such as the following:

- "However, BPA believes that its statutory responsibilities and the objectives of the Northwest Power Act would be frustrated if BPA were required to pay negative prices [to address oversupply conditions] in order to ensure compliance with BPA's environmental responsibilities."[41]
- "In addition, paying negative prices to displace renewable generation [during oversupply conditions] to ensure BPA's environmental responsibilities are met is neither socially optimal nor consistent with traditional principles of cost causation."[42]
- In explaining the mechanics of its Environmental Redispatch Protocol, Bonneville explained that "during times of high flows, all reasonably practicable actions must be taken to operate the FCRPS consistent with BPA's environmental responsibilities," as well as that it "would perform Environmental Redispatch only as a last resort to avoid harm to listed salmon and other aquatic species during high water periods that result in overgeneration in the BPA Balancing Authority Area and dangerous [total dissolved gas] levels in the Columbia River system, and to provide options to reduce generation in

[41] Environmental Redispatch Policy Final ROD at p. 12.

[42] *Id.* at p. 12 (citing to Northwest Power Act provision 16 U.S.C. § 839b(h)(10)(A), which states: "[t]he Administrator shall use the [BPA] Fund and the authorities available to the Administrator . . . to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with [the Council's power plan and fish and wildlife program], and the purposes of th[e] [Northwest Power Act].").

BPA's Balancing Authority Area in order to maintain system reliability, while meeting its environmental and statutory responsibilities."[43]

- "The payment of negative prices [during oversupply conditions] could result in opportunities to distort the market and presents an unreasonable cost shift from those generators that can operate profitably during times of negative prices to BPA's fish and wildlife program and/or to BPA ratepayers, and jeopardizes BPA's ability to comply with its statutory responsibilities, including cost recovery. To date, BPA has not been required to pay negative prices during these situations."[44]
- "Currently, BPA's fish and wildlife budget exceeds $750 million each year (over $440 million in direct expenditures and over $300 million in foregone revenues) . . . . Payment of negative prices [during oversupply conditions] in order to protect fish and wildlife and to assure that the value of a wind generators' PTCs and/or RECs are not impacted could impose an additional and unnecessary burden on BPA's fish and wildlife program costs and compromise BPA's cost recovery objectives and the need to maintain an economical power supply. Environmental compliance is a fundamental part of BPA's operations and a major cost of doing business. Just like BPA's customers, all generators interconnecting to BPA's system must take the system as it is, complete with environmental responsibilities. Negative pricing would place a new financial burden on BPA's fish and wildlife program and BPA's preference customers in order to ensure VERs are kept whole, even though BPA's preference customers are not purchasing or receiving benefits from the VER generation."[45]

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43 *Id.* at p. 14.

44 *Id.* at p. 18.

45 *Id.* at pp.18-19.

Bonneville continued to advance this position in its pleadings submitted to the Commission in Docket No. EL11-44, concerning the Environmental Redispatch and Oversupply Management Protocols:

- "Bonneville and its public and private customers have incurred billions of dollars in costs to protect and enhance salmon and other species and should not have to pay any generators, including wind generators, to protect the region's aquatic life, including ESA-listed fish."[46]
- "Bonneville is acting to protect aquatic life, including ESA-listed fish, while protecting itself and its customers from exposure to costs that Federal and state governments have placed in taxpayers and consumers of wind power."[47]
- "Bonneville does not "choose" to generate hydroelectric power in these spill limitation periods [during oversupply conditions]. Bonneville must generate hydroelectric power to protect endangered fish and other aquatic species . . . ."[48]
- "The Oversupply Management Protocol is a necessary tool for Bonneville to protect endangered fish and other aquatic species during periods of excess spill in spring and summer by moderating TDG to the extent practicable in accordance with applicable state water quality standards enacted under the Clean Water Act."[49]

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[46] Baker, *et al.*, OS-14-E-JP03-02-AT11, p. 11 (*Iberdrola Renewables, Inc.*, *et al. v. Bonneville Power Admin.,* Docket No. EL11-44-000, "Answer of the Bonneville Power Administration," dated Jul. 29, 2011) ("Bonneville Answer to 211A Complaint").

[47] *Id.* at p. 13.

[48] Baker, *et al.*, OS-14-E-JP03-02-AT03, p. 19 (*Iberdrola Renewables, Inc.*, *et al. v. Bonneville Power Admin.,* Docket No. EL11-44-000, "Bonneville Request for Leave to Answer and Answer to Protest and Comments," dated Apr. 23, 2012) ("Bonneville Answer to Protest and Comments").

[49] Bonneville Compliance Filing at p. 26.

Similarly, in the Initial Proposal for the OS-14 Rate Proceeding, Bonneville stated that the purpose of the proceeding is to recover costs attributable to Bonneville's OMP[50] which is in place because:

- "The Clean Water Act (CWA), the Endangered Species Act (ESA), and associated court orders limit the amount of spill over the dams to protect the river's aquatic life, including salmon, steelhead, sturgeon, bull trout, and other species listed under the ESA, as well as non-listed species. Too much spill injects dangerous amounts of nitrogen into the water that can harm fish by causing gas bubble trauma. As a result, the states of Washington and Oregon have used their authority under the CWA to set water quality standards, including total dissolved gas levels. In order to meet its legal responsibilities under the CWA and the ESA, BPA must take all reasonable actions to avoid excess spill and keep total dissolved gas levels within the water quality standards set by the states. As explained below, BPA has determined that the displacement of other generating resources interconnected to its transmission system is a reasonable action to avoid spill in excess of state water quality standards."[51]

Bonneville's preference customers also concede that these are fish and wildlife costs, stating that "[w]e agree that the costs BPA incurs managing oversupply events can be categorized as fish and wildlife costs."[52]

Further proof that the cause of the OMP is Bonneville's fish and wildlife responsibilities, is Bonneville's decision to recover approximately 22 percent of its oversupply costs from the

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50 *See* Frederickson, *et al*., OS-14-E-BPA-01 at p. 1, lines 18-20.

51 *Id.* at p. 3, lines 6-17.

52 Bedbury, *et al*., OS-14-E-WG-02 at p. 18, lines 4-5.

U.S. Treasury under Section 4(h)(10)(C) of the Northwest Power Act.[53] These Treasury credits are recoverable only for hydro project costs exclusively related to fish and wildlife.[54] As part of its submission of the estimated credits to the U.S. Treasury, the Bonneville Administrator provides a signed certification to the Department of Energy stating that the "estimate of credits is completely due to operations and expenditures incurred in this fiscal year in compliance with the Administrator's statutory mandate to protect, mitigate, and enhance fish and wildlife, and their habitats, in the Columbia River Basin under section 4(h)(10) of the Pacific Northwest Electric Power Planning and Conservation Act."[55] This submission is then followed by a similar assurance regarding the nature of the costs by the Department of Energy to the Undersecretary of Finance at the Department of Treasury.

It is difficult to understand how the Bonneville Administrator can sign a certification assuring the Department of Energy that the costs associated with the OMP are "completely due to" fish and wildlife operations, while at the same time maintaining in its OS-14 case that such costs are not exclusively fish and wildlife costs.[56] For instance, Bonneville, in its rebuttal testimony, argues:

> In the case of oversupply costs, the costs are incurred because Federal hydropower projects must be operated to mitigate impacts on fish and wildlife. This may qualify the costs for 4(h)(10)(C) credits. However, neither section 4(h)(10)(C) nor section 7 of the Northwest Power Act states how such costs are to be recovered in rates.[57]

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53 *See* Parker, *et al*., OS-14-E-BPA-02 at p. 14, lines 12-19.

54 16 U.S.C. § 839b(h)(10)(A); *see also* Bonneville Response to Data Request SC-BPA-1, Letter from David D. Aufhauser, Gen. Counsel, U.S. Dept. of Treasury, to Lee Liberman Otis, Gen. Counsel, U.S. Dept. of Energy and Randy Roach, Acting Gen. Counsel, Bonneville Power Admin. at p. 1 (Sept. 26, 2011) ("A fish credit is precisely that – a credit incurred for the cost of protecting the fish.")

55 *See, e.g.,* Bonneville Response to Data Request SC-BPA-2, Letter from Stephen Wright, Administrator and Chief Exec. Off., Bonneville Power Admin., to Joanne Y. Choi, Acting Deputy Chief Financial Off., U.S. Dept. of Energy at p. 5 (Sept. 19, 2012).

56 *Cf.* 31 USC § 3729.

57 Metcalf, et al., OS-14-E-BPA-03 at p. 9, lines 6-9.

However, as discussed in more detail in Section 4 below, Northwest Power Act Section 7(g) *does* state how such costs are to be recovered in rates. Section 7(g) says such costs "shall" be allocated to power rates.[58]

B. Oversupply Costs Are Also the Costs of Bonneville's Inability to Sell Excess Electric Power

In addition to being fish and wildlife costs, the costs associated with oversupply are costs resulting from the "sale of or inability to sell excess electric power."[59] Northwest Power Act Section 7(g) specifically directs that such costs be allocated to power rates. Due to certain hydrological and weather events, at times Bonneville believes that it must generate power by running its turbines in order to support its fish and wildlife program. By running the water through the turbines, Bonneville generates electric energy that exceeds Bonneville's loads. An oversupply condition is essentially one in which Bonneville has power that it cannot sell in the market for a price that is zero or greater than zero. Historically, in order for Bonneville to market this energy, Bonneville at times would have to pay negative market prices in order to incentivize other generation to voluntarily back down. Any such negative prices represent a cost resulting from the sale of excess electric power. Although Bonneville has structured the OMP specifically to avoid paying negative market prices to dispose of its energy, the costs associated with the OMP are still costs that accrue because of Bonneville's inability to sell excess electric power on the market at other than negative prices.

No party to this proceeding, including Bonneville, has explained why oversupply costs are not costs resulting from the "sale of or inability to sell excess electric power" under Section 7(g) of the Northwest Power Act. This statutory language contemplates precisely the costs at

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[58] Northwest Power Act § 7(g), 16 U.S.C. § 839e(g).

[59] *Id.*

issue in this case, and provides a specific directive regarding the allocation of such costs to power rates. Statutes must be interpreted to have meaning and "[s]ettled principles of statutory construction require giving 'effect, if possible, to every word Congress used.'"[60] When a statute speaks directly to the costs at issue, Bonneville cannot simply ignore it.

C. Attempts to Recharacterize the Cause of Oversupply Are Untenable

1. Oversupply Costs Are Not Caused by Open Access or Transmission Usage

After receiving numerous comments on its draft Environmental Redispatch Policy Record of Decision from customers who believed that it was unlawful for Bonneville to adopt a policy that required transmission customers to bear costs that are clearly associated with Bonneville's fish and wildlife program,[61] Bonneville began to modify its position on the "cause" of oversupply conditions, suggesting that in addition to addressing fish and wildlife obligations, oversupply had another cause.

In particular, in an effort to connect oversupply costs to transmission usage and thereby facilitate allocating such costs to transmission customers, Bonneville argued that the Commission's open access transmission policies were part of the origin of Bonneville's oversupply problem, because such policies "led to such widespread use of BPA's transmission system," and that Bonneville's decision to adopt an open access transmission tariff "was partly responsible for the interconnection of wind generation and other generation."[62] At most, Bonneville's reasoning draws a causal nexus between open access policies and *increased use of*

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60 *Andrews v. Loheit*, 49 F.3d 1404, 1408 (9th Cir. 1995) (citing to *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

61 *See, e.g.*, Comments of Iberdrola Renewables on Administrator's Draft Record of Decisions on Environmental Redispatch and Negative Pricing (Mar. 11, 2011) at pp 7-10; Comments of Renewable Northwest Project on BPA's Draft Record of Decision concerning Environmental Re-dispatch and Negative Pricing Policy (Mar. 11, 2011) at p. 3.

62 Parker, *et al.*, OS-14-E-BPA-02 at 5, lines 5-9.

its transmission system, but it does not draw a causal nexus between open access transmission policies and *increased oversupply events*.

The term "oversupply" in the OMP context is a reference to Bonneville Power Services producing electric energy in excess of the amount of load it has secured to absorb its production. "Oversupply" does not relate to the amount of transmission usage on Bonneville's system at any given time. Bonneville has admitted that it has available transmission capacity during oversupply events, and transmission users are in no way overburdening Bonneville's system or creating any reliability issues.[63] Indeed, there is no causal connection between "transmission use" and "oversupply events."

