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July 19, 2011

VIA ELECTRONIC FILING

The Honorable Kimberly D. Bose, Secretary
The Honorable Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 1st Street, NE
Washington, DC 20006

Re: Iberdrola Renewables, Inc. et al. v. Bonneville Power Administration
Docket No. EL11-44-000

Dear Secretary Bose and Deputy Secretary Davis:

Enclosed please find a copy of the *Comments of Joint Intervenors* for filing in the above-referenced docket. A copy of this pleading is being served on all parties listed on the official service list for this proceeding. If you have any questions, please do not hesitate to contact me immediately.

/s/ Sherry A. Quirk
Sherry A. Quirk, Esq.

Counsel for Joint Intervenors

Enclosure

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

Complainants,

v.

Bonneville Power Administration

Respondent.

Docket No. EL11-44-000

**COMMENTS
OF JOINT INTERVENORS**

Pursuant to the Commission’s June 15, 2011 Notice of Complaint and June 20, 2011 Notice of Extension of Time issued in this proceeding, Public Power Council (“PPC”), Pacific Northwest Generating Cooperative (“PNGC”), and Northwest Requirements Utilities (“NRU”) (collectively “Joint Intervenors”) hereby submit comments in response to the Complaint filed by Iberdrola Renewables, Inc. (“Iberdrola Renewables”); PacifiCorp; NextEra Energy Resources, LLC (“NextEra”); Invenergy Wind North America LLC; and Horizon Wind Energy LLC (“Horizon”) (collectively “Complainants”) in this proceeding.¹

¹ Complaint And Petition For Order Under Federal Power Act Section 211A Against Bonneville Power Administration Requesting Fast Track Processing, Docket No. EL11-44-000 (filed June 13, 2011) (“Complaint”).

I. INTRODUCTION

The Complaint is, at its core, a broadside attack on Bonneville Power Administration's ("Bonneville") Final Record of Decision ("ROD")² on the Interim Environmental Redispatch and Negative Pricing Policies ("Interim ERP"). It is also a bold effort to make Northwest ratepayers the guarantors of the subsidies and business risks of wind generators. The Complainants admit that their dispute with Bonneville rests on Bonneville's determination in the ROD not to include in its rates to preference customers compensation to the Complainants for the Production Tax Credits ("PTCs") and Renewable Energy Credits ("RECs") that Complainants claim they would have received in the absence of the Interim ERP. Complainants contend that Bonneville's decision is simply an economic choice, thereby seeking to transform their displeasure with the ROD into claims of discrimination and transmission market power that, if substantiated, would arguably provide a basis for the Commission to exercise its jurisdiction over unregulated transmitting utilities under Sections 211A and 212 of the Federal Power Act ("FPA"). The facts of this case, however, do not support Complainants' claims and do not provide a defensible basis for the Commission to exercise its jurisdiction over unregulated transmitting utilities under the FPA.

As demonstrated below, the Complainants' contentions, in fact, fail to support the claims advanced.

First, the Complainants' argument that the Interim ERP reflects an economic choice by Bonneville rather than a decision balancing Bonneville's various statutory responsibilities is undone by the extensive and careful discussion in the Interim ERP of those very responsibilities. It is simply not credible for the Complainants to say that the Interim ERP is not based upon the

² *Administrator's Final Record of Decision, BPA's Interim Environmental Redispatch and Negative Pricing Policies*, dated May 13, 2011, ("ROD") available at: http://www.bpa.gov/corporate/pubs/RODS/2011/ERandNegativePricing_FinalROD_web.pdf.

need to balance multiple responsibilities, including statutory, reliability and environmental responsibilities. This characterization is nothing more than an ill-conceived effort to obscure the actual content of the Interim ERP in aid of the Complainants' desire to transform this case into an example of discrimination in transmission, thereby invoking the Commission's jurisdiction, and should be rejected.

Second, the Complainants' contention that under the Large Generator Interconnection Agreements ("LGIAs") Bonneville does not have the right to implement the Interim ERP flatly ignores the language of those contracts which authorize Bonneville to take the very actions Bonneville has taken. The LGIAs clearly empower Bonneville, as the Balancing Authority in its Balancing Authority Area ("BAA"), to comply with mandatory reliability standards, which include maintaining the generation and load balance and frequency within Bonneville's BAA. The Interim ERP is a protocol aimed at achieving compliance with reliability standards and maintaining reliability within its BAA during overgeneration conditions in low-load periods while also meeting Bonneville's environmental responsibilities, which during such conditions requires power generation rather than spilling water. Further, the LGIAs clearly contemplate that Bonneville will modify its operating protocols and procedures instructions, just as it has done with the promulgation and implementation of the Interim ERP.

If there is any remaining doubt about Bonneville's authority to curtail generation to maintain system reliability, as contemplated by the Interim ERP, it is resolved by the language of the LGIAs themselves. Section 9.7.2 explicitly states:

9.7.2 Interruption of Service. If required by Good Utility Practice to do so, Transmission Provider may require Interconnection Customer to interrupt or reduce deliveries of electricity if such delivery of electricity could adversely affect Transmission Provider's ability to perform such activities as are necessary to safely and reliably operate and maintain the Transmission System. The following provisions shall apply to any interruption or reduction permitted under this Article 9.7.2.

It is vitally important to note that all of these provisions are included in the existing LGIAs that have been executed by the Complainants. Thus, Complainants' extensive argument objecting to Bonneville's effort to "unilaterally" modify existing LGIAs is simply misplaced.

Third, Complainants assert that the Interim ERP violates the terms of Bonneville's Open Access Transmission Tariff ("OATT") by improperly curtailing Complainants' transmission service on a discriminatory basis. However, when examined in light of the actual tariff language of both Bonneville's OATT and the Commission's *pro forma* OATT, it is clear that Bonneville's actions do not constitute a curtailment of transmission service within the meaning of Bonneville's OATT. Bonneville's actions are a curtailment of generation, based upon Bonneville's balancing of its statutory, environmental and reliability responsibilities in overgeneration conditions that occur rarely during the spring runoff.

Complainants' further attempt to invoke the Commission's remedial authority under Sections 211A or 212 of the FPA does not provide a basis for relief. Both of these sections relate to the provision of transmission services by unregulated transmitting utilities (like Bonneville). However, the Complainants have failed to establish that the Interim ERP involves the rates, terms or conditions of transmission service. Moreover, Section 212(i) (in language not quoted or cited by the Complainants) clearly states that the Commission's authority under that section, when applied to the Federal Columbia River Transmission System ("FCRTS"), is subject to "otherwise applicable Federal laws," which "shall continue in full force and effect and continue to be applicable to the system...." Thus, not only do Complainants' assertions fail to prove why the Commission should act under these sections, they also neglect to acknowledge the obligation that the Commission has to recognize that the FCRTS is subject to other applicable laws – as extensively discussed in the ROD adopting the Interim ERP.

