

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

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

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

Docket No. EL11-44-001

v.

Bonneville Power Administration

ORDER DENYING REHEARING

(Issued December 20, 2012)

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

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

² 16 U.S.C. § 824j-1 (2006).

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

I. Background

A. Bonneville

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

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

³ 16 U.S.C. § 832 (2006).

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

⁵ 16 U.S.C. § 837e (2006).

⁶ 16 U.S.C. § 838d (2006).

⁷ 16 U.S.C. § 839f(i)(1)(B) (2006).

⁸ 16 U.S.C. § 839f(1)(3) (2006).

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

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

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

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

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

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

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

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

B. Bonneville's Environmental Redispatch Policy

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

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

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

¹⁵ 16 U.S.C. § 1536 (2006).

¹⁶ 33 U.S.C. § 1341 (2006).

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

C. The December Order

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

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

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

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

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

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

II. Procedural Matters

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

¹⁹ *Id.* P 62

²⁰ *Id.* P 65.

²¹ *Id.* P 73.

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

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

January 6, 2012. Charles Pace filed an opposition to Mid-West's motion and request for rehearing on January 23, 2012.²⁴

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

III. Substantive Matters

A. Jurisdictional Concerns

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

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

²⁵ 18 C.F.R. § 385.713(d).

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

²⁷ *Id.*

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

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

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

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

²⁹ Bonneville Rehearing at 19-20.

³⁰ Bonneville Rehearing at 18.

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

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

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

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

Commission Determination

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

³² Bonneville Rehearing at 21.

³³ NRECA Rehearing at 14.

³⁴ *Id.* at 12.

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

³⁶ NRECA Rehearing at 13.

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

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

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

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

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

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

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

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

B. The Scope of December Order

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

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

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

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

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

⁴¹ Bonneville Rehearing at 7.

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

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

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

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

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

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

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

⁴⁶ APPA Rehearing at 10.

⁴⁷ *Id.* at 14.

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

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

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

Commission Determination

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

⁴⁸ Joint Intervenors Rehearing at 18.

⁴⁹ *Id.* at 37.

⁵⁰ Western Public Agencies Group Rehearing at 17-18.

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

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

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

2. Requirement to File An Entire Section 211A Tariff

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

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

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

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

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

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

Commission Determination

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

⁵³ Bonneville Rehearing at 8-9.

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

⁵⁵ LPPC Rehearing at 3, 8-10.

⁵⁶ Joint Intervenors Rehearing at 39.

⁵⁷ Joint Intervenors Rehearing at 29.

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

C. Non-Comparable Transmission Service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

43. Parties argue that the record does not support a finding that the Environmental Redispatch Policy results in non-comparable transmission service.⁶⁹ Joint Intervenors contend that the Record of Decision supporting the Environmental Redispatch Policy is clear that Petitioners and other similarly situated wind generators are treated fairly, if not afforded preferential transmission service, because they are the last non-federal resource that Bonneville interrupts when low load conditions are present.⁷⁰

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

⁶⁵ *Id.* at 25.

⁶⁶ *Id.* at 27.

⁶⁷ *Id.* at 27.

⁶⁸ Bonneville Rehearing at 11-14.

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

⁷⁰ Joint Intervenors Rehearing at 15.

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

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

Commission Determination

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

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

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

⁷³ Western Rehearing at 22-23.

⁷⁴ *Id.* at 23.

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

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

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

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

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

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

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

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

D. Impact of Bonneville's Actions On Transmission Service

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

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

⁷⁷ March Compliance Filing at 26.

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

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

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

⁷⁸ Joint Public Parties Rehearing at 13-14.

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

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

⁸¹ *Id.* at 29.

⁸² *Id.* at 32.

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

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

Commission Determination

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

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

⁸⁴ NRECA Rehearing at 18.

⁸⁵ Joint Intervenors Rehearing at 30.

⁸⁶ Joint Intervenors Rehearing at 35.

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

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

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

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

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

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

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

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

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

E. Evidentiary Record

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

⁸⁹ CAISO Operating Protocol No. 2390

⁹⁰ CAISO Tariff Section 11.5.6.1.

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

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

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

⁹² Joint Intervenors Rehearing at 38, citing *East Texas Elec. Coop. v. FERC*, 331 F.3d 131, 136 (D.C. Cir. 2003) (citing *Fla. Power & Light Co. v. FERC*, 88 F.3d 1239, 1243 (D.C. Cir. 1996); *City of Vernon v. FERC*, 845 F.2d 1042, 1046 (D.C. Cir. 1988)).

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

⁹⁴ Joint Intervenors Rehearing at 38.

⁹⁵ *Id.* at 41.

⁹⁶ *Id.* at 44.

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

Commission Determination

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

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

⁹⁷ NRECA Rehearing at 29.

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

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

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

F. Bonneville's Authority to Act under the LGIA

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

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

¹⁰⁰ In the December Order, the Commission stated, "[r] egardless of the magnitude of the loss, however, Petitioners have demonstrated that Bonneville's [Policy] results in transmission service that is not comparable to the service it provides itself, justifying the Commission's exercise of its authority under section 211A." December Order, 137 FERC ¶ 61,185 at P 63.

¹⁰¹ Joint Intervenors Rehearing at 42-43.

¹⁰² *Id.* at 22.

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

Commission Determination

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

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

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

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

G. Miscellaneous Issues

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

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

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

¹⁰⁴ LPPC Rehearing at 17.

¹⁰⁵ Western Rehearing at 30.

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

Commission Determination

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

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

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

¹⁰⁶ Bonneville Rehearing at 9-10.

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.