Bonneville's Supplemental OS-14 proposal, which remains before the Administrator in this case, relies heavily on an alleged connection between transmission use and oversupply costs for its oversupply cost allocation.[64] In the Supplemental Proposal, Bonneville offers the following explanation for proposing to functionalize OMP compensation costs to transmission for allocation among its transmission customers:

> BPA acknowledged that parties could well argue that oversupply costs "should not be viewed as a fish and wildlife cost, occasioned by environmental limits, but as a transmission cost, since the cause of payments would be BPA's open access transmission regime, i.e., but for open transmission access, BPA would not be paying negative prices to meet its environmental responsibilities." [Administrator's Final Record of Decision on Environmental Redispatch and Negative Pricing Policies (May 2011)]. This reasoning supports functionalization of all oversupply costs to transmission, and appears to be aligned with the Commission's guidance to allocate costs to all firm transmission use during the oversupply event.[65]

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63 *See* Bonneville Response to Data Request IR-BPA-9 ("We are not aware of any situations when there was insufficient transmission availability during oversupply events."); Bonneville Response to Data Request IR-BPA-10; *see also,* Bonneville Answer to Protest and Comments at p. 2 ("Bonneville had ample transmission capacity during the 2011 high-water event.").

64 *See* Parker, et al., OS-14-E-BPA-02 at p. 4, line 15-p. 5, line 18.

65 *Id.* at p. 5, lines 11-18.

Additionally, in response to a data request asking Bonneville to explain why transmission customers taking service under Bonneville's open access tariffs should be assigned the costs of oversupply, Bonneville stated:

> As stated in the Initial Proposal and reiterated in the Supplemental Proposal, Staff believes that oversupply is caused by both BPA's fish and wildlife obligations and by renewable generation that will not voluntarily curtail for zero-priced power. In addition, our supplemental proposal recognizes that any user of BPA's transmission system that will not voluntarily displace with free Federal hydropower contributes to size of the cost of solving the oversupply problem. As a result transmission customers using BPA's transmission system during oversupply events are charged for that use as a part of the cost of operating the system. *The voluntary nature of BPA's adoption of open access policies has no bearing on the cause of oversupply—the use of BPA's transmission system during oversupply events.*[66]

Clearly, at least at the Supplemental Proposal stage of this proceeding, Bonneville was arguing that "the use of BPA's transmission system during oversupply events" is "the cause of oversupply." In Bonneville's rebuttal testimony, however, Bonneville moved away from this argument, recharacterizing its position as follows:

> Parties appear to have interpreted the premise included in our supplemental proposal – that open access policies contribute to the costs of oversupply – as blaming a lack of transmission capacity. . . . *As previously stated, our supplemental proposal does not state that usage of transmission causes oversupply events*; we acknowledge that the costs of oversupply are not related to a lack of transmission capacity. *The logic behind the supplemental proposal was that generators scheduling for oversupply event hours would reduce oversupply costs if they took BPA's offer of free power.* Given that the transmission system is normally not constrained during oversupply events, all customers using BPA's transmission system could take BPA's offer of free power. That is, there would be transmission capacity available to serve those customers [sic] loads with BPA power.[67]

Bonneville's rebuttal testimony, therefore, rejects any causal connection between transmission use and oversupply costs. Bonneville has similarly stated, in response to data

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66 Bonneville Response to Data Request IR-BPA-15 (emphasis added).

67 Metcalf, *et al.*, OS-14-E-BPA-03 at p. 11, line 16-p. 12, line 5 (emphasis added).

requests made by rate case parties, that "BPA does not contend that oversupply is a result of insufficient transmission capacity."[68]

On rebuttal, Bonneville has now revised its position to state only that transmission customers *could* take Bonneville's free power (though they have no obligation to do so) and thereby voluntarily aid in reducing Bonneville's oversupply costs. While this appears to be an accurate observation, it says nothing about cost causation, nor does it provide any basis for allocating Bonneville's oversupply costs. Certainly any voluntary action by an entity to provide Bonneville with more load or more money would aid Bonneville during an oversupply event, but this fact does not make others obligated in any way to provide Bonneville with load or money.[69] Similarly, this fact does not in any way support the idea that costs should be allocated to a party simply because it could have voluntarily chosen to do something, but declined to do so. By modifying its characterization of the relationship between transmission and oversupply in this way, Bonneville has eliminated any argument that oversupply costs or benefits should be allocated to transmission customers.

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[68] Bonneville Response to Data Request CS-BPA-4.

[69] Iberdrola Renewables notes that Bonneville, in its rebuttal testimony, suggests that its "understanding" is that "BPA's fish and wildlife obligations extend to generators inside the balancing authority area, which are the generators over which BPA has operational control." Metcalf, *et al.*, OS-14-E-BPA-03 at p. 4, lines 13-15. As a basis for this, Bonneville points to language in its Record of Decision for the Juniper Canyon I wind project, where Bonneville noted "the interconnection of existing and proposed wind-powered generation projects in the region to the BPA transmission system does pose[] the potential for cumulative impacts to listed Columbia River fish species through a somewhat complex relationship among the wind projects, general Columbia River hydrosystem operations, and operation of the hydrosystem to meet Clean Water Act (CWA) and ESA requirements for listed fish species. . . . BPA is working with wind project developers and operators to develop measures for temporarily reducing sources of wind generation within the BPA Balancing Area when necessary." *Id.* at p. 7, line 20 – p. 8, line 10. This Record of Decision language – which merely observes that Bonneville is "working with" wind developers to "develop measures" related to oversupply – cannot and does not extend Bonneville's statutory fish and wildlife obligations to wind developers. A general observation in a Record of Decision cannot change the statutory requirements imposed by Congress. Further, this statement also does not constitute a contractual obligation for the Juniper Canyon I wind project specifically, nor does it have any application to or effect upon other Large Generation Interconnection Agreements.

Other parties argued in rebuttal testimony that Iberdrola Renewables and the other 211A Petitioners have "consistently characterized OMP as an aspect of transmission service."[70] Iberdrola Renewables and the other 211A petitioners have never characterized OMP as a "transmission service." OMP, like its predecessor Environmental Redispatch, is a policy that interferes with and prevents open access transmission service, but it is not itself a "service." The various pleadings cited by Joint Party 3 support Iberdrola Renewables' view of OMP as an interference, but not a "service." For instance in the 211A Petitioners' Complaint, the 211A Petitioners explain how Bonneville's provision of transmission service was negatively impacted by the Environmental Redispatch Policy, and that Bonneville was failing to provide such transmission service on terms and conditions that were comparable to those terms under which Bonneville provided transmission services to itself and that this treatment was unduly discriminatory and preferential.[71] In the 211A Petitioners' "Motion of Complainants for Leave to Answer and Answer," the 211A Petitioners reiterated that Bonneville was providing transmission service that was substandard because it was not comparable and was unduly discriminatory and preferential.[72] In the "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," the 211A Petitioners again request that Bonneville be required to provide transmission service that is comparable and not unduly discriminatory or preferential.[73] In each case, the oversupply practices are characterized as

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[70] Baker, *et al.*, OS-14-E-JP03-02 at p. 5, line 6.

[71] *See* 211A Petitioners' Complaint at p. 37.

[72] Baker, *et al.*, OS-14-E-JP03-02-AT07at pp. 4-5 (*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).

[73] *See* Baker, *et al.*, OS-14-E-JP03-02-AT08 at p. 15 (*Iberdrola Renewables, Inc.*, *et al. v. Bonneville Power Admin.,* Docket No. EL11-44-000, "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,"

interfering with the provision of transmission service that is comparable and not unduly discriminatory or preferential, but these practices are not themselves characterized as "services."

In the "Protest of Complainants to Compliance Filing by Bonneville Power Administration" the 211A Petitioners remind the Commission that the Environmental Redispatch Policy was not the only Bonneville policy interfering with Bonneville's provision of comparable and non-unduly discriminatory transmission service.[74] The 211A Petitioners' requested that the Commission respond in a manner to ensure that, at the simplest level, Bonneville simply follow the terms of its own tariff going forward.[75] Finally, in the portion of the "Motion of Complainants for Leave to Supplement Protest and Supplemental Protest," cited by Joint Party 3, the 211A Petitioners again request that the Commission require Bonneville to file its tariff in a manner which, at the minimum, would ensure that Bonneville follow the terms of its own tariff.[76] None of these pleadings consider the Environmental Redispatch Policy or OMP to provide a "service"—they are requests for assistance because the Environmental Redispatch Policy and OMP inappropriately infringe on transmission service.

Bonneville has acknowledged that it has available transmission capacity during oversupply events,[77] and that transmission usage is unrelated to oversupply, explaining that "[s]taff believes that oversupply is caused by both BPA's fish and wildlife obligations and by renewable generation that will not voluntarily curtail for zero-priced power. In addition, our

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dated Jan. 1, 2012).

74 *See* 211A Petitioners' Protest to Bonneville Compliance Filing at p. 28.

75 *See id.*

76 *See* Baker, *et al.*, OS-14-E-JP03-02-AT10 at pp. 4-9 (*Iberdrola Renewables, Inc., et al. v. Bonneville Power Admin.,* Docket No. EL11-44-000, "Motion of Complainants for Leave to Supplement and Supplemental Protest," dated Apr. 30, 2012).

77 *See* Bonneville Response to Data Request IR-BPA-9 ("We are not aware of any situations when there was insufficient transmission availability during oversupply events."); *see also,* Bonneville Answer to Protest and Comments at p. 2 ("Bonneville had ample transmission capacity during the 2011 high-water event.").

supplemental proposal recognizes that any user of BPA's transmission system that will not voluntarily displace with free Federal hydropower contributes to size of the cost of solving the oversupply problem. BPA's open access transmission policies contributed to the costs of oversupply by increasing non-federal use of BPA's transmission system."[78]

Setting aside the existence of Northwest Power Act Section 7(g), which precludes the allocation of oversupply costs to transmission rates in any event, Bonneville has failed to establish any connection between transmission and oversupply or any basis for allocating oversupply costs to transmission customers.

2. Oversupply Costs Are Not Reliability Related

In rebuttal testimony, some parties attempt to describe the OMP as providing a reliability service for transmission customers.[79] Again, we note that within the OMP context "oversupply" is not a reference to transmission, but instead is a reference to Bonneville Power Services producing electric energy in excess of the amount of load it has secured to absorb its production. Bonneville has admitted that transmission users are not overburdening Bonneville's system or creating any reliability issues during oversupply events. Bonneville has explained that it "does not contend that oversupply is the result of insufficient capacity,"[80] and that it was "not aware of any situations when there was insufficient transmission availability during oversupply events."[81] Instead, Bonneville believes that oversupply is too much electricity relative to load, not a lack of transmission capacity."[82]

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78 *See* Bonneville Response to Data Request IR-BPA-8.

79 *See* Baker, *et al.*, OS-14-E-JP03-02 at p. 4, lines 16-17.

80 Bonneville Response to Data Requests IR-BPA-16, IR-BPA-17 and IR-BPA-18; *see also* Bonneville Response to Data Request CS-BPA-4.

81 Bonneville Response to Data Request IR-BPA-9.

82 Bonneville Response to Data Request IR-BPA-10. *See also* Bonneville Response to Data Request JP01-

WPAG argues that the "cause" of oversupply is unclear, and therefore Bonneville should allocate oversupply costs based on the benefits customers receive from oversupply.[83] WPAG argues that oversupply provides reliability benefits to all transmission customers.[84] While Iberdrola Renewables disagrees that it "benefits" in any way from having its generation unilaterally displaced and its transmission and loads co-opted for the convenience of Bonneville Power Services, this argument disregards the fact that there would be no need for oversupply, and no risk of reliability concerns, if Bonneville would simply offer its excess power into the market at negative prices.[85] Bonneville cannot claim that it has an imbalance between generation and load that is causing a reliability issue when it has arbitrarily refused to take steps to achieve balance through additional power sales.

It is incorrect to characterize OMP as a reliability tool for the benefit of *transmission customers*—if it is to be characterized as a tool, it is one that benefits Bonneville's Power Services. If reliability can be achieved simply by paying market prices, Bonneville must do so; it cannot use the desire to avoid market costs to manufacture a "reliability" problem.