The Complainants broadly allege that the Interim ERP is discriminatory and claim that the curtailments unfairly target wind generators. While it is true that under the LGIAs, which authorize curtailment of generation, generation curtailment must be made on “an equitable, non-discriminatory basis,”³ it is clear that the Interim ERP meets this standard. The Interim ERP applies to all generators in the Bonneville BAA. *Indeed, Bonneville has made dispatch of wind the highest priority (i.e., wind is the last generation off the system) of all non-Federal generators.* In stark illustration of its non-discriminatory intent, the Interim ERP requires Bonneville to curtail its own Federal wind generation, as well as curtailing thermal and non-wind REC-earning generation, such as non-federal small hydropower, before curtailing wind generators. Moreover, the list of actions that Bonneville will take prior to curtailing non-Federal wind is extensive and is evidence of the fact that Bonneville is making every effort to avoid curtailment of wind generators within the constraints in which it must operate.

Having failed to establish a basis for the Commission to take any remedial action, it is unnecessary for the Commission to address the specific relief that the Complainants have sought – negative pricing to address the alleged harms caused by the Interim ERP. However, it is well-established that the Commission’s authority over the power and transmission rates charged by Bonneville is limited to appellate-type oversight. The Commission has no authority to instruct Bonneville on how, as an initial matter, the agency should develop its power and transmission rates. Furthermore, given the Commission’s obvious lack of jurisdiction, the Complainants, in effect, lack standing to seek this remedy from the Commission.

The Commission's authority over Bonneville is bounded by the limited jurisdiction granted to the Commission by Congress, and by the myriad of other federal laws applicable to Bonneville. The Commission does not possess the jurisdiction to afford the relief sought by the

³ Section 9.7.2.2 of the LGIA (Attachment L to the Bonneville OATT).

Complainants and in so doing would completely disregard the environmental, operational and reliability responsibilities that Bonneville must meet as part of its statutory responsibilities. The Complainants provide no basis for the Commission to order Bonneville to disregard its statutory responsibilities.

It is ironic that the Complainants would seek to have this Commission ignore the various statutory responsibilities overlaid on Bonneville's operations in order to realize their investment expectations. Complainants have offered no statutory basis for their theory that RECs and PTCs are entitlements, guaranteed to be paid. In fact, there is no guarantee that the expected rate of return embodied in a PTC will be afforded to investors. This irony is enhanced by the fact that wind generators have enjoyed extraordinary assistance from the federal hydropower system in the Northwest, which has enabled development of a robust wind generation sector. Given this level of support, it is startling that wind generators would now demand to be made whole in those instances where Bonneville must balance its environmental, operational and reliability concerns to ensure the integrity of the FCRPS. Nonetheless, the Complainants demand exactly that.

In fact, the allocation of risks associated with PTCs is simply not the business of Bonneville. Rather, it is a matter more properly addressed as a contractual matter in the project documents between a wind generator and its customer. The possibility that PTCs or RECs are unavailable for the projects in question is not the responsibility of Bonneville's preference customers, particularly when the majority of power generated by these projects is sold to customers outside of Bonneville's control area. There is simply no remedy within this Commission's jurisdiction for the harm alleged by the Complainants.

The Complaint is most accurately understood as an attack on the ROD and, more subjectively, an expression of the Complainants' frustration over the complexity of being a

power supplier in the Pacific Northwest. However the venue for this frustration is not the Commission. Even if the Commission were to determine that it has *some* jurisdiction over the matters raised in this Complaint, Joint Intervenors urge the Commission to stay its hand and decline to order mediation or a settlement judge proceeding – let alone a hearing – pending resolution of the issues raised by Complainants in the proper forum. Ultimately, Complainants’ real avenue of relief may lie with the United States Congress where they may address the issue of whether a PTC should be denied to a wind generator during certain hydrologic conditions.

Finally, the Joint Intervenors note that the Complaint fails to meet the elements required by the Commission’s Rule 206(b). Rule 206(b) requires a complainant to set forth the statutory or regulatory requirements that have been violated. Nowhere in the Complaint do Complainants provide a basis in law or statute for Bonneville and therefore, Bonneville’s customers, to compensate wind generators for PTCs and RECs that wind generators would have received had Bonneville not been bound by law to generate hydropower rather than to dispatch wind. In fact, no such authority exists.

Rule 206(b)(8) explicitly requires that complaints include documents supporting the facts alleged in the complaint, including contracts and affidavits. The Complaint is starkly devoid of such support. Complainants include only one affidavit setting forth the fact that export capability was available during a day Bonneville implemented the Interim ERP. Clearly that affidavit cannot provide all the factual support for the relief sought by the Complainants. Moreover, Complainants provide no documentation of the harm they allegedly suffered as a result of Bonneville’s actions. In fact, the documents that would presumably provide a basis for the allegations in the Complaint are inexplicably absent. Key agreements, such as the executed LGIAs, are not provided. The facts surrounding the application of the Interim ERP are not

supplied. In light of these deficiencies, the Joint Intervenors urge the Commission to find that this Complaint is procedurally defective and dismiss it.

II. DESCRIPTION OF THE PARTIES

PPC is a non-profit trade organization that represents the common interests of approximately 100 consumer-owned electric utilities that are preference customers of Bonneville. PPC's members purchase power and transmission from Bonneville at the rates set by Bonneville. Many of PPC's members also purchase wind and other renewable energy from non-federal generators located in Bonneville's BAA and deliver that energy to their loads across Bonneville's transmission system. Some PPC members also own wind and other renewable generation in Bonneville's BAA and elsewhere in the Northwest.

PNGC is a wholesale generation and transmission electric cooperative with 16 rural electric distribution member cooperatives serving retail electricity customers in seven Western states. PNGC meets the power needs of its members with a combination of purchases from Bonneville, renewable resources, and market purchases. PNGC also holds a Network Integration Transmission Service ("NITS") contract with BPA to meet the transmission needs of its members. PNGC is a statutory preference customer of Bonneville under the Bonneville Project Act⁴ and the Pacific Northwest Electric Power and Conservation Act ("Northwest Power Act"),⁵ is a Joint Operating Entity under the Northwest Power Act, and holds power sales contracts with Bonneville through fiscal year 2028.

NRU is a non-profit trade organization that represents the common interests of 50 consumer-owned electric utilities that are preference customers of Bonneville. NRU's members

⁴ *Bonneville Project Act of 1937*, 16 U.S.C. § 832 (1937).

⁵ *Pacific Northwest Electric Power Planning and Conservation Act*, 16 U.S.C. § 839.

are primarily non-generating electric distribution utilities serving end-use electric consumers that rely on Bonneville as their primary supplier of wholesale power and transmission services.

Among them, PPC, PNGC and NRU represent the interests of the vast majority of Bonneville's consumer-owned utility customers. Under the Complainants' theory of the case, if the Commission were to order Bonneville to pay the requested compensation to the Complainants, Bonneville would be required to pass on those costs through its transmission or power rates to its transmission or power customers, including members of PPC, PNGC and NRU.

III. STATEMENT OF THE CASE

A. The Instant Proceeding.

This case concerns Bonneville's curtailment of wind generation and redispatch of replacement hydropower from the Federal Columbia River Power System ("FCRPS") or other energy from generation projects in Bonneville's BAA. Bonneville's curtailment practices are part of its Interim ERP, which are documented in Bonneville's May 13, 2011 ROD.⁶

In the ROD, Bonneville explains that high flow conditions caused by spring runoff create environmental protection issues. Specifically, these conditions could result in dangerous levels of Total Dissolved Gas ("TDG") that may be fatal to fish protected by court orders issued pursuant to the Endangered Species Act ("ESA")⁷ and Clean Water Act ("CWA").⁸ In order to meet its environmental and statutory responsibilities and maintain system reliability, Bonneville manages high flows by running water through FCRPS generators. In the ROD, Bonneville established a policy that when full use of federal generation is necessary to protect water quality

⁶ The policies set forth in the ROD will remain in place until March 30, 2012.

⁷ *Endangered Species Act of 1973*, 16 U.S.C. 1531 *et seq.* (1973).

⁸ *Clean Water Act of 1977*, 33 U.S.C. 1251 *et seq.* (1977).

pursuant to the ESA and the CWA, and Bonneville has exhausted all reasonable means of spilling and storing water and otherwise disposing of excess federal power, it will dispatch federal hydropower at no cost to displace other generation within its BAA. Bonneville's ROD provides that Bonneville will not pay negative energy prices to induce entities to curtail their output and take the federal hydropower offered for free.

On June 13, 2011, Complainants initiated this proceeding arguing that Bonneville is "using its transmission market power to curtail competing generators in an unduly discriminatory manner" to protect its "preferred" power customer base from the negative economic impacts of surplus power created under high flow conditions. Complainants allege that Bonneville does not have the authority to curtail wind generators. Moreover, Complainants argue that Bonneville's Interim ERP unduly discriminates against wind generation and unduly prefers other customers by curtailing wind generation and replacing wind power with hydropower without compensating wind generation. Complainants seek various forms of relief and request that the Commission resolve the issues raised in the Complaint using the Fast Track process.

On June 15, 2011, the Commission issued a Notice of Complaint setting a deadline for the answer and protests of July 5, 2011, and on June 20, 2011 issued a Notice of Extension of Time extending that deadline until July 19, 2011. PPC, PNGC and NRU filed motions to intervene in this proceeding on June 16, June 20, and June 21, respectively.

B. History of the Interim ERP.

The Army Corps of Engineers and the Bureau of Reclamation operate the FCRPS for multiple public purposes, including flood control, fish and wildlife protection, irrigation, power production, navigation, and recreation. As part of its fish and wildlife protection obligation, those federal agencies, along with Bonneville, must protect, mitigate, and enhance the river's

fish, including salmon, steelhead, sturgeon and bull trout, which are listed as threatened or endangered under the ESA.⁹

High flows in the Columbia River system are common in years with rapid snowmelt and create specific protection needs for fish. Water that cannot be stored has to travel downstream and must be either spilled or run through the generators. When too much water is spilled over a spillway, it can produce high concentrations of TDG in the water, which can cause serious injuries or even death to fish, and salmonids in particular. To protect fish, state water quality standards under the CWA limit allowable levels of TDG.¹⁰ Since water that is run through the turbines does not increase dissolved gas levels significantly, loading the hydropower generators during such high-water events is a primary tool for maintaining safe conditions for fish. That, of course, produces energy and that energy production may occur during periods when demand for energy is low.

For the power and transmission system to operate reliably, the energy produced must be balanced with load. Excess generation in relation to loads creates high frequency and, if the imbalance is sufficiently severe, it can lead to blackouts. Therefore, as the Balancing Authority, Bonneville must ensure that balance is always intact.¹¹ Since the 1970's, Bonneville has routinely disposed of surplus power produced during high flow periods at very low rates to utilities in the Northwest and California. By displacing their fuel with cheap hydropower, operators of coal, oil, natural gas and other power plants could reduce their output while saving

⁹ The Administrator and other Federal agencies responsible for managing, operating, or regulating hydroelectric projects on the Columbia River and its tributaries must operate the FCRPS “in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated.” 16 U.S.C. § 839b(h)(11)(A)(i).

¹⁰ See *e.g.*, *Northwest Sportfishing v. Wash. State Dept. of Ecology*. Super. Ct. of Wash., Thurston Cnty., Docket No. 10-2-01236-0 (May 20, 2011).

¹¹ See North American Electric Reliability Corporation (“NERC”) NERC Reliability Standard BAL-002-0.

money. Over the last few years, however, these measures have not been sufficient and it has become increasingly difficult for Bonneville to manage the overgeneration supply.

In recent years, a major contributor to oversupply of generation has been the development of merchant wind generation.¹² Specifically, wind development in the Bonneville BAA has been rapid. In 2005, a total of 500 MW of wind generation was located in the Bonneville BAA and in 2011 that number has leapt to more than 3,550 MW.¹³ Despite the fact that the wind is largely consumed by loads outside of the Bonneville BAA, Bonneville is left to deal with balancing loads and resources using the FCRPS.

The problem of oversupply related to increased wind generation is not a new concern. The region discussed the issue in 2006 and 2007 as evidenced by the report issued by the Northwest Wind Integration Forum that stated:

In a carbon-constrained environment, the discussion over maintaining or enhancing hydro system flexibility is not limited to its historic scope, or one that can simply be reduced to a willingness to pay. Rather, it will become a discussion that also involves trade-offs between potential fish impacts and the ability to provide real reductions in greenhouse gas emissions – through the ability of wind to displace thermal resource generation and associated emissions to the maximum

¹² Some of the other factors contributing to the overgeneration supply situation include: (1) lower than expected demand for energy as a result of the recession; (2) addition of independent power producers as a result of market deregulation in the 1990s; (3) reduction of available reservoir storage space available to manage high spring flow events as a result of state flow augmentation requirements; and (4) addition of highly variable renewable generation, such as wind, to the hydroelectric base of the Columbia River system. Northwest Overgeneration: An assessment of potential magnitude and cost, http://www.bpa.gov/corporate/AgencyTopics/ColumbiaRiverHighWaterMgmt/BPA_Overgeneration_Analysis.pdf.

¹³ BPA Wind Generation Capacity, <http://www.bpa.gov/corporate/WindPower/index.cfm>. Bonneville has one of the highest, if not the highest ratio of wind generation (nameplate) to average load of any utility in the country. See Bonneville, *Balancing Act - BPA grid responds to wind power boom*, (2008) p. 4 (http://www.bpa.gov/corporate/pubs/fact_sheets/08fs/Wind-balancing-act-Nov2008.pdf). Approximately 80% of wind generation connected to Bonneville's grid is exported outside the balancing authority area. Mainzer, et al., Direct Testimony of Bonneville, BP-12-E-BPA-23, p. 4, lines 6-13 (Nov. 23, 2010) (<https://www.bpa.gov/secure/RateCase/openfile.aspx?fileName=BP-12-E-BPA-23.pdf&contentType=application%2fpdf>). In 2010 Bonneville stated that “[i]t is not widely known that only 400 MW of the 2,800 MW of wind on the BPA system serves the loads of preference customers located within the BPA balancing authority.” Post-Workshop Reply Comments of the Bonneville Power Administration, *Order Instituting Rulemaking to Develop Additional Methods to Implement the California Renewables Portfolio Standard Program*, California Public Utilities Commission Rulemaking 06-02-012 & 08-08-009, p. 4, May 12, 2010, available at <http://docs.cpuc.ca.gov/EFILE/CM/118108.htm>.

extent possible. While that work is beyond the current scope of this effort, this group believes that this is a dialogue that must commence within the region.