"Oversupply" is also not caused by generators who happen to be utilizing their firm transmission contract rights and generating at the same time that Bonneville Power Services is generating in excess of its load. Generators who are serving their own loads are not creating an oversupply of power and they are not causing any potential reliability issues. If generators

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BPA-7 (explaining the potential reliability even would be due to a failure to dispose of excess generation during times when Bonneville Power Services has an oversupply.)

83 *See* Bedbury, *et al.*, OS-14-E-WG-02 at p. 22, lines 1-3.

84 *See id.* at p. 18, lines 16-18.

85 Bonneville's "Daily Overgeneration Management Protocol Retrospective," attached as Attachment A, demonstrates that, for each hour in 2012 when Bonneville invoked OMP, it had significant unused capacity on the AC, DC and Northern Interties. In addition to the potential for sales in the Pacific Northwest, sufficient transmission capacity existed for Bonneville to make sales outside the region.

stopped generating, and secured a way to serve their load through alternative means, Bonneville Power Services would still have an oversupply of FCRPS energy.

3. Oversupply Is Not a "Redispatch" of Transmission Service

Joint Party 3 argues that OMP is simply a "redispatch" consistent with the day-to-day management of Bonneville's system.[86] The OMP is not a system redispatch—indeed, Bonneville's OMP turns the concept of "redispatch" that is embodied in the Commission's open access policies on its head. The *pro forma* Open Access Transmission Tariff ("OATT") permits the redispatch of generation, but it is the redispatch of the *Transmission Provider's* generation resources to *maintain* the schedules and reservations of *transmission customers*, not the curtailment of customer generation to maintain the dispatch of Transmission Provider resources. For example, Section 13.5 of Bonneville's OATT requires that, if a request for firm Point-to-Point transmission service cannot be granted out of existing transmission capacity, the Transmission Provider must upgrade its system to accommodate that request or "[t]o the extent the Transmission Provider can relieve any system constraint *by redispatching the Transmission Provider's resources*, it shall do so." This is commonly referred to as "planning redispatch." Section 33.2 of Bonneville's OATT also addresses "reliability redispatch" for Network customers, which requires that:

> To the extent the Transmission Provider determines that the reliability of the Transmission System can be maintained by redispatching resources, the Transmission Provider will initiate procedures pursuant to the Network Operating Agreement to redispatch all Network Resources and the Transmission Provider's own resources on a least-cost basis *without regard to the ownership of such resources*. Any redispatch under this section *may not unduly discriminate* between the Transmission Provider's use of the Transmission System on behalf of its Native Load Customers and any Network Customer's use of the Transmission System to serve its designated Network Load.

[86] *See* Baker, *et al.*, OS-14-E-JP03-02 at p. 5, lines 1-3.

There is therefore nothing in Bonneville's OATT that remotely would allow Bonneville to "redispatch" a non-Network customer's generation resources under any circumstance. Moreover, even in the case of a Network customer's generation, any such redispatch must be for reliability reasons only and, even in that limited situation, must be nondiscriminatory. Bonneville's OMP is not implemented for reliability reasons, and provides for curtailment in a manner that is inconsistent with Bonneville's other OATT requirements.

4. Wind Generators' Unwillingness to Displace for Free Is Not the Cause of Oversupply

Throughout this proceeding, Bonneville and other parties have argued that Bonneville's oversupply problem is in part due to wind generators that do not have power supply costs and "do not wish to reduce their output due to the desire to take advantage of the governmental subsidies they receive from generating."[87] Generators have no affirmative duty to act against their own interests for the benefit of Bonneville, and in refraining from doing so they are not causing Bonneville's oversupply.

Setting aside the fact that generators have no obligation to volunteer to pay costs they have not caused, and for which they are not statutorily liable, parties have suggested in this proceeding that the existence of Production Tax Credits ("PTCs") somehow inappropriately incent wind generators to generate electricity and contribute to the oversupply problem.[88] PTCs are lawful incentives created by Congress with the bipartisan[89] goal of encouraging the

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87 Baker, *et al*., OS-14-E-JP03-02 at p. 7, lines 3-6.

88 Similar treatment is given to Renewable Energy Credits (or "RECs") which are provided at the state level.

89 "[O]ne of the things that I think is very instructive is that the history of the wind production tax credit has been completely bipartisan. I would like to lay out a little bit of that history. The production tax credit began in a bipartisan energy policy in 1992, signed by then-President George H.W. Bush. It was extended in December 1999 by a Republican Congress and signed into law by President Clinton. It was extended again in 2002 and in 2004, this time signed into law by President George W. Bush. In 2005, it was extended again as a part of bipartisan energy legislation, the 2005 Energy Policy Act . . . . In December 2006, it was extended again. Most recently, it was extended in the 2009 Recovery Act, which was signed by President Obama." 158 Cong. Rec. S 673 (2012)

development of renewable energy sources.[90] PTCs were created because Congress wished to affirmatively incent not only the investment in, but the *utilization*, of renewable energy sources.[91] The PTCs were therefore designed to promote competition between renewable energy sources and conventional energy sources,[92] and were intentionally crafted to target the activity sought to be incented—the production of wind energy. Consequently, the PTC "for wind is available only when wind energy is produced. There is no benefit for simply placing the turbine in the ground. It is a tax relief that rewards results . . . ."[93]

While it is fair for the rate case parties, or even Bonneville, to disagree with the government's reasoning for creating a tax incentive for wind generation, it is not appropriate to develop a protocol to administratively circumvent these policies. It is particularly inappropriate given that Bonneville has a statutory obligation under the Northwest Power Act to encourage "the development of renewable resources within the Pacific Northwest."[94]

In *Maislin Indus., U.S. v. Primary Steel, Inc.*, the Supreme Court overturned the Interstate Commerce Commission's decision to allow negotiated (rather than regulated) rates for certain

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(statement of Sen. Tom Udall).

90 H.R. REP. NO. 108-548, pt. 1 at 218 (2004) ("The Committee recognizes that the section 45 production credit has fostered additional electricity generation capacity in the form of non-polluting wind power. The Committee believes it is important to continue this tax credit by extending the placed in service date for such facilities to bring more wind energy to the U. S. electric grid.").

91 H.R. REP. NO. 102-474, pt. 5 at 42 (1991) ("The committee [of Government Operations] believes that the development and utilization of certain renewable energy sources should be encouraged through the tax laws. A production-type credit is believed to target exactly the activity that the committee seeks to subsidize (the production of electricity using specified renewable energy sources). The credit is intended to enhance the development of technology to utilize the specified renewable energy sources and to promote competition between renewable energy and to promote competition between renewable energy sources and conventional energy sources.")

92 *Id.*

93 158 Cong. Rec. S 7718 (2012) (statement of Sen. Chuck Grassley).

94 Northwest Power Act Section 2(1)(B), 16 U.S.C. §839(1)(B) (setting forth the Congressional declaration of purposes behind the Northwest Power Act).

trucking services.[95] The Court found that the agency's removal of regulatory requirements in order to stimulate competition was inconsistent with the existing statutory scheme.[96] In his concurring opinion, Justice Scalia explained that while Congress had a plain intent to deregulate the trucking industry, its intent was "to deregulate *within the framework of the existing statutory scheme*. Perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours."[97]

Bonneville may disagree with Congress on the value of the PTCs, and the purpose of making certain renewable energy output more competitive in the energy market, but production-driven tax incentives for certain forms of renewable generation, including wind, remain established national law. That Bonneville must adjust to lawful market conditions, including the natural market effect of PTCs, is not a cause of oversupply.

4. NORTHWEST POWER ACT SECTION 7(g) PROHIBITS THE ALLOCATION OF COSTS ASSOCIATED WITH OVERSUPPLY MANAGEMENT TO TRANSMISSION RATES

Except as may be otherwise ordered by statute, all costs of fish and wildlife measures, as well as all costs associated with the sale of or inability to sell excess electric power, must be allocated to power rates. Section 7(g) of the Northwest Power Act states as follows:

> Except to the extent that the allocation of costs and benefits is governed by provisions of law in effect on December 5, 1980, or by other provisions of this section, *the 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

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95 *See Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (superseded by statute on other grounds) (emphasis in original).

96 *See id.* at 130.

97 *Id.* at 138.

> 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 electric power*.[98]

As demonstrated in Section 3 above, oversupply costs are fish and wildlife costs and costs associated with the sale or inability to sell excess electric power. Accordingly, such costs must be allocated to power rates, not transmission rates (including ancillary or control area services rates). Bonneville does not have discretion on this issue, as Congress used clear, unambiguous language stating that Bonneville "shall" allocate Section 7(g) costs to power rates.[99]

Both the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") and the Commission have consistently interpreted Northwest Power Act Section 7(g) to preclude the allocation of any power system costs to transmission rates. More specifically, both the Ninth Circuit and the Commission have held that fish and wildlife costs are power system costs and may not be allocated to transmission rates.[100] Although the Ninth Circuit and the Commission have not yet specifically addressed the language in Section 7(g) requiring Bonneville to allocate to power rates costs attributable to "the sale of or inability to sell excess power," the plain wording of this portion of the statute would also seem to cover precisely the oversupply situation at issue in this proceeding.

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98 Northwest Power Act § 7(g), 16 U.S.C. § 839e(g) (emphasis added).

99 Specifically, in the Northwest Power Act context, Representative Swift explained that "[t]hroughout legislative consideration of this bill, however, there was also repeated discussion and concern about the difference between mandatory provisions and discretionary provisions. Therefore, the simplest point to make for the record is that where the bill uses the word 'shall', it means 'shall', not 'may'." 96 Cong. Rec. E5,092 (daily ed. Dec. 1, 1980) (statement of Representative Swift).

100 *See, e.g.*, *Central Lincoln Peoples' Utility Dist. v. Johnson*, 735 F.2d 1101, 1123-1124 (9th Cir. 1984) ("Section 7(g) states that unless otherwise provided, costs and benefits, including fish and wildlife measures, shall be equitably allocated to power rates."); *U.S. Dept. of Energy - Bonneville Power Admin.*, 36 FERC ¶ 61,335 at 43 (1986) ("Concerning the section 7(g) argument by the California parties [that section 7(g) of the Regional Act bars the inclusion of fish and wildlife costs in nonfirm rates because it requires that such costs be allocated to regional customers], we agree with BPA that the language and legislative history of section 7(g) do not support the California parties' interpretation. Section 7(g) refers simply to the allocation of costs to power rates and not specifically to allocation of costs to firm power rates.") (Internal citation removed); *see also U.S. Dept. of Energy - Bonneville Power Admin.*, 29 FERC ¶ 63,039 at 65,096 (1984); *U.S. Dept. of Energy - Bonneville Power Admin.*, 25 FERC ¶ 61,140 at 61,375 (1983) (requiring that Bonneville provide data to prove that costs assigned to transmission are only transmission based, and not power based, before temporarily approving rates).

The mandatory allocation of these categories of costs to power rates is not punitive, but consistent with the inverse of the situation: Section 7(g) also states that Bonneville shall allocate to power rates the *benefits* associated with fish and wildlife measures and the sale of or inability to sell excess electric power.[101] Bonneville has concluded in Final Records of Decision that Section 7(g) mandates the allocation of such benefits solely to power rates.[102] Accordingly, it has historically allocated benefits in strict accordance with this provision, allocating 100 percent of the benefits of the sale of excess electric power (*i.e.*, surplus power revenues) solely to power rates. As a matter of statutory interpretation, and as a matter of fundamental fairness, Bonneville cannot be permitted under the statute to allocate a share of the *costs* of such power to transmission rates, without similarly allocating a share of the *benefits*.

B. The "Exception" to Section 7(g) Does Not Apply Here

Despite the plain language of Section 7(g), some parties attempt to dispute its applicability to oversupply costs. WPAG argued in rebuttal testimony that the "exception" to Section 7(g) applies here; that is, that oversupply costs have already been appropriately allocated under Section 7(a) of the Northwest Power Act, and thus Section 7(g) does not apply.

In WPAG's view, Section 7(g) is a catch-all provision that applies only to costs that, in WPAG's words, "cannot otherwise be allocated" under other provisions of Section 7.[103] WPAG

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101 Northwest Power Act § 7(g), 16 U.S.C. § 839e(g).

102 *See, e.g.,* 2007 Supplemental Wholesale Power Rate Case, Administrator's Final Record of Decision, WP-07-A-05 at 346 (Sept. 2008); 2010 Wholesale Power and Transmission Rate Adjustment Proceeding (BPA-10), Administrator's Final Record of Decision, WP-10-A-02; TR-10-A-02 at 308 (Jul. 2009) ("Section 7(g) of the Northwest Power Act specifically requires that secondary sales revenues be equitably allocated to *power rates*. 16 U.S.C. § 839 e(g). Wind Balancing Service is not a power rate. Thus, there is no need to revisit the issue of crediting Wind Balancing Service with secondary sales revenues.") (emphasis added). In its BP-12 Final Record of Decision, Bonneville reiterated its position that the benefits of Section 7(g) must be allocated to solely power rates, but argued that 7(g) didn't necessarily preclude it from applying certain risk mitigation tools to ancillary services rates. 2012 Wholesale Power and Transmission Rate Adjustment Proceeding (BP-12), Administrator's Final Record of Decision, BP-12-A-02 at 282-83 (Jul. 2011).

103 *See* Bedbury, *et al.*, OS-14-E-WG-02 at p. 23.

argues that Section 7(a) of the Northwest Power Act gives Bonneville discretion to "equitably" allocate oversupply costs to both transmission and power customers, thereby bypassing Section 7(g). This equitable allocation is permitted, WPAG argues, because one traditional method of cost allocation in ratemaking is to assign costs to the customers who benefit from them. According to WPAG, oversupply costs "benefit both power and transmission customers," because they "are in the nature of obligations to ensure the operation of a reliable integrated power system."[104] In this situation, WPAG argues, all customers benefit from a "reliable" system, making it "equitable" to allocate oversupply costs to transmission customers under Section 7(a).[105]

Northwest Power Act Section 7(a) states as follows:

> 839e(a)(1) The Administrator shall establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Such rates shall be established and, as appropriate, revised to recover, in accordance with sound business principles, the cost associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this chapter and other provisions of law. Such rates shall be established in accordance with sections 9 and 10 of the Federal Columbia River Transmission System Act [16 U.S.C. 838g and 838h], section 5 of the Flood Control Act of 1944 [16 U.S.C. 825s], and the provisions of this chapter.
>
> 839e(a)(2) Rates established under this section shall become effective only, except in the case of interim rules as provided in subsection (i)(6) of this section, upon confirmation and approval by the Federal Energy Regulatory Commission upon a finding by the Commission, that such rates –
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> > (A) are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years

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104 *Id.* at p. 23, lines 22-24.

105 The concept of "equitable allocation" is found in various places in Bonneville's governing statutes, including Section 7(a) of the NWPA and Section 10 of the Federal Columbia River Transmission System Act (16 U.S.C. §838h).

after meeting the Administrator's other costs,

(B) are based upon the Administrator's total system costs, and

(C) insofar as transmission rates are concerned, equitably allocate the costs of the Federal transmission system between Federal and non-Federal power utilizing such system.[106]

Setting aside the fact that oversupply costs are unrelated to system reliability,[107] WPAG's argument is supported neither by the words of the statute itself nor the rules of statutory interpretation. First, WPAG's extraordinarily broad interpretation of Section 7(a) would vitiate the meaning of Section 7(g) altogether. A well-established tenet of statutory construction is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[108] Section 7(g) is not a catch-all provision for costs that, as WPAG says, *cannot otherwise* be allocated under other provisions of the Northwest Power Act. It is a mandatory cost allocation provision that applies unless another provision specifically states otherwise. Any other interpretation of the very specific mandate of Section 7(g) would render the provision superfluous.

Nor is there anything in the general provisions of Section 7(a) that would supersede the specific directives in Section 7(g).[109] Bonneville exercises significant discretion in exercising many of its statutory obligations. The requirement that Bonneville "equitably allocate" costs is a broad statutory mandate, found in more than one place in Bonneville's enabling statutes, that

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106 16 U.S.C. 839e(a).

107 *See* Section 3.C.2., above.

108 *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). In addition, the Supreme Court has stated that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted).

109 It is a "commonplace of statutory construction that the specific governs the general." *Dan Morales, Att'y Gen. of Texas v. Trans World Airlines, Inc., et al.,* 504 U.S. 374, 385 (1992) (stating "[a] general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision…"). *See also, International Paper Co. v. Ouellette et al.,* 479 U.S. 481, 494 (1987).

puts some limits on that discretion. Section 7(g), by contrast, is an explicit, detailed directive, crafted in a manner that provides little room for the exercise of discretion. The prescriptive nature of Section 7(g) is apparent not only in its words, but also in the framework of Section 7 of the Northwest Power Act, which governs Bonneville's rates. Section 7(a) and (b) provide a broad overview of Bonneville's rate-setting obligations; Sections 7(c) through (h) then provide more detailed specifications for Bonneville's rate-setting authority, establishing specific requirements for rates for direct service industrial customers, discount rates, special rates, and seasonal rates, among others, as well as detailing explicit bases for setting rates, surcharges, and, in Section 7(g), for the *appropriate allocation of costs and benefits* of certain types of costs – including fish and wildlife costs and the costs of the inability to sell excess electric power. This very specific mandate cannot be negated by Bonneville's general preference to allocate costs somewhere else.

More broadly, Congress included Section 7(g) in the Northwest Power Act for a reason, and precedent requires Bonneville to give effect to Section 7(g) rather than read Section 7(a) in a strained and overbroad way that results in Section 7(g) being rendered meaningless. In drafting Section 7(g), Congress included specific language calling out how fish and wildlife costs must be accorded—this must be given the meaning that Congress intended. Congress also included language regarding the allocation of costs related to the inability to sell excess electric power. This must also be accorded meaning. With regard to the allocation of these costs, Congress was specific that they were to be allocated solely to power rates, stating that "[t]he costs or benefits under this section 7(g) are intended to be applied in an equitable manner and as appropriate to any or all of the rates for power sales of the Administrator in order to assure that he can meet the

requirements of section 7(a) to collect sufficient revenue to recover all of his costs."[110] The interpretation of 7(g) proffered by Iberdrola Renewables and other transmission customers[111] is consistent with the way Bonneville,[112] the Commission[113] and the Ninth Circuit[114] have interpreted this language. In short, a common sense reading of the statute supports the conclusion that 7(g) applies and is the only reasonable method of allocating OMP costs.

In any case, Section 7(a) does not include any language that would remove the allocation of oversupply costs or benefits from the purview of Section 7(g). The OS-14 rate is not a rate "for the sale and disposition of electric energy and capacity" – it is a rate intended to collect back the amounts Bonneville pays displaced generators, and is therefore not associated with any *Bonneville* energy or capacity sales. The oversupply rate is not a rate "for the transmission of non-Federal power," nor is it a rate for "the acquisition, conservation and

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110 S. Rep. No. 96-272, at 32 (1979) (emphasis added).

111 *See, e.g.*, *Holland, et al*., OS-14-E-JP05-01 at page 27, line 19 – page 29, line 6; *Pascoe*, OS-14-E-CS-01 at page 20, line 16 – page 21, line 7.

112 *See, e.g.,* 2007 Supplemental Wholesale Power Rate Case, Administrator's Final Record of Decision, WP-07-A-05 at 346 (Sept. 2008); 2010 Wholesale Power and Transmission Rate Adjustment Proceeding (BPA-10), Administrator's Final Record of Decision, WP-10-A-02; TR-10-A-02 at 308 (Jul. 2009) ("Section 7(g) of the Northwest Power Act specifically requires that secondary sales revenues be equitably allocated to *power rates*. 16 U.S.C. § 839 e(g). Wind Balancing Service is not a power rate. Thus, there is no need to revisit the issue of crediting Wind Balancing Service with secondary sales revenues.") (emphasis added). In its BP-12 Final Record of Decision, Bonneville reiterated its position that the benefits of Section 7(g) must be allocated to solely power rates, but argued that 7(g) didn't necessarily preclude it from applying certain risk mitigation tools to ancillary services rates. 2012 Wholesale Power and Transmission Rate Adjustment Proceeding (BP-12), Administrator's Final Record of Decision, BP-12-A-02 at 282-83 (Jul. 2011).

113 *See, e.g., U.S. Dept. of Energy - Bonneville Power Admin.*, 36 FERC ¶ 61,335 at 43 (1986) ("Concerning the section 7(g) argument by the California parties [that section 7(g) of the Regional Act bars the inclusion of fish and wildlife costs in nonfirm rates because it requires that such costs be allocated to regional customers], we agree with BPA that the language and legislative history of section 7(g) do not support the California parties' interpretation. Section 7(g) refers simply to the allocation of costs to power rates and not specifically to allocation of costs to firm power rates.") (Internal citation removed); *see also U.S. Dept. of Energy - Bonneville Power Admin.*, 29 FERC ¶ 63,039 at 65,096 (1984); *U.S. Dept. of Energy - Bonneville Power Admin.*, 25 FERC ¶ 61,140 at 61,375 (1983) (requiring that Bonneville provide data to prove that costs assigned to transmission are only transmission based, and not power based, before temporarily approving rates).

114 *See, e.g.*, *Central Lincoln Peoples' Utility Dist. v. Johnson*, 735 F.2d 1101, 1123-1124 (9th Cir. 1984) ("Section 7(g) states that unless otherwise provided, costs and benefits, including fish and wildlife measures, shall be equitably allocated to power rates.").

transmission of electric power." It is not an FCRPS amortization cost or an irrigation cost.

For similar reasons, the OS-14 rate is not a rate for the sale of Federal power or transmission of non-federal power as contemplated by sections 9 and 10 of the Transmission System Act.[115] The OS-14 rate is neither a rate for the sale of power nor transmission service, but a rate intended to collect the amounts Bonneville pays generators for lost revenues after their generation has been displaced. It is also not a sale of electric power from reservoir projects under the Flood Control Act of 1944.[116]

In short, Section 7(a) of the Northwest Power Act does not supersede the specific cost allocation directives found in Section 7(g).

C. Bonneville Precedent Does Not Support the Allocation of Fish and Wildlife Costs to Transmission Customers

Joint Party 3 argues in its rebuttal testimony that Bonneville can and does collect fish and wildlife costs in transmission rates.[117] In support of this contention, Joint Party 3 points to Bonneville's inclusion in transmission rates of environmental study and mitigation costs associated with the construction of a specific transmission project.[118] The costs Joint Party 3 cites to are "certain, more costly steps in the construction and management of the [transmission] line,"[119] including additional land acquisition costs, costs associated with clearing logs, use of a helicopter instead of a crane, and easement/right-of-way conditions.[120] These are typical capital construction-type costs that have nothing to do with FCRPS operations. There are no

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115 16 U.S.C. § 838g; 16 U.S.C. § 838h.

116 16 U.S.C. § 825s. The remainder of Section 7(a) discusses the procedural standards that apply to the Commission's review of Bonneville's power and transmission rates.

117 *See* Baker, *et al.*, OS-14-E-JP03-02 at p. 15, line 23 – p. 16, line 18.

118 *See id.* at p. 16, lines 5-9.

119 *Id.* at p. 16, lines 7-8.

120 *See* Baker, *et al.*, OS-14-E-JP03-02 at Attachment 13, pp. 3-13 ("Bonneville Power Administration Kangley-Echo Lake Transmission Line Project Record of Decision," dated July 2003).

construction projects and no construction-related environmental costs at issue in this proceeding. There are only costs associated with Bonneville's FCRPS operations[121] – costs that Bonneville, the Commission and the Ninth Circuit have consistently held to be allocable solely to power rates.[122]

D. Exposing Transmission Customers to Liability for Power Costs Could Open the Door to Huge Potential Cost Shifts and Undermine Bonneville's Historic Rate Allocation Principles

Bonneville's proposed allocation of power cost to transmission customers in this case threatens to open the door to the unlawful inclusion of fish and wildlife or other power costs in transmission rates. Opening the door to fish and wildlife (and other) costs being allocated to transmission rates could expose transmission customers to potential cost shifts of a much greater magnitude. WPAG has suggested that Bonneville's proposed allocation of costs to wind generators' "appear[s] to be too small to provoke the positions being advanced by these parties in

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[121] The Northwest Power Act's references to fish and wildlife obligations specifically concern fish and wildlife obligations related to the operation of FCRPS power generating facilities, not to fish and wildlife conservation generally. *See* 96 Cong. Rec. S14,696 (statement of Senator Hatfield) (discussing the conservation provisions of the Pacific Northwest Electric Power Planning and Conservation Act) ("My distinguished colleague from Idaho (Mr. Symms) also was successful in amending the purposes of the act in subsection 2(6) to modify the phrase 'other facilities on the Columbia River and its tributaries' to read 'other power generating facilities on the Columbia River and its tributaries.' *This particular amendment is essential to insure that this bill and its many provisions related to facilities and fish and wildlife mitigation will exclusively deal with the Federal Columbia River Power System and other power generating facilities on the river and its tributaries* and will not in any way affect any other facilities or impoundment structures on the Columbia River or its tributaries in the Pacific Northwest region. *All this bill addresses are power generating facilities, and no provision or authority under this bill can be construed to cover any other facility or structure in the region*.") (emphasis added).