In recognition of the potential for wind power integration to adversely impact fish operations, the Council, in Action GEN-9 of its Fifth Power Plan, calls for an assessment of the effects of “shaping” large amounts of wind power on other hydropower system operations. The purpose of the Council’s recommendation is to ensure that the use of the hydropower system for integrating wind power does not adversely affect other hydropower system operations.¹⁴

In 2008 Bonneville took up the matter again in its draft paper, *Connecting Variable Generating Resources to the Federal Columbia River Transmission System (FCRTS)*, Dec. 8, 2008.¹⁵

Bonneville described the problem of providing balancing reserves for wind generation and explained that the problem was exacerbated during spring run-off, expressly noting that during those conditions balancing reserves would have to be reduced to protect endangered fish species:

[U]nder high-flow seasons (*e.g.* May and June), carrying reserves to compensate for possible under-generation by variable generators may limit the FCRPS’s ability to generate. This may, in turn, inhibit the FCRPS’s ability to move the necessary volumes of water through the turbines (through increased generation) consistent with legal requirements such as Total Dissolved Gas (TDG) limits. The upward reserves that the system could carry would be limited to the amount of capacity that could be made available without violating the TDG limits.¹⁶

In June 2010, Bonneville faced an oversupply of generation from surging spring runoff, wind power and thermal power. Lack of demand for federal hydropower, even at zero cost, threatened to create river conditions dangerous to fish.

[Federal] system operators managed through this first coincidence of high wind and high streamflows. In addition to actions within the hydro system itself, these steps included reducing nuclear plant output, storing water in Canadian reservoirs, providing power at little or no cost to utilities to displace operation of their thermal power plants, and temporarily reducing amounts of balancing reserves

¹⁴ The Northwest Wind Integration Plan, pp. 42-43 (2007) (<http://www.nwcouncil.org/energy/Wind/library/2007-1.pdf>).

¹⁵ Bonneville finalized this paper in March 2009 after taking two rounds of comments from industry participants. See Bonneville website at http://transmission.bpa.gov/wind/op_controls/connecting_var_gen_resources070210.pdf.

¹⁶ Bonneville, *Connecting Variable Generating Resources to the Federal Columbia River Transmission System (FCRTS)*, p. 3 (Dec. 8, 2008).

provided to wind power projects.¹⁷

Although most Northwest thermal generation shut down or reduced to minimum operating levels and instead took the offered no-cost federal power, wind generators did not shut down and continued to operate, sometimes operating at full output capacity.¹⁸ Flow requirements caused Bonneville to reduce the amount of balancing reserves set aside for wind generators and, as a result, generation by those wind generators was curtailed periodically during the oversupply event.¹⁹ Although Bonneville managed through that event, operationally there was very little else that it could have done to reduce excess spill and comply with its statutory environmental responsibilities.²⁰

Recognizing the serious need to establish a protocol for overgeneration situations in which endangered fish species were threatened, Bonneville initiated a public dialogue on options for planning and responding to overgeneration events. Over the past year, Bonneville has worked closely with the region, and especially the Complainants, to explore potential immediate and long-term solutions to the oversupply problem. Beginning in October of 2010, Bonneville held public workshops to discuss possible measures that can be taken to plan for overgeneration events and performed various studies to inform those discussions. All of the Complainants were invited to actively participate in the discussions. Cognizant of the fact that wind generators had

¹⁷ Bonneville, *Columbia River high-water operations [June 1–14, 2010]*, p. 1 (Sept. 2010) (<http://www.bpa.gov/corporate/pubs/final-report-columbia-river-high-water-operations.pdf>).

¹⁸ “During the event, regional thermal generation significantly declined as utilities consumed very low or no cost BPA hydropower instead. Loads remained fairly flat and low due to cool weather. Wind power fluctuated between zero and almost full output as storms blew through the region.” Bonneville, *Columbia River high-water operations [June 1–14, 2010]*, p. 6 (Sept. 2010) (<http://www.bpa.gov/corporate/pubs/final-report-columbia-river-high-water-operations.pdf>).

¹⁹ *Id.* at pp. 8-10.

²⁰ In addition to disposing of hydro power at zero or very low prices, Bonneville also cancelled or delayed non-essential hydro unit outages, moved spill within the hydro system to increase generation at fish-passage projects, reduced spill and shaped generation to avoid overgeneration on the FCRPS in low-load hours, obtained flow changes at Canadian reservoirs and took other actions, including cycling the region’s only nuclear plant. *Id.* at pp. 6-8, (Sept. 2010) (<http://www.bpa.gov/corporate/pubs/final-report-columbia-river-high-water-operations.pdf>).

an economic incentive to operate as much as possible because they received financial benefits during operation in the form of PTCs and RECs, Bonneville committed from the start that “it would take all reasonable actions including measures that affect Federal generation, before redispatching any non-Federal generator in BPA’s Balancing Authority Area.”²¹ It has clearly stated that it would redispatch wind generators only as a measure of last resort and only when necessary for it to comply with its statutory environmental obligations.²² Sticking by its commitment, on April 8, 2011, Bonneville began weekly conference calls to brief the interested parties, including the Complainants, on specific measures it was taking to anticipate oversupply conditions and avoid the need for environmental redispatch. Bonneville continually requested and evaluated ideas for actions it could take this year, as well as in the next several years, to manage the oversupply events in a way that was acceptable to the stakeholders while allowing Bonneville to comply with its statutory responsibilities.

IV. BONNEVILLE’S ACTIONS UNDER THE INTERIM ERP HAVE NOTHING TO DO WITH EXERCISING TRANSMISSION MARKET POWER AND BONNEVILLE HAS PROMULGATED AND IMPLEMENTED THE INTERIM ERP IN A NON-DISCRIMINATORY MANNER.

Complainants assert that Bonneville’s promulgation and implementation of its Interim ERP is an exercise of “transmission market power” and that Bonneville has engaged in unduly discriminatory conduct.²³ Complainants elaborate on their allegations claiming that:

This undue discrimination is not the result of a *reliability or environmental condition*. Rather, as the Final [Record of Decision] indicates, it is an *economic choice*. Bonneville could address any reliability and environmental concerns by

²¹ ROD at 54.

²² See Working Together to Address Northwest Oversupply of Power (May 2011); Statement on Environmental Redispatch and Negative Pricing (Dec. 3, 2010); see also ROD at 57 (environmental redispatch “will only be triggered when all other reasonable actions outlined in this Final ROD have been taken to reduce excess spill in the FCRPS power system.”).

²³ Complaint at 2.

making consensual contractual arrangements to curtail thermal, non-federal hydro, and wind generation, or to store energy outside the region.²⁴

As discussed in greater detail herein, none of these assertions are correct.²⁵ Complainants ignore the multiple statutory responsibilities under Bonneville's authorizing statutes and strain to describe the promulgation and implementation of the Interim ERP as an abuse of transmission market power in order to reach the Commission's broad remedial authority to remedy undue discrimination under the FPA. Bonneville's actions under the Interim ERP have nothing to do with exercising transmission market power and Bonneville has promulgated and implemented the Interim ERP in a non-discriminatory manner.