[122] *See, e.g.*, *Central Lincoln Peoples' Utility Dist. v. Johnson*, 735 F.2d 1101, 1123-1124 (9th Cir. 1984) ("Section 7(g) states that unless otherwise provided, costs and benefits, including fish and wildlife measures, shall be equitably allocated to power rates."); *U.S. Dept. of Energy - Bonneville Power Admin.*, 36 FERC ¶ 61,335 at 43 (1986) ("Concerning the section 7(g) argument by the California parties [that section 7(g) of the Regional Act bars the inclusion of fish and wildlife costs in nonfirm rates because it requires that such costs be allocated to regional customers], we agree with BPA that the language and legislative history of section 7(g) do not support the California parties' interpretation. Section 7(g) refers simply to the allocation of costs to power rates and not specifically to allocation of costs to firm power rates.") (Internal citation removed); *see also U.S. Dept. of Energy - Bonneville Power Admin.*, 29 FERC ¶ 63,039 at 65,096 (1984); *U.S. Dept. of Energy - Bonneville Power Admin.*, 25 FERC ¶ 61,140 at 61,375 (1983) (requiring that Bonneville provide data to prove that costs assigned to transmission are only transmission based, and not power based, before temporarily approving rates).

this proceeding,"[123] and therefore concludes that "these parties are simply seeking to minimize their exposure to oversupply management costs and maximize the benefits they receive from BPA when an oversupply event occurs."[124] In fact, the proper allocation of costs between transmission and power rates is a critical issue to wind generators going forward, as it should be for all Bonneville customers.

Bonneville's oversupply rate proposals implicate a fundamental legal principle—the allocation of costs and benefits pursuant to Northwest Power Act Section 7(g). If the costs of Bonneville's fish and wildlife program operations, or the inability to sell excess electric power, can be allocated to transmission rates, transmission customers could face the potential exposure to costs that far exceed those associated with oversupply. Conversely, such an allocation would open the door for transmission customers to argue that surplus power revenues (and other revenues) must also be allocated to the transmission function. The statutory provision cannot be read to allow allocation of costs but not benefits. Interpretation of Section 7(g) in this manner would conflict with and disrupt Bonneville's established precedent regarding allocation of fish and wildlife and surplus power revenues, opening the door to much larger and more contentious issues for the region.

Despite the position it has taken in this proceeding regarding cost allocation, Bonneville appears to recognize the tenuous nature of that position. In the Environmental Redispatch Policy Final ROD, Bonneville declined to adopt an approach nearly identical to that described in the current OS-14 proposal(s) due to concerns about the cost allocation language in Northwest Power Act Section 7(g). In that proceeding, Bonneville declined to adopt a policy of paying

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123 Bedbury, *et al.*, OS-14-E-WG-02 at p. 8, line 5.

124 *Id.* at p. 8, lines 8-10.

negative pricing and allocating the costs to generators, noting its discomfort with the cost allocation methodology this policy would entail:

> Another uncertainty of Tacoma's proposal is the outcome of the BPA rate case process that would be necessary to assign negative costs to the generators causing negative prices. Attempting to forecast the amount of negative prices would be very difficult and wind generators would strongly oppose the inclusion of these costs in a wind balancing rate. There would be significant debate whether the payments should be allocated to power or transmission for reasons previously stated. While many, like Tacoma Power, may believe BPA's equitable allocation ratemaking standard would permit allocation of negative pricing payments to transmission, this is an issue likely to generate significant controversy. Only when FERC has reviewed the issue and judicial review has been exhausted can we be certain of the outcome. . . . BPA believes at this time it should not pay negative prices based on an untested legal assumption.[125]

FERC, for its part, has given Bonneville no comfort on this issue.[126] Instead, the Commission has made clear in its orders discussing Bonneville's OMP it has not considered or spoken in any way to the lawfulness of Bonneville's proposed cost allocation under Northwest Power Act standards.

If Bonneville adopts a cost allocation that violates Section 7(g), its rate filing will likely be remanded by the Commission or the Ninth Circuit, further extending regional uncertainty regarding this issue. Bonneville should not continue to advance this flawed rate allocation proposal as a solution to its oversupply situation. As the Ninth Circuit observed in connection with Bonneville's Residential Exchange Program, Bonneville cannot evade the requirements of the Northwest Power Act:

> We conclude that BPA ignored the exchange program that Congress created in the NWPA and that BPA has implemented through its regulations. BPA proceeded from a flawed legal premise about its settlement authority, and its defense of the settlement as consistent with the NWPA appears to be post-hoc rationalization for BPA insisting on greater flexibility in designing a REP program than Congress was willing to give it. Congress ordained one system; BPA appears to prefer

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125 Environmental Redispatch Policy Final ROD at p. 47.

126 As discussed in greater detail in Section 7 below.

> another. In saying this, we do not impugn BPA's motives or its business judgment. BPA itself has written that as "a result of the implementation of the directives of the Northwest Power Act," "different customer classes may receive greater or lesser benefits. While it is unfortunate that some customer classes may receive greater benefits than other customer classes, BPA cannot unilaterally change the law." 2000 REP Settlement Agreement ROD at 80. Yet, it appears to us that, in an effort to spread its relatively cheap power across the Pacific Northwest, BPA has done precisely that.[127]

Bonneville, the Commission and the Ninth Circuit have consistently interpreted Section 7(g) to preclude allocation of such costs to transmission rates, and Bonneville must continue to allocate costs and benefits in accordance with the clear directives of the Northwest Power Act.

5. THE NORTHWEST POWER ACT AND TRANSMISSION SYSTEM ACT EQUITABLE ALLOCATION STANDARDS PROHIBIT THE ALLOCATION OF COSTS ASSOCIATED WITH OVERSUPPLY MANAGEMENT TO TRANSMISSION RATES

Section 7(g) of the Northwest Power Act explicitly states that costs associated with fish and wildlife costs, or with Bonneville's sale or inability to sell excess power, must be allocated to power rates. Bonneville's proposal in this proceeding, which allocates such costs to transmission rates, violates Section 7(g). Bonneville's proposed oversupply solution also conflicts with other overarching statutory principles governing the allocation of costs.

While the Bonneville Administrator has some discretion in the rate setting context, this discretion is not without limits. Bonneville's statutes create a framework for rate setting, and these statutes firmly establish the difference between power rates and transmission rates for cost allocation purposes. The Administrator does not have discretion to operate outside these statutory directives.[128] Both the Northwest Power Act and the Transmission System Act include an "equitable allocation" requirement that has been interpreted by the Commission to prohibit

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127 *Portland General Electric Co. v. BPA*, 501 F.3d 1009, 1036-37 (9th Cir. 2007).

128 *See Portland General Electric Co. v. BPA*, 501 F.3d 1009, 1031 (9th Cir. 2007); *M-S-R Public Power Agency v. BPA*, 297 F.3d 833, 844 (9th Cir. 2002), *amended by Ass'n of Pub. Agency Customers, Inc. v. BPA*, 126 F.3d 1158 (9th Cir. 1997).

the use of transmission rates to collect revenues to cover power costs. To that end, section 7(a) of the Northwest Power Act requires the Commission to ensure that Bonneville's rates, among other things, "insofar as transmission rates are concerned, equitably allocate the costs of the Federal transmission system between Federal and non-Federal power utilizing such system."[129] Similarly, section 10 of the Transmission System Act states as follows:

> The said schedules of rates and charges for transmission, the said schedules of rates and charges for the sale of electric power, or both such schedules, may provide, among other things, for uniform rates or rates uniform throughout prescribed transmission areas. The recovery of the cost of the Federal transmission system shall be equitably allocated between Federal and non-Federal power utilizing such system.[130]

After the Transmission System Act was enacted, the Commission determined that, in order for it to assure that Bonneville's rates are consistent with statutory standards, it would "require that [Bonneville] provide a separate accounting for its transmission system separate and apart from its accounting for its generation system."[131] The Commission has applied the Northwest Power Act equitable allocation standard in the same manner, stating that it "is in general agreement that the customers should be provided access to the full portion of the services for which they are being assigned costs."[132] In addition, during the Commission's review of Bonneville's 1983 rates, Bonneville sought reconsideration of the Commission's requirement to maintain separate accounting for the costs, revenues and deficits of transmission and generation. The Commission declined to grant interim approval of Bonneville's rates because Bonneville had not provided the required separate accounting, and further stated:

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129 Northwest Power Act § 7(a)(2)(C), 16 U.S.C. § 839e(a)(2)(C).

130 Transmission System Act § 10, 16 U.S.C. § 838h.

131 *U.S. Dep't of Energy, Bonneville Power Admin.*, 20 FERC ¶ 61,142, at 61,315 (1982).

132 *Id.* at 61,314.

> BPA's refusal to comply with our order precludes any type of tracking system which demonstrates that (1) transmission revenues are only being used to repay transmission costs; (2) *costs assigned to transmission are only transmission related costs*; and (3) any deficiencies or surpluses in transmission revenues are being tracked and collected or credited to the appropriate customer class. Without this information, we cannot determine whether BPA's transmission rates satisfy the statutory requirements of the [Northwest Power Act], as well as similar provisions in sections 9 and 10 of the [Transmission System Act].[133]

Bonneville subsequently argued that it could "apply revenues from one function, such as transmission, to temporarily support unrecovered costs of the other function."[134] The Commission permitted this, but made clear that "if [Bonneville] chooses to temporarily apply revenues from one function to unrecovered costs of the other function, [Bonneville] [should] account for these funds, repay them from the appropriate revenues and charge the costs to the appropriate customers."[135]

Bonneville has also recognized and applied this equitable allocation standard many times in the ratemaking context. For instance, in the BP-12 rate case, BPA acknowledged the requirement to separately account for its power and transmission functions when addressing customer concerns that the reliance by Bonneville's Power Services group on $150 million of transmission reserves for power rate purposes would violate the equitable allocation standard and Commission requirements. At the time, Bonneville explained that its "reserves proposal does not entail funding of [Power Services] expenses from [Transmission Services] revenues. Any reserves attributed to [Transmission Services] that are consumed for Power purposes will be restored from [Power Services] revenues."[136]

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133 *U.S. Dep't of Energy, Bonneville Power Admin*., 25 FERC ¶ 61140, at 61,375 (1983)(emphasis added).

134 *U.S. Dep't of Energy, Bonneville Power Admin*., 54 FERC ¶ 61,235, at 61,693 (1991).

135 *Id*.

136 2012 Wholesale Power and Transmission Rate Adjustment Proceeding (BP-12), Administrator's Final Record of Decision, BP-12-A-02, at p. 99 (2011) (citing to Lovell *et al*., BP-12-E-BPA-15, at 49).

The equitable allocation standard prohibits the allocation of oversupply costs – which are power costs – to transmission rates. Allocation to transmission customers of costs that are related to Bonneville's fish and wildlife operations, and costs of the inability to sell excess electric energy, cannot be reconciled with the Commission's directive that "costs assigned to transmission are only transmission related costs."[137] Despite Bonneville's various attempts to characterize oversupply as connected in some way to transmission use or transmission customers, Bonneville's rebuttal testimony makes clear that there is no such connection.[138]

6. BONNEVILLE'S PROPOSED OVERSUPPLY COST ALLOCATIONS DO NOT SATISFY FEDERAL POWER ACT SECTION 211A COMPARABILITY STANDARDS

Just as Bonneville's proposed oversupply rate violates the Northwest Power Act, it also violates the Federal Power Act. In addition to satisfying its Northwest Power Act ratemaking directives, any Bonneville oversupply rate must also satisfy the rate standard in Federal Power Act Section 211A. Specifically, Section 211A requires that an unregulated transmission entity, such as Bonneville, provide transmission services "at rates that are comparable to those under which the unregulated transmitting utility charges to itself."[139] The Commission's comparability standard is a well-established and fundamental tenet of the Commission's open access policy, and a standard that Congress did not alter when it included a comparability requirement in Federal Power Act Section 211A.[140]

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137 *U.S. Dep't of Energy, Bonneville Power Admin.*, 25 FERC ¶ 61,140, at 61,375 (1983).

138 *See* Metcalf, *et al.*, OS-14-E-BPA-03 at p. 11 line 16-p. 12 line 5.

139 16 U.S.C. § 824j-1(b)(1).

140 December 2011 Initial Order at P 32 ("[W]e find a compelling case here to exercise [FPA Section 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. FPA Section 211A is one statutory tool that Congress provided to ensure open access to transmission service at comparable and not unduly discriminatory or preferential rates, terms

The Commission explained in Order No. 888[141] that its open access tariffs and standards are based upon the comparability principles it has applied in individual cases since its decision in *American Electric Power Service Corporation*.[142] Under the Commission's standards, comparability requires that utilities offer third parties access on the same or comparable basis and under the same or comparable terms and conditions, as the transmission provider's own use of its system.[143] As Bonneville has stated, "[t]he Commission's test for comparability is 'whether the transmission owner treats affiliated and non-affiliated generators on a comparable basis.'"[144] Under the Commission's comparability standard, Bonneville must offer to its customers, at comparable rates, the transmission services it is reasonably capable of providing, and not just those services that it is currently providing to itself.

None of Bonneville's proposed OS-14 cost allocations satisfy the FPA section 211A comparability standard. Each cost allocation is noncomparable because each results in preferential treatment in favor of Federal generation--Bonneville does not subject its own FCRPS generation, or its own use of the transmission system to deliver FCRPS power, to the same cost allocations that it proposes to assess to its transmission customers.

Bonneville's Initial Proposal proposed a 50/50 sharing of oversupply costs between wind generators and Bonneville's power customers.[145] On December 20, 2012, the Commission

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and conditions.")

141 *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶ 31,036 at 31,647 (1996) ("Order No. 888").

142 *American Electric Power Service Corp*., 64 FERC ¶ 61,279 (1993), *reh'g granted*, 67 FERC ¶ 61,168, *clarified*, 67 FERC ¶ 61,317 (1994).

143 Order No. 888 at 31,647.

144 Bonneville Answer 211A Complaint at p. 99 (citing to *Bonneville Power Admin. v. Puget Sound Energy*, 125 FERC ¶ 61,273, P 13 (2008).).

145 *See* Frederickson, *et al.*, OS-14-E-BPA-01 at p. 7, lines 22-23; p. 8, lines 7-9 and p. 11, lines 11-14.

issued the December 2012 Order on Compliance Filing, finding that, "taken together, the rates and non-rate terms and conditions of the OMP and the cost sharing arrangement proposed by BPA do not result in transmission service for generating resources at rates that are comparable to those BPA charges itself, and on terms and conditions that are comparable to those under which [Bonneville] provides to itself and that are not unduly discriminatory or preferential,"[146] and noted that it was "not persuaded that a 50/50 sharing of displacement costs results in comparable transmission service for displaced wind generators."[147]

Bonneville then made its Supplemental Proposal, wherein it proposed to allocate all of the oversupply costs to transmission customers based upon "Actual Transmission Use" during oversupply hours.[148] Under this proposal, when Bonneville displaces generators under OMP, displaced generators would continue to have "Actual Transmission Use" for the purposes of allocating oversupply costs, even though such generators are unable to make use of their transmission rights during such hours (because Bonneville is using the displaced generators' transmission rights to deliver Bonneville's Federal power to displaced generator loads).[149] Meanwhile, the use of such transmission is *not* attributed to Bonneville Power Services for purposes of determining its "Actual Transmission Use."[150] Bonneville's Supplemental Proposal requires displaced generators to pay both transmission and oversupply charges for transmission system use during times when Bonneville Power Services has displaced their generation and co-opted their transmission rights so that Bonneville can dispose of its excess hydro power. Bonneville pays no transmission or oversupply charges for this use of the transmission system

146 December 2012 Order on Compliance Filing at P 45.

147 *Id*.

148 See Parker, *et al.*, OS-14-E-BPA-02 at p. 4, lines 8-10; p. 7, lines 6-10.

149 *See* Bonneville Response to Data Request CS-BPA-3.

150 *See* Bonneville Response to Data Request CS-BPA-2.

during OMP hours. The Supplemental Proposal treats non-Federal generation differently from Federal generation and is plainly noncomparable.

Bonneville's Supplemental Proposal received a great deal of criticism from customers. Without withdrawing the Supplemental Proposal, Bonneville included yet another oversupply cost allocation proposal in its rebuttal testimony. In its Rebuttal Proposal, Bonneville continued to propose that oversupply costs be collected solely from transmission customers, but in order to address certain customer comments, Bonneville decided to make a number of changes to its prior proposal.[151] Specifically, Bonneville proposed to (1) exempt transmission customers wheeling through the Bonneville BAA from oversupply charges;[152] (2) apply the charges to certain *generators* in Bonneville's BAA, rather than to transmission contract holders;[153] (3) exclude Slice customers from the portion of Bonneville Power Services' reallocation that is attributable to Bonneville surplus marketing at a price above zero;[154] and (4) withdraw the proposed Unauthorized Decrease Charge for Slice customers.[155] Bonneville describes its new proposal in summary as a proposal "to allocate oversupply costs to generation in BPA's balancing authority area scheduled for the hours of oversupply events, based on the source generation as identified by the transmission e-Tag. Costs allocated to BPA Power Services will be recovered from power customers based upon their Modified TOCAs."[156]

Bonneville's new proposal continues to charge non-Federal generation for "Actual Transmission Use" based on scheduled use, "such that all generation that is displaced under

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151 *See* Metcalf, *et al*., OS-14-E-BPA-03 at p. 2, lines 2-5.

152 *See id.* at p. 2, lines 9-14.

153 *See id.* at p. 2, lines 19-22.

154 *See id.* at p. 2, line 25-p. 3, line 1.

155 *See id.* at p. 3, lines 3-8.

156 *See id.* at p. 3, lines 10-13.

OMP would be charged based on its scheduled use."[157] Under this proposal, Bonneville Power Services continues to make use of the displaced generator's transmission rights without being identified as a "source generator,"[158] continuing the noncomparable treatment that is present in the Supplemental Proposal. Further, after Bonneville's various exemptions and carve-outs, its Rebuttal Proposal appears to be quite similar to the Initial Proposal – a cost allocation that has already been rejected by the Commission as noncomparable.[159]

Bonneville and its public power customers continue to misapprehend the Commission's comparability requirement. Bonneville represents that its Rebuttal Proposal satisfies the Commission's comparability principles because the new proposal allocates costs based on scheduled transmission usage.[160] The Commission orders finding Bonneville's Environmental Redispatch Policy and its Initial Proposal cost allocation to be noncomparable[161] did not discuss the use of scheduled, as opposed to actual, transmission usage during oversupply conditions.[162] Bonneville's attempt to satisfy the Commission's comparability standard by adjusting the OMP cost allocation methodology so that it is based on parties' scheduled transmission usage during oversupply events remains flawed.

Charging customers for transmission service that is not provided, while not charging Bonneville for its actual transmission usage, is not comparable treatment of affiliated and non-affiliated generators. Shifting this paradigm to assess transmission customers a portion of the oversupply costs based on *scheduled* transmission service that is not provided, while exempting

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157 *See id.* at p. 12, lines 17-18.

158 *See* Bonneville Response to Data Request JP03-BPA-1.

159 *See* December 2012 Order on Compliance Filing at P 59.

160 *See, e.g.,* Metcalf, *et al.*, OS-14-E-BPA-03 at p. 4, lines 21-24.

161 *See* December 2011 Initial Order at P 65.

162 *See* June 2013 Order Denying Rehearing at P 39.

Bonneville from any assessment because Bonneville does not update the schedule or e-Tag[163] to reflect the fact that generation source has been changed to the FCRPS, similarly fails to treat affiliated and non-affiliated generators on a comparable basis.

Joint Party 3 argues that comparability is met if Bonneville is simply required to pay the same rate for transmission services as others are required to pay.[164] The Commission's comparability test is not satisfied merely by examining the numerical value in the rate. Comparability requires not only that Bonneville pay the same dollar/MW rate as its transmission customers, but also that it pays the *same rate* under the *same circumstances.*[165] A uniform rate is not sufficient if it is not applied uniformly. In Bonneville's oversupply proposals, Bonneville's use of the transmission system is not accurately reflected in the OMP and instead Bonneville's use of transmission is attributed to displaced generators. Comparability is only satisfied when Bonneville provides transmission services at rates that are comparable in application and amount to those under which Bonneville charges itself.

7. THE FEDERAL ENERGY REGULATORY COMMISSION DID NOT DECLARE THAT OVERSUPPLY MANAGEMENT COSTS ARE TRANSMISSION COSTS

Multiple parties, including Bonneville, continue to look to the Commission's orders in Docket No. EL11-44 for guidance regarding how to allocate the costs associated with the OMP. While in its December 2012 Order on Compliance Filing the Commission discusses the need for customers to bear an appropriate cost burden related to OMP, it discusses transmission customer

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[163] Joint Party 3 has asserted that oversupply is an hour-to-hour problem. *See* Baker, *et al.*, OS-14-E-JP03-02 at p. 9, line 1. Oversupply is not an hour-to-hour problem. It is a multi-hour problem. Bonneville's administrative decision to implement an hour-by-hour "solution" does not change its nature as a multi-hour problem.

[164] *See*, Baker, *et al.*, OS-14-E-JP03-02 at p. 10, line 16-p. 11, line 2.

[165] *American Electric Power Service Corp*., 64 FERC ¶ 61,279 (1993), *reh'g granted*, 67 FERC ¶ 61,168 at 61,490-91, *clarified*, 67 FERC ¶ 61,317 (1994) (finding that "[A]n open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system.").

cost allocation only in the context of illustrating that Bonneville's originally proposed cost allocation apportioned a subset of transmission customers—wind generators—a cost burden that was excessive when compared to such generators' use of the system.[166] The Commission's June 2013 Order Denying Rehearing in clarified that "the Commission did not make any findings with regard to a cost allocation methodology based on transmission usage during oversupply conditions. Rather, the Commission suggested just one possible approach as an option that may result in an equitable allocation of costs, and also recognized that other approaches are possible."[167] The Commission went on to state that the December 2012 Order on Compliance Filing "provided guidance regarding a possible alternative cost sharing method, but did not make any determination on an appropriate cost allocation methodology,"[168] and further reiterated unequivocally "the Commission did not direct Bonneville to allocate displacement costs in a particular manner."[169]

In addition to Federal Power Act Section 211A requirements, Bonneville's OMP cost allocation must also comply with Bonneville's statutory directives, including its Northwest Power Act and Transmission System Act directives.[170] So far, the Commission has directed Bonneville to develop a method of handling its oversupply problem that reconciles and complies

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166 December 2012 Order on Compliance Filing at P 45 ("Bonneville has not demonstrated that all customers taking firm transmission service would bear an appropriate cost burden related to Bonneville's management of the transmission system during oversupply situations. *Transmission service for wind generators* that submit displacement costs *represents a fraction of the firm transmission service on Bonneville's system during oversupply situations, yet those entities are allocated half of displacement costs*. Based on the record in this proceeding, we are not persuaded that a 50/50 sharing of displacement costs results in comparable transmission service for displaced wind generators.") (emphasis added).

167 June 2013 Order Denying Rehearing at P 39.

168 *Id.* at P 41.

169 *Id.* at P 42.

170 *See* Beane, *et al.*, OS-14-E-IR-01 at p. 19, line 20-p. 24, line 2.

with all of its organic statutes, including Federal Power Act Section 211A.[171] In the June 2013 Order Denying Rehearing, the Commission explained that "the Commission directed Bonneville to devise a methodology that results in an equitable allocation of displacement costs and provides comparable transmission service. The Compliance Order did not make, and should not be interpreted as making, any determination as to the lawfulness, under any provisions other than section 211A, of allocating OMP-related costs to transmission rates."[172] Just as the Commission has never directed that OMP costs should be borne by transmission customers, the Commission has never indicated that allocating such costs to power customers would be inappropriate.