A. The Interim ERP is a Reasonable and Non-Discriminatory Means for Bonneville to Maintain Reliability While Complying with Its Environmental Responsibilities.

Complainants' statement that Bonneville's actions and the Interim ERP are "not the result of a reliability or environmental condition" is in error and startlingly so. Among other things, the statement is at odds with (i) the ROD regarding the Interim ERP, (ii) Bonneville's experience with high hydro conditions in June of 2010, and (iii) the stakeholder process that led to the implementation of the Interim ERP. For example, Bonneville states in the Interim ERP that:

Under Environmental Redispatch, Bonneville will temporarily substitute renewable, carbon-free hydropower for other generation when necessary *to ensure FCRPS operations are consistent with Bonneville's environmental, statutory, and reliability responsibilities*. During an Environmental Redispatch, utilities and consumers who purchase wind power or other energy would continue to receive the full energy deliveries associated with their transmission schedules, but the energy would originate from the FCRPS instead of other resources.

As explained in the previous section, during times of high flows, all reasonably practicable actions must be taken to operate the FCRPS consistent with Bonneville's environmental responsibilities. During the June 2010 events, in order to match this generation with load, Bonneville offered free hydropower to

²⁴ *Id.* at 4 (emphases added).

²⁵ Nor have Complainants come close to making the requisite showing to satisfy the Commission's requirements for a complaint pursuant to Rule 206. See Section VI, *infra*, and 18 C.F.R. § 385.206 (2011).

generators within Bonneville's Balancing Authority Area, resulting in most of the thermal generators in the Northwest shutting down.

With another 3,000 MW of wind generation expected to interconnect to the Bonneville transmission system over the next few years, and with the potential for even higher flows than those experienced in June 2010, the proposed Environmental Redispatch protocol is now necessary to ensure consistency with Bonneville's *environmental, statutory, and reliability* responsibilities.

Bonneville 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 Bonneville Balancing Authority Area and dangerous TDG levels in the Columbia River system, and to provide options to reduce generation in Bonneville's Balancing Authority Area *in order to maintain system reliability, while meeting its environmental and statutory responsibilities.*²⁶

In short, the Interim ERP is replete with references to both Bonneville's reliability responsibilities as a Balancing Authority and its environmental responsibilities under the various statutes that apply to Bonneville. It simply is not credible for Complainants to say that the Interim ERP is not the result of reliability or environmental conditions.

It was the Complainants' decision to locate their generating resources in the Northwest and specifically in Bonneville's BAA; therefore the Commission should reject any statement or implication by the Complainants that they did not know or were unaware of the attributes of the electricity market in the Northwest (*e.g.*, the nature of the Federal hydroelectric resources, the multiple environmental responsibilities that Bonneville and other federal agencies are required to balance, and Bonneville's responsibilities as the transmission provider and Balancing Authority for its BAA). As discussed in Section IV.B, the generation curtailment at the center of Complainants' claims is neither curtailment of transmission service nor a violation of Bonneville's OATT. Rather, the generation curtailment in the Interim ERP is a balancing of Bonneville's responsibilities under the Northwest Power Act²⁷ and its obligations to comply with

²⁶ See Interim ERP at 14 (emphases added).

²⁷ 16 U.S.C. § 839 (2006).

the North American Electric Reliability Corporation’s (“NERC”) Mandatory Reliability Standards, as well as the environmental responsibilities imposed by the ESA²⁸ and the CWA.²⁹

Complainants knew when they signed their interconnection agreements that Bonneville must maintain the frequency and the generation and load balance within its BAA. Under NERC’s reliability standards, a Balancing Authority like Bonneville must, among other things, “maintain Interconnection steady-state frequency within defined limits by balancing real power demand and supply in real-time.”³⁰ In addition, Bonneville must comply with the NERC disturbance control standards (“DCS”) that are meant to “ensure the Balancing Authority is able to utilize its Contingency Reserve to balance resources and demand and return Interconnection frequency within defined limits following a Reportable Disturbance.”³¹

Complainants also were fully aware of Bonneville’s environmental responsibilities when they signed their interconnection agreements. As described in the Interim ERP, the Army Corps of Engineers and the Bureau of Reclamation operate the FCRPS for multiple public purposes, including flood control, fish and wildlife protection, irrigation, power production, navigation, and recreation. The Bonneville Administrator (“Administrator”) and other Federal agencies responsible for managing, operating, or regulating hydroelectric projects on the Columbia River and its tributaries must operate the FCRPS “in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated.”³² As part of the fish and wildlife protection obligations, those federal agencies,

²⁸ *Endangered Species Act of 1973*, 16 U.S.C. § 1531 *et seq.* (1973).

²⁹ *Clean Water Act of 1977*, 33 U.S.C. § 1251 *et seq.* (1977).

³⁰ NERC Reliability Standard BAL-001-0.1a.

³¹ NERC Reliability Standard BAL-002-0.

³² Northwest Power Act, 16 U.S.C. § 839b(h)(11)(A)(i).

along with Bonneville, must protect, mitigate, and enhance the river's fish, including salmon, steelhead, sturgeon and bull trout, which are listed as threatened or endangered under the ESA.³³

In addition, high flows in the FCRPS system are common in years with rapid snowmelt and create specific protection needs for fish. Water that cannot be stored has to travel downstream and must be either spilled or run through the generators. When too much water is spilled over a spillway, it can produce high concentrations of TDG in the water, which can cause serious injury or death to fish, and salmonids in particular.³⁴ To protect fish, state water quality standards under the CWA limit allowable levels of TDG.³⁵ Since water that is run through the turbines does not increase dissolved gas levels significantly, loading the hydropower generators during such high-water events is a primary tool for maintaining safe conditions for fish. That, of course, produces energy and that energy production may occur during periods when demand for energy is low.

Notwithstanding Complainants' characterizations to the contrary, the Interim ERP is the means through which Bonneville balances compliance with its environmental statutes and maintenance of reliability within its BAA.³⁶ If there were no environmental requirements, the Army Corps of Engineers and the Bureau of Reclamation could assist in meeting reliability requirements in overgeneration conditions by simply spilling more water over the dams. However, Bonneville and the other Federal agencies must comply with the ESA and CWA. As noted above, compliance with these statutes limits the amount of spill due to TDG limitations under the ESA and CWA. The Interim ERP is aimed at: (i) maintaining reliability and

³³ See Interim ERP at 5-8.

³⁴ *Id.* at 5-7.

³⁵ *Id.*

³⁶ The Commission itself is familiar with balancing statutory responsibilities. The Commission is required to comply with other federal statutes in fulfilling its statutory duties (*e.g.*, statutes covering environmental review and protection, financial reporting, and information technology reporting).

addressing overgeneration under high-hydro, low-load conditions given the statutory must-run nature of the Federal hydroelectric resources in those circumstances; and (ii) addressing statutory obligations under the ESA and CWA. Complainants' claim to the contrary that Bonneville's actions are "not the result of a reliability or environmental condition" is incorrect, at odds with a plain reading of the Interim ERP, and contradicted by the extensive stakeholder process that led to the Interim ERP (a stakeholder process in which Complainants participated).