In response to a request for Bonneville to identify the provisions in its transmission customers' various contracts that permit the assessment of oversupply charges on generators,[173] Bonneville provided the following response: "Section 3(b) of Attachment P to BPA's Open Access Transmission Tariff provides that if a generator elects to be compensated for displacement costs, the generator 'shall be subject to cost allocation with respect to such facility for costs incurred under this attachment.'"[174] Bonneville seems to be resting its authority to assess oversupply charges on the faulty foundation of its Attachment P.

The Commission did not approve Bonneville's Interim Attachment P under the Section 211A standard in the absence of an approved cost allocation mechanism – indeed, it found that

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171 *See* December 2012 Order on Compliance Filing at 5.

172 June 2013 Order Denying Rehearing at P 41. Despite this clear statement by the Commission that it gave no consideration to the Northwest Power Act or other Bonneville ratemaking standards, certain rate case parties mistakenly assert that the Commission has already found that OMP costs can appropriately be allocated to transmission customers. *See, e.g.*, Baker, *et al.*, OS-14-E-JP03-02 at p. 8, lines 1-3.

173 Bonneville's tariff contains no provisions that permit it to charge transmission customers for oversupply costs. As applies to the Supplemental Proposal, for entities wheeling through the Bonneville BAA, even Bonneville has acknowledged that "[t]here are no contractual provisions that require a transmission customer with generation sourced outside of Bonneville's balancing authority area to accept free Federal hydropower." *See* Bonneville Response to Data Request IR-BPA-11.

174 Bonneville Response to Data Request IR-BPA-5. Bonneville objected to providing the other information as requiring a legal conclusion and being unduly burdensome.

"[t]he rate and non-rate aspects of Bonneville's proposal are intrinsically linked."[175] The Commission also stated that "it must consider both the rate and non-rate aspects of the compliance proposal to determine whether, consistent with section 211A of the Federal Power Act, Bonneville's proposal results in comparable and not unduly discriminatory treatment of all generating resources connected to Bonneville's transmission system."[176] In the June 2013 Order Denying Rehearing, the Commission explained that only after the completion of the current rate case, and its submission to the Commission for review, will the Commission evaluate the cost allocation methodology in conjunction with the non-rate terms and conditions to ensure comparability of transmission service.[177] To date, the Revised Attachment P has not been approved by the Commission on an interim basis or otherwise.

When Bonneville submitted the Interim Attachment P to the Commission, it requested the Commission's approval of the protocol based on the protocol being a "short-term solution," intended to apply for a single year, effective from March 31, 2012, through March 30, 2013.[178] In response, and based on Bonneville's representation that the OMP as submitted was temporary,[179] the Commission conditionally accepted "the OMP as a balanced *interim* measure that complies with our December Order, *subject to* Bonneville submitting a further compliance filing."[180] Bonneville's Interim Attachment P only purported to "authorize" it to assess costs

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175 December 2012 Order on Compliance Filing at P 43.

176 *Id.*

177 *See* June 2013 Order Denying Rehearing at P 43. The Commission also clarified that "despite the fact that Bonneville has already implemented certain aspects of the OMP, we continue to find that the proposed cost allocation methodology, the compensation, and the non-rate terms and conditions of the OMP are linked, and must be evaluated together to determine whether the OMP ensures comparable transmission service for all rates." *Id.* at P 38.

178 *See* Bonneville Compliance Filing at pp. 1, 4, 12.

179 *See* December 2012 Order on Compliance Filing at PP 6, 16.

180 *Id.* at P 46 (emphasis added); *see also id.* at Ordering Paragraph (A).

incurred under the attachment to generators who elected to submit a facility's costs of displacement, "in which case the Generator shall be subject to cost allocation with respect to such facility for costs incurred under this attachment."[181] This language would, theoretically, only allow Bonneville to assess the OS-14 Rate onto displaced generators, a result that has already been determined to be an unduly discriminatory and noncomparable treatment.

The Interim Attachment P provides no authority for Bonneville to allocate oversupply costs to any customers at this time—it has expired by its own terms; it does not allow an allocation of costs on transmission customers or generators within Bonneville's BAA generally; and it has not been finally approved by the Commission. The Revised Attachment P provides no authority for Bonneville to allocate oversupply costs to any customers—it lays out a plan for compensation for cost displacement, but no plan for cost allocation; and it has not been approved by the Commission either on an interim basis nor as part of the requisite complete OMP proposal (cost allocation methodology, compensation, and non-rate terms and conditions) required by the Commission. At this point, neither the Interim Attachment P, nor the Revised Attachment P can be considered as part of Bonneville's tariff.

Section 9 of Bonneville's OATT provides it with the ability to propose changes to rates, terms and conditions of service. Oversupply is not a "service" and so the OS-14 Rate cannot become integrated into Bonneville's tariff through this mechanism. However, since Bonneville believes its tariff provides it with authority to assess this rate, it should be noted that such changes can become effective "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 a

[181] Bonneville Compliance Filing at Ex. A, p. 1.

declaratory order under 18 CFR Sec. 35.28(e)." The Commission has not made this requisite finding with regard to Attachment P language and Bonneville has not demonstrated that it can satisfy the Section 9 standards that are required in order to modify its tariff to enable such charges. In order to be effective, all tariff changes have to meet the Section 9 standards.

8. BONNEVILLE'S PROPOSAL CONSTITUTES RATEMAKING IN VIOLATION OF NORTHWEST POWER ACT SECTION 7(i)

The Northwest Power Act requires Bonneville to follow certain procedures when it establishes or revises its rates, including publication of notice of proposed rates in the Federal Register, holding public hearings, and decision on the record.[182] Before Bonneville's rates can become effective, they must receive final approval from the Commission.[183]

Under Bonneville's OMP, during oversupply events, Bonneville displaces wind generators and thermal plants down to declared minimum generation levels, and replaces their hourly schedules with "free" FCRPS generation.[184] Providing "free" FCRPS generation is, in fact, a sale of FCRPS generation at a price of $0/MWh. Bonneville has acknowledged as much, stating repeatedly that this transaction is, in fact, a "sale of power at a zero price."[185]

By law, this sale cannot happen in a vacuum. The Ninth Circuit has stated that any sale of power by Bonneville must occur pursuant to an established rate.[186] In order to make such power sales, then, Bonneville must have in place an effective rate schedule that has been

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182 16 U.S.C. § 839e(i).

183 16 U.S.C. § 839e(i)(6).

184 *See, e.g.*, 211A Petitioners' Complaint at Bonneville presentation titled "BPA's Proposed Oversupply Management Protocol" at slide 10, discussed during the Feb. 14, 2012 public meeting on the proposed OMP attached as Attachment B.

185 *See, e.g.,* Answer of the Bonneville Power Administration at 9, 39 (Jul. 19, 2011) (describing Bonneville's sale of power at "zero price" during oversupply conditions); Environmental Redispatch Policy Final ROD at p. 51 (May 2011) (describing risk of zero cost power sales under Environmental Redispatch policy).

186 *See, e.g., Portland Gen. Elec. Co. v. Johnson*, 754 F.2d 1475, 1481 (9th Cir. 1985) (BPA's rates are not an interchangeable set of prices among which it is free to choose in any particular sale of energy; each rate is, by its own terms, available only to certain customers under certain conditions.") (decision overruled on other grounds).

established in accordance with the requirements of Section 7(i) of the Northwest Power Act.[187] In fact, no rate exists for the "sale of power at a zero price." Moreover, Bonneville is not even seeking to establish one. In this proceeding, Bonneville seeks to establish an oversupply rate to collect its displacement costs, but it neglects to include in its rate filing a rate for Bonneville's nonconsensual sale of power at a zero-price. None of Bonneville's current power rate schedules would apply to this nonconsensual sale.[188] Consequently, Bonneville's proposed method of addressing OMP would violate the requirements of Section 7(i).

In a past oversupply situation,[189] Bonneville was able to bypass the requirements of Section 7(i) due to two circumstances: the short-term, emergency nature of the Bonneville's sales, and the fact that counterparties voluntarily agreed to Bonneville's emergency sales.[190] Neither circumstance exists here. First, the oversupply situation at issue in this proceeding can hardly be considered an emergency: Bonneville has been well aware of the current oversupply

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187 *See, e.g., Cal. Energy Res. Conservation & Dev. Comm'n v. Bonneville Power Admin.*, 831 F.2d 1467, 1472 (9th Cir. 1987)("[R]ates are simply charges BPA imposes on its customers for the provision of service.") (citing Seattle, City Light Dep't v. Johnson, 813 F.2d 1364, 1367 (9th Cir. 1987).

188 *See* Bonneville Power Administration 2012 Power Rates Schedules and General Rate Schedule Provisions (FY 2012-2013) (revised Oct. 29, 2011, Dec. 7, 2011; Jan. 17, 2012; Mar. 14, 2012); approved at *U.S. Dep't of Energy – Bonneville Power Admin.*, 136 FERC ¶62,253 (2011).

189 Oversupply conditions on Bonneville's system are not unusual. For instance, in 1983 Bonneville experienced a period of unexpectedly high supply and unexpectedly low demand. *See, e.g., Cal. Energy Res. Conservation & Dev. Comm'n. v. Bonneville Power Admin.*, 754 F.2d 1470, 1471-72 (9th Cir. 1985) (describing the background and events surrounding the 1983 oversupply situation) (decision overruled on other grounds). Unlike under Bonneville's Environmental Redispatch Policy or OMP, Bonneville paid other joint owners of the Trojan nuclear power plant to shut down Trojan and replace the power that Trojan would have produced with hydroelectric power from Bonneville. *Id.* In particular, Bonneville paid $14.1 million for these "scheduling rights" to Trojan for the projected oversupply period of January 21, 1983 through April 30, 1983. *Id.*

190 The Ninth Circuit granted one-time, emergency relief from the ratemaking and approval requirements of the Northwest Power Act in March of 1985, but stated that such action should not be repeated outside an emergency. *Portland Gen. Elec. Co.,* 754 F.2d 1475, 1484 (9th Cir. 1985) ("We do not suggest, however, that impromptu action should be a regular feature of BPA's operations. The statutory ratemaking procedure must be the primary means for modifying BPA's rates and the availability provisions that apply to those rates. If short-term, emergency variations in rates and availability are required, provision for such emergency variations in the future should be built into the rate structure that is developed in ratemaking hearings and approved by FERC.") (decision overruled on other grounds).

situation for several years now,[191] and has been aware of the occurrence of oversupply situations generally for a much longer period of time.[192] Second, even when the Ninth Circuit permitted Bonneville to establish rates outside of the Northwest Power Act Section 7(i) requirements during the 1983 oversupply emergency, the Court noted the importance of the counterparties' voluntary participation in Bonneville's proposed "emergency" solution:

> While we cannot say that circumstances justifying similar action by BPA will never recur, we do not expect such rate modification action will become a regular feature of BPA's operations. Statutory ratemaking procedures will remain the primary mechanism for modifications of BPA's rates. Second, *our decision in this case relies on the fact that PGE and PP&L voluntarily participated in the transactions. A unilateral modification, even one that prevented economic waste, would stand on entirely different ground*.[193]

In this proceeding, the parties have not agreed to Bonneville's proposed solution. Under Bonneville's OMP, generators are forced to accept Bonneville's zero-priced power sale. Absent mutual agreement, Bonneville does not have an approved rate in place that applies to the power sale. As the Ninth Circuit has noted:

> By refusing to condemn a consensual arrangement that, in an emergency, temporarily lowered the rate that BPA charged to one group of customers, we do not suggest that BPA could lawfully increase its charges to any customer without the consent of that customer and without statutory ratemaking proceedings.[194]

Bonneville's proposed solution to oversupply has a number of flaws. In addition to conflicting with numerous mandatory legal requirements, including NWPA Section 7(g) and FERC's

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191 *See, e.g.,* Environmental Redispatch Final ROD at p. 10 ("High flows in the Columbia River system are not rare; there is a one-in-three change of flows at least as high as those of early June 2010 occurring in any year and lasting for one month or more.").

192 *See id. See also, e.g., Cal. Energy Res. Conservation & Dev. Comm'n. v. Bonneville Power Admin.*, 754 F.2d 1470 (9th Cir. 1985) (decision overruled on other grounds); Portland Gen. Elec. Co., 754 F.2d 1475 (9th Cir. 1985) (decision overruled on other grounds).

193 *Cal. Energy Res. Conservation & Dev. Comm'n. v. Bonneville Power Admin.*, 754 F.2d 1470, 1475 (9th Cir. 1985) (emphasis added) (decision overruled on other grounds).