As discussed in the next section, the generation curtailments at the center of Complainants' claims are authorized under their interconnection agreements. Furthermore, the generation curtailments are neither curtailments of transmission service nor violations of Bonneville's OATT.

B. Bonneville's Actions under the Interim ERP Are Authorized by the Interconnections Agreements, Do Not Involve the Curtailment of Transmission Service, and Do Not Violate Bonneville's OATT.

1. Bonneville's Actions under the Interim ERP Are Authorized under the Generator Interconnection Agreements Executed by Complainants.

Complainants allege that Bonneville does not have the right under the executed LGIAs to either implement the Interim ERP or order generation curtailments as contemplated by the Interim ERP.³⁷ Complainants are wrong on both counts. It is clear from reading the LGIAs that Complainants agreed to comply with Western Electricity Coordinating Council ("WECC") reliability criteria and Bonneville's operating protocols and procedures as they may change from time to time.³⁸

Under Section 4.3 of the LGIA, each party is required to perform all of its obligations:

³⁷ Complaint at 46.

³⁸ As noted earlier, BPA also must comply with the requirements imposed by the ESA and CWA. Compliance with these statutes limits the amount that can be spilled since spill raises TDG, kills fish, and would cause a violation of the ESA and CWA.

in accordance with Applicable Laws and Regulations, Applicable Reliability Standards, and Good Utility Practice, and to the extent a Party is required or prevented or limited in taking any action by such regulations and standards, such Party shall not be deemed to be in Breach of this LGIA for its compliance therewith.³⁹

Under Section 4.3.1 of the LGIA, the “Interconnection Customer shall comply with the provisions of the WECC Reliability Criteria Agreement that are applicable to generators.”⁴⁰ As noted earlier, as the Balancing Authority in its BAA, Bonneville must comply with NERC’s mandatory reliability standards for the WECC. These standards include, among other things, maintaining the generation and load balance and the frequency within Bonneville’s BAA.⁴¹ In addition, under Section 9.3 of the LGIA, Bonneville as the Transmission Provider “may provide operating instructions to Interconnection Customer consistent with this LGIA and Transmission Provider’s *operating protocols and procedures as they may change from time to time.*”⁴²

Furthermore, under the under Section 9.4 of the LGIA, the Interconnection Customer must:

operate the Large Generating Facility and Interconnection Customer’s Interconnection Facilities in accordance with *all applicable requirements of the Control Area of which it is part*, as such requirements are set forth in Appendix C, Interconnection Details, of this LGIA. Appendix C, Interconnection Details, *will be modified to reflect changes to the requirements as they may change from time to time.*⁴³

It simply is beyond controversy that (i) the LGIAs require interconnection customers to comply with reliability standards and all Control Area requirements, and (ii) that the compliance obligations under the LGIAs contemplate that those requirements “may change from time to

³⁹ Section 4.3 of the LGIA (Attachment L to the Bonneville OATT).

⁴⁰ Section 4.3.1 of the LGIA (Attachment L to the Bonneville OATT).

⁴¹ See NERC Reliability Standard BAL-001-0.1a.

⁴² LGIA Section 9.3 - Transmission Provider Obligations (emphasis added). Section 9.3 also provides that the “Transmission Provider will consider changes to its operating protocols and procedures proposed by Interconnection Customer.” See also *Bonneville Power Administration*, 112 FERC ¶ 61,195 at P 20 (2005) (indicating that under Section 9.3, the Transmission Provider has the responsibility for establishing the Interconnection Customer’s operating instructions and operating protocols and procedures (which include reliability criteria)).

⁴³ LGIA Section 9.4 – Interconnection Customer Obligations (emphasis added).

time.” The Interim ERP is a Bonneville “operating protocol and procedure” and a “Control Area requirement” with which interconnection customers agreed to comply under the LGIAs. Complainants’ arguments are at odds with the provisions of their own LGIAs and should be rejected by the Commission.

While unnecessary to go beyond the plain meaning of the aforementioned provisions, Joint Intervenors note that the “rules of interpretation” under the LGIAs further evidence Complainants’ agreement to comply with the Transmission Provider’s operating protocols and procedures and Control Area requirements. The rules of interpretation provide, in relevant part that:

*reference to any agreement (including this LGIA), document, instrument or tariff means such agreement, document, instrument, or tariff as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof.”*⁴⁴

The rules of interpretation also provide that “reference to any Applicable Laws and Regulations means such Applicable Laws and Regulations as amended, modified, codified, or reenacted, in whole or in part, and in effect from time to time, including, if applicable, rules and regulations promulgated thereunder.”⁴⁵

Finally, the Complainants claim that the LGIAs “do not permit curtailment as contemplated by the [Interim ERP].”⁴⁶ Complainants’ allegation appears to be the equivalent of calling “up” “down” or “night” “day”. Section 9.7.2 of the LGIA is entitled “Interruption of Service” and reads as follows in relevant part:

9.7.2 Interruption of Service. If required by Good Utility Practice to do so, Transmission Provider may require Interconnection Customer to interrupt or reduce deliveries of electricity if such delivery of electricity could adversely

⁴⁴ LGIA Section 30.3(3) (emphasis added).

⁴⁵ *Id.* at Section 30.3(4) (emphasis added).

⁴⁶ Complaint at 46 and 55.

affect Transmission Provider’s ability to perform such activities as are necessary to safely and reliably operate and maintain the Transmission System. The following provisions shall apply to any interruption or reduction permitted under this Article 9.7.2:

9.7.2.1 The interruption or reduction shall continue only for so long as reasonably necessary under Good Utility Practice;

9.7.2.2 Any such interruption or reduction shall be made on an equitable, non-discriminatory basis with respect to all generating facilities directly connected to the Transmission System. . . .⁴⁷

By its terms, Section 9.7.2 of the LGIAs permits curtailment of generation if not doing so “could adversely affect Transmission Provider’s ability to perform such activities as are necessary to safely and reliably operate and maintain the Transmission System.”⁴⁸

Joint Intervenors emphasize that all of the aforementioned provisions are contained within the *existing* LGIAs executed by the Complainants. In other words, the promulgation and implementation of Bonneville’s Interim ERP is contemplated and authorized under the existing LGIAs executed by Complainants. Complainants spend a significant portion of their Complaint alleging that Bonneville does not have the right to “unilaterally modify the terms of the existing LGIAs” (referring to Bonneville’s proposed clarifying changes to Appendix C of the LGIAs).⁴⁹ However, Bonneville’s actions in developing and implementing the Interim ERP do not depend upon Bonneville’s proposed changes to Appendix C of the LGIA. Rather, Bonneville’s actions under the Interim ERP are among the actions authorized and addressed under the existing LGIAs executed by Complainants.

Complainants’ arguments are premised on an erroneous and purported conflict between the Interim ERP and the Bonneville OATT and the Bonneville LGIAs. Properly understood, the

⁴⁷ LGIA at Section 9.7.2.

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, Complaint at 51-55.

LGIAs obligate the interconnection customer to comply with Bonneville operating protocols and procedures and BAA requirements as those protocols, procedures, and requirements are modified or change from time to time. However, it also is important to note that Complainants *do not* challenge Bonneville’s authority and right to promulgate and adopt the Interim ERP itself as a means of satisfying Bonneville’s reliability and environmental responsibilities that arise from the rapid increase in wind power in the Northwest. There is a good reason for the absence of any attack on Bonneville’s authority to promulgate and adopt the Interim ERP. As noted in the Interim ERP, the amount of wind generation in the Northwest has increased the power system’s maximum generation output significantly and requires balancing reserve capacity to compensate for within-hour movement and forecast error.⁵⁰ Providing the balancing reserve capacity consumes a significant portion of the operating flexibility of the FCRPS.⁵¹ Given the events in the spring of 2010⁵² and Bonneville’s operating, Balancing Authority, statutory, and environmental responsibilities, it is reasonable and prudent that Bonneville established a plan (in consultation with Complainants and other stakeholders) to maintain the reliability of the system in overgeneration conditions while, at the same time, complying with its environmental responsibilities.

2. The Interim ERP Does Not Involve Curtailment of Transmission Service and Does not Violate Bonneville’s OATT.

Complainants state that the Interim ERP violates Bonneville’s OATT.⁵³ Complaints cite to Section 13.6 of Bonneville’s OATT regarding point-to-point (“PTP”) transmission service and explain that the section “permits curtailment of firm transmission service in order to maintain

⁵⁰ Interim ERP at 9.

⁵¹ *Id.*

⁵² See ROD at 9-11 and discussion in Section III.B and IV.A, *supra*.

⁵³ Complaint at 39-40.

system reliability, but such curtailment must be made ‘on a non-discriminatory basis to the transaction(s) that effectively relieve the constraint.’”⁵⁴ Complainants also cite to Section 33.2 of Bonneville’s OATT regarding NITS for the same point that curtailment of transmission service must be on a non-discriminatory basis.⁵⁵

Complainants’ arguments about transmission curtailments under Bonneville’s OATT are flawed for the simple reason that those provisions of the OATT do not apply to the curtailment of generation under the Interim ERP. “Curtailment” is defined under the Bonneville OATT (as well as under the Commission’s Order 890⁵⁶ pro-forma OATT) as “[a] reduction in firm or non-firm transmission service in response to a transfer capability shortage as a result of system reliability conditions.”⁵⁷ Bonneville’s actions under the Interim ERP (*i.e.*, curtailing generating resources as a last result in overgeneration conditions and substituting Federal hydropower resources), do not involve reducing “firm or non-firm transmission service in response to a transfer capability shortage as a result of system reliability conditions.” Therefore, Bonneville’s actions and the Interim ERP do not violate the transmission curtailment provisions of the Bonneville OATT.

Under the Interim ERP Bonneville is not curtailing transmission service or a transmission schedule.⁵⁸ Indeed, Bonneville is substituting Federal hydropower to ensure that all transmission schedules are met.⁵⁹ Environmental redispatch under the Interim ERP is a limitation on the

⁵⁴ *Id.* at 39 (citing to Bonneville OATT Section 13.6).

⁵⁵ *Id.* at 40 (citing to Bonneville OATT Section 33.2).

⁵⁶ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh’g*, Order No. 890-A, 73 FR 2984 (January 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) (“Order 890”).

⁵⁷ See Section 1.8 of the Bonneville OATT and Section 1.8 of the Commission’s *pro-forma* OATT.

⁵⁸ Interim ERP at 43.

⁵⁹ *Id.*

ability of a generator interconnected to the FCRTS to generate and, as stated previously, this limitation is contemplated and authorized under the interconnection agreements executed by the Complainants.

Complainants' erroneous notions that the Interim ERP primarily is about transmission service and that it violates Bonneville's OATT infect and undermine several arguments in the Complaint. For example, Complainants assert that Bonneville's OATT does not give Bonneville the right to implement the Interim ERP.⁶⁰ Complainants' argument is based on two incorrect notions. The first error (discussed above) is that the curtailment under the Interim ERP is curtailment of "transmission service." The second error is that Section 6 of the Pacific Northwest Consumer Preference Act (16 U.S.C. § 837(e)) prohibits curtailment under the Interim ERP.⁶¹ Section 6 of the Pacific Northwest Consumer Preference Act reads, in relevant part, as follows:

Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas. . . . *No contract for the transmission of non-Federal energy on a firm basis shall be affected by any increase, subsequent to the execution of such contract, in the requirements for transmission of Federal energy, the energy described in section 837h of this title, or other electric energy.*⁶²

The italicized language on which Complainants' argument is based is inapplicable to the circumstances under the Interim ERP. As noted earlier, the interconnection agreements executed by Complainants require interconnection customers to comply with reliability standards and all

⁶⁰ Complaint at 50.

⁶¹ See Complaint at 50 where Complainants state that: "[t]hus, if Federal transmission needs arise after a firm contract is signed, Bonneville cannot unilaterally displace the firm contract rights and use those rights for its own marketing purposes. This is inconsistent with both Bonneville's OATT obligations and Bonneville's statutes." (citing to Section 6 of the Pacific Northwest Consumer Preference Act, 16 U.S.C. § 837(e)).

⁶² 16 U.S.C. § 837(e) (2006) (emphasis added).

BAA requirements as those requirements may change from time to time. These requirements include the right to curtail generation if not doing so could adversely affect Bonneville's ability to perform such activities as are necessary to safely and reliably operate and maintain the transmission system.⁶³ In other words, the need to manage Bonneville's environmental and reliability responsibilities in high-hydro, low-load conditions was a *known and anticipated contingency* and it was addressed or contemplated in Complainants' interconnection agreements. Stated in terms of the statute relied on by Complaints (*i.e.*, 16 U.S.C. § 837e), the Interim ERP has nothing to do with an "*increase, subsequent to the execution of* [an interconnection or transmission agreement], in the requirements for transmission of Federal energy.

In sum, the Interim ERP: (i) is consistent with the LGIAs executed by Complainants, (ii) does not involve the curtailment of transmission service or affect transmission rates, and (iii) does not violate the OATT. As explained in the next section, the Complainants have failed to set forth facts supported by evidence that fall within the Commission's jurisdiction over Bonneville as an unregulated transmitting utility. However, even if the Complainants' evidentiary submission is properly reviewed under Sections 211A or Section 212 of the FPA, Bonneville's actions under the Interim ERP are neither unduly discriminatory nor preferential.

C. Complainants Have Not Established a Basis or Claim on Which the Commission Can Exercise Its Remedial Authority under Section 211A or Section 212 of the Federal Power Act and the Relief Requested by Complainants is Inappropriate.