194 *Portland Gen. Elec. Co.*, 754 F.2d 1475, 1483 (9th Cir. 1985) (emphasis added) (decision overruled on other grounds).

comparability standards, Bonneville's proposed solution would violate NWPA Section 7(i) by allowing Bonneville to force customers into non-voluntary power sales at zero cost without an effective rate or tariff in place authorizing such sales.

9. ADOPTION OF BONNEVILLE'S REBUTTAL PROPOSAL WOULD VIOLATE NORTHWEST POWER ACT AND APA PROCEDURAL REQUIREMENTS

Bonneville submitted its current Rebuttal Proposal at the same time parties submitted their rebuttal testimonies. However, parties' testimonies were in direct response to Bonneville's Supplemental Proposal – Bonneville's second amended OMP proposal in this proceeding. In the Rebuttal Proposal, without withdrawing the Supplemental Proposal, Bonneville proposed a third framework for allocating oversupply costs, whereby costs of the OMP would be assigned to certain generators within the Bonneville BAA proportional to their scheduled generation for the hour during oversupply event hours.[195]

The OS-14 procedural schedule did not provide parties an opportunity to submit surrebuttal testimony or otherwise comment upon Bonneville's Rebuttal Proposal.[196] Bonneville's failure to allow parties to respond to its Rebuttal Proposal creates a significant procedural deficiency. First and foremost, Bonneville is required by the Northwest Power Act to offer all parties "an adequate opportunity . . . to offer refutation or rebuttal of any material submitted by any other person or the Administrator."[197] Bonneville's failure to adjust the procedural schedule to allow for surrebuttal testimony after it changed its rate proposal and proposed a different framework for oversupply cost allocation is a clear violation of the act. Second, Bonneville's own Rules of Procedure Governing Rate Hearings echo this Congressional

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195 *See* Metcalf, *et al.*, OS-14-EBPA-03, at p. 4, lines 25-26.

196 *See* "Order Granting BPA Motion to Amend the Procedural Schedule," OS-14-HOO-33 (Aug. 12, 2013).

197 16 U.S.C. § 839e(i).

mandate, providing that, "Parties shall be provided an adequate opportunity to offer refutation or rebuttal on any material submitted by any other party or by BPA."[198] Bonneville's rules go on to state, "In lieu of cross- examination, the hearing officer is encouraged to allow the filing of surrebuttal testimony on an issue."[199]

By failing to allow opportunity for surrebuttal testimony, Bonneville has opened itself up to having its record of decision struck down on review. The Northwest Power Act states, in part, "For purposes of sections 701 through 706 of Title 5 [i.e., the Administrative Procedure Act ("APA")], the following actions shall be final agency actions subject to judicial review . . . 839f(e)(1)(G) final rate determinations under section 839e of this title . . . ."[200] Accordingly, rate making is reviewed pursuant to the APA.[201] The APA provides that a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law."[202] The Northwest Power Act requires Bonneville to provide parties with an adequate opportunity to rebut any material submitted by Bonneville or another party. Bonneville failed to provide parties such an opportunity when it submitted its Rebuttal Proposal and did not amend the OS-14 schedule to allow parties to comment on the new proposal. Bonneville's Rebuttal Proposal was introduced with no opportunity for surrebuttal and adoption of such a proposal would violate Northwest Power Act and APA requirements.

198 Procedures Governing Bonneville Power Administration; Rate Hearings, Section 1010.11.

199 *Id*.

200 16 U.S.C. § 839f(e)(1).

201 *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 806 (2012).

202 5 U.S.C. § 706(2)(d).

10. BONNEVILLE'S OVERSUPPLY PROPOSALS ARE INCONSISTENT WITH SOUND BUSINESS PRINCIPLES

Section 9 of the Transmission System Act requires Bonneville to establish rates "with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sounds business principles."[203] Bonneville's refusal to negotiate mutually agreeable arrangements with parties for displacement during oversupply events, and pay negative prices as necessary, violates Bonneville's directive to operate in accordance with sound business principles.

The rationale offered for Bonneville's proposals has primarily focused on Bonneville's view of its fish and wildlife obligations and its responsibility to charge low power rates.[204] Bonneville has not provided a justification as to how its actions are consistent with sound business principles. In *Pacific Northwest Generating Cooperative v. Bonneville Power Administration ("PNGC II")*, the Ninth Circuit held that Bonneville was required to justify that its proposed contract with Alcoa was consistent with sound business principles, even where the rate charged to Alcoa was authorized by statute.[205] Under *PNGC II*, it is clear that Bonneville's mere assertion that its action is consistent with sound business principles is insufficient. Further, the Court in *PNGC II* explained that demonstration of "sound business principles" must be based on a "reasonable business analysis of [Bonneville's] decision" and that Bonneville must provide "a rational business justification . . . supported by the record before the agency."[206]

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203 Transmission System Act § 10, 16 U.S.C. § 838h.

204 *See, e.g.,* Environmental Redispatch Policy Final ROD at pp. 20-21; Frederickson, *et al.*, OS-14-E-BPA-01 at pp.2-3; Parker, et al., OS-14-E-BPA-02 at p. 10; Metcalfe, et al., OS-14-E-BPA-03 at p. 6.

205 596 F.3d 1065, 1068-69 (9th Cir. 2010) ("*PNGC II*"). *See also, id.* at 1074 ("The mere fact that BPA has chosen to contract with a DSI at the statutorily authorized IP rate does not insulate the decision to contract from review under the 'sound business principles' standard.")

206 *Id.* at p. 1085.

Negotiating mutually agreeable arrangements with parties for displacement during oversupply events, and paying negative prices as necessary, is consistent with sound business principles. Many transmission providers undertake this approach in order to manage oversupply events, and the Commission has repeatedly approved the use of such an approach.[207] In addition, other federal power marketing agencies pay negative prices, and do not view such payments as anticompetitive or inconsistent with federal law.[208] Bonneville has acknowledged that overgeneration is a common occurrence, stating "[h]igh flows in the Columbia River system are not rare; there is a one-in-three chance of flows at least as high as those of early June 2010 occurring in any year and lasting for one month or more."[209] Bonneville has also acknowledged that other generation owners respond to overgeneration situations by selling at negative prices.[210] Further, at times in the past Bonneville itself has addressed oversupply by negotiating with counterparties for displacement or sales upon mutually agreeable terms, in some cases paying negative costs, and Bonneville has allocated the associated costs to power rates.[211]

To date, Bonneville has focused its efforts related to its oversupply on creating a captive load base for its energy by developing protocols to curtail unilaterally the generation and transmission rights of competing generators. Bonneville stated its motivation creating these

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207 *See, e.g., Midwest Indep. Sys. Operator*, Inc., 125 FERC ¶ 61,318 (2008); *Cal. Indep. Sys. Operator Corp*., 86 FERC ¶ 61,122 (1999) *reh'g denied*, 101 FERC ¶ 61,021 (2002); *Portland Gen. Elec. Co.,* 124 FERC ¶ 61,208 (2008).

208 According to the Western Area Power Administration ("WAPA"), two WAPA regions have paid negative prices on several occasions in recent years (the Colorado River Storage Project region and the Central Valley Storage Project region in California). *See e.g.,* Western Area Power Administration, Wind and Hydro Feasibility Study at p. 2-8 (Jun. 2, 2009) *available at* https://www.wapa.gov/ugp/powermarketing/WindHydro/Final%20WHFS%20Ver%20Mar-2010%205b.pdf.

209 Environmental Redispatch Policy Final ROD at p. 20.

210 *Id.* at p. 18.

211 San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, Docket No. EL00-95-249, "Direct Testimony and Exhibits of the Bonneville Power Administration, Testimony of Steve Oliver," dated Oct. 25, 2011) (reprinted in OS-14-E0CS-02 at pp. 27-31.)

protocols is its own economic decision not to pay negative prices,[212] a policy that advantages Bonneville's merchant function and preference customers.[213] Bonneville's dominance in the Pacific Northwest transmission and energy markets is indisputable – as WPAG observes, "BPA will be the largest single seller of excess power, and can be fairly described as making the market."[214] In light of this, it is especially troubling that Bonneville believes it is appropriate for it to enjoy the opportunity to profit in the market, while at the same time imposing an arbitrary pricing policy to minimize its exposure to downside market risk.[215] To be sure, such behavior increases Bonneville's profits and limits its "risks," but most market participants understand that participation in open and competitive markets involves the opportunity to benefit as well as the risk, at times, of losses.

Bonneville has argued that "marketers and thermal generators" will take advantage of Bonneville if it adopts a policy of paying negative prices, and engage in market manipulation in order to extract extreme negative prices from Bonneville, threatening Bonneville's ability to

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212 Environmental Redispatch Policy Final ROD at p. 12.

213 Iberdrola Renewables notes that Bonneville does in fact pay negative prices. Indeed, Bonneville's payment of displacement costs under OMP is a payment of administratively-determined negative prices. When Bonneville displaces a wind generator's load and substitutes Bonneville's own power, and then makes a payment to the wind generator for this substitution, Bonneville is in effect accepting a negative price for its own hydropower, however Bonneville may choose to characterize it. In other words, Bonneville can and does pay negative pricing, even in the OMP context, though not on a market basis but on terms administratively dictated by Bonneville.

214 Bedbury, *et al*., OS-14-E-WG-02 at p. 8, lines 18-19.

215 Bonneville's conduct may not constitute the more common form of market manipulation where traders engage in fraudulent acts that distort markets through deception, however, the questionable behavior at issue here is the use of market power in one market (transmission) to affect prices in another market (wholesale power). In Order No. 890, the Commission recognizes that such conduct could, depending on the facts, constitute market manipulation. *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 at P 1751 (2007) ("We adopt the NOPR proposal for a case-by case approach to considering whether OATT violations may constitute market manipulation."). As market manipulation precedent continues to develop, courts and regulators are paying more attention to manipulation based upon dominant market position, including where such behavior occurs in the absence of deception. *See* Spence, et al., *Energy Market Regulation and the Problem of Market Power*, B. C. L. REV. 131, 185 (2011). Further, "[t]o uncover market manipulation, the question must be asked as to "whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand." Abrantes-Metz, *et al.*, *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357 (2013).

meet its statutory objectives.[216] Bonneville, however, has no evidence of such behavior and cannot justify its own questionable behavior based on speculation that Commission-regulated generators will engage in prohibited market manipulation.[217] Market manipulation carries severe penalties of up to $1 million per violation per day.[218] Bonneville cannot use mere speculation that some entities might violate the Commission's rules, or that the Commission would fail to address any such violations, as a legitimate basis for adopting policies that conflict with its statutory obligations.

Bonneville has not demonstrated that its proposals are consistent with "sound business principles" nor has it provided "a rational business justification . . . supported by the record before the agency."[219] Instead, Bonneville has offered a series of ill-supported shifting proposals, as it casts about in search of a solution that will facilitate its preferred cost allocation result. Bonneville's proposals are contrary to its statutes, and continue to exhibit the original discriminatory premise repeatedly found unlawful by the Commission.[220] In order to avoid yet another remand, Bonneville should abandon its proposals and adopt the lawful and rational solution urged herein.

11. CONCLUSION

The various oversupply cost allocations proposed in this proceeding violate Northwest Power Act and Transmission System Act rate directives, fail to satisfy Federal Power Act Section 211A comparability standards, and are inconsistent with Bonneville's statutory obligations to operate in accordance with sound business principles. Bonneville has offered no

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216 Bonneville Answer to 211A Complaint at p. 70-73.

217 Petitioners' 211A Complaint at 48.

218 16 U.S.C. § 825o-1(b).

219 *PNGC II* at p. 1085.

220 *See e.g.,* December 2011 Initial Order at P 62; December 2012 Order on Compliance Filing at P 39.

principled argument or theory for its proposals, and adopting any of the proposals currently in the record in this proceeding is highly likely to result in rejection of the proposal by the Commission or the Ninth Circuit or both. A remand will necessitate further similar processes for Bonneville and the region.

In order to avoid such an outcome, Iberdrola Renewables urges Bonneville to abandon its oversupply proposals and negotiate mutually agreeable bilateral arrangements with parties for displacement during oversupply events, and pay negative prices as necessary, then allocate those costs to power rates in accordance with Northwest Power Act Section 7(g). By adopting this solution, Bonneville can comply with the law and put an end to the regional discord that has existed since the spring of 2011.

Respectfully Submitted,

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