As discussed above, the curtailment of non-federal generation by Bonneville under the Interim ERP does not involve the curtailment of transmission service, does not involve violations of Bonneville's OATT, and is consistent with the LGIAs executed by the Complainants. In addition, the Interim ERP does not involve the rates for transmission service on Bonneville's

⁶³ LGIA Section 9.7.2.

system. However, these topics (*i.e.*, the rates, terms and conditions of non-discriminatory transmission service by transmitting utilities) comprise the subject matter or scope of Section 211A and Section 212(i) of the FPA.⁶⁴ The Complainants have not established that the Interim ERP involves either rates, or terms, or conditions of transmission service. If the Complainants have not established that the Interim ERP involves rates, terms or conditions of transmission service, then their allegations regarding the Interim ERP do not provide a subject or basis on which the Commission can exercise its remedial authority under Section 211A and Section 212(i) of the FPA. However, even if the Commission were to determine that review of Complainants' allegations falls within the Commission's jurisdiction over Bonneville under either Section 211A or Section 212(i) of the FPA, it is clear that the Interim ERP meets the standards in those sections and that its adoption and implementation is not unduly discriminatory or preferential.

1. The Relief Requested by Complainants is Inappropriate.

The errors in Complainants' allegations regarding the LGIAs and Bonneville OATT also affect the relief requested by the Complainants. Complainants state that they are requesting "three inter-related" forms of relief from the Commission.⁶⁵

Complainants' first two requested "forms of relief" are to revise Bonneville's curtailment practices to be non-discriminatory and to have Bonneville abide by its interconnection

⁶⁴ Section 211A of the FPA pertains to the provision of "transmission services" by unregulated transmitting utilities like Bonneville, 16 U.S.C. § 824j-1(b) (2006). Under Section 211A, the Commission can require an unregulated transmitting utility to provide transmission services (i) at rates that are comparable to those that the unregulated transmitting utility charges itself, and (ii) on terms and conditions that are comparable to those under which the unregulated transmitting utility provides to itself. 16 U.S.C. § 824j-1(b)(1) and (b)(2) (2006). The terms and conditions may not be unduly discriminatory or preferential. *Id.*

Similarly, under Section 212(i) of the FPA, the Commission can order Bonneville to provide transmission services and establish terms and conditions of service. 16 U.S.C. § 824k(i)(1)(A) and (i)(1)(B) (2006). The rates for transmission service cannot be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission. 16 U.S.C. § 824k(i)(1)(B)(ii) (2006).

⁶⁵ Complaint at 7.

agreements.⁶⁶ As explained in the Interim ERP and in Section IV.D of this submission, *infra*, Bonneville's curtailment practices are not discriminatory or preferential in design or practice. And, as discussed previously, the Interim ERP is consistent with the LGIAs executed by the Complainants. The Complaint ignores important provisions of both the LGIAs and the Bonneville OATT and, with regard to the provisions of the documents that the Complainants actually cite, their interpretation of those provisions is incorrect in either substance, applicability, or both.

Complainants' last form of requested relief is that the Commission order Bonneville to file an Order 890 *pro forma* OATT with the Commission. This request is flawed for numerous reasons. First, the Interim ERP does not violate the Bonneville OATT. Generation curtailment under the Interim ERP is not the same thing as transmission curtailment under either the Commission's *pro forma* OATT or Bonneville's OATT. As discussed previously, the reasons for the curtailment are important. The generation curtailment under the Interim ERP requires balancing of: (i) Bonneville's responsibilities under the Northwest Power Act; (ii) its obligations to comply with the NERC Reliability Standards; and (iii) its environmental responsibilities imposed by the ESA and CWA. For the Complainants to say that "[n]owhere in the Final ROD has Bonneville provided support for the argument that Bonneville is *required* to implement the [Interim ERP] in order to comply with its environmental compliance requirements"⁶⁷ is simply disingenuous. In the Interim ERP, Bonneville explains, *e.g.*, that "[m]anaging high flow events consistent with BPA's environmental responsibilities *can require* operation of FCRPS power generation to avoid certain levels of spilled water over the dams."⁶⁸ Complainants also are

⁶⁶ *Id.*

⁶⁷ Complaint at 47.

⁶⁸ Interim ERP at 10 (emphasis added).

incorrect in describing Bonneville’s reasons for implementing the Interim ERP as containing a “false reliability-related justification”⁶⁹ and in describing generation curtailment under the Interim ERP as “(only for wind generators) and for reasons unrelated to reliability.”⁷⁰ The Interim ERP applies to all generators in Bonneville’s BAA and does not contain a false reliability justification; Bonneville as a BAA must comply with NERC reliability standards.⁷¹

Second, it is clear that Complainants are objecting to the details of Bonneville’s ROD on the Interim ERP, which is an operational protocol applicable to generation within the Bonneville BAA in overgeneration and low-load conditions. In other words, since the Interim ERP and Complainants’ objections to the Interim ERP are not related to transmission service or transmission rates, and since the Interim ERP is consistent with the LGIAs, the requested remedy of having the Commission order Bonneville to place an OATT on file is inapt in the extreme. Complainants’ objections are to the ROD on the Interim ERP and, as discussed in Section V.D, *infra*, the appropriate forum for relief for objections to the Interim ERP is the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”).

Third, even if the Commission were to determine that the Interim ERP involves transmission service and OATT issues, which it does not, a process already exists for addressing issues with Bonneville’s OATT. *Bonneville is already conducting a process to revise its OATT.* In 2010 Bonneville was involved in litigating a request for rehearing at the Commission

⁶⁹ Complaint at 53 (emphasis added).

⁷⁰ *Id.* at 56.

⁷¹ Under NERC’s reliability standards, Bonneville must, among other things, “maintain Interconnection steady-state frequency within defined limits by balancing real power demand and supply in real-time.” NERC Reliability Standard BAL-001-0.1a. In addition, Bonneville must comply with the NERC disturbance control standards whose purpose it is to: “ensure the Balancing Authority is able to utilize its Contingency Reserve to balance resources and demand and return Interconnection frequency within defined limits following a Reportable Disturbance.” NERC Reliability Standard BAL-002-0.

regarding Bonneville's petition for a declaratory order for reciprocity status.⁷² The request for rehearing regarded proposed provisions to its open-access transmission tariff (Bonneville tariff) that the Commission had previously ruled not to be equivalent or superior to the *pro forma* OATT. Bonneville had initially considered requesting a conference with the Commission but after discussions with customers and considering its desire for an open, industry forum, Bonneville requested that the Commission rule on its request for rehearing without first convening a conference⁷³ and elected instead to hold a public process in the Northwest that involved all of its customers and stakeholders, including wind generators and investor-owned utilities.⁷⁴

As a result, in February 2011, Bonneville initiated a process with the industry and the region to review the Bonneville tariff and determine whether its potential differences from the *pro forma* OATT should be revised and made consistent with that OATT. This was dubbed the "BOATT process." In order to get an objective view of the issues in the BOATT process, Bonneville hired a facilitator so that the results of the process would reflect the customers' input and not simply Bonneville's own position on these issues. Complainants attach the list of issues that Bonneville proposes to cover in this process in Attachment C, p. 12 of their Complaint. However, contrary to Complainants' assertions, Bonneville did not express any intent to avoid compliance with the *pro forma* OATT provisions in areas where it currently has differences. Rather, Bonneville, as a Federal Agency, is asking its customers for input on regional needs and the value of regional practices and uniform tariffs.

⁷² *U.S. Dept. of Energy – Bonneville Power Admin.*, FERC Docket No. NJ09-1-000.

⁷³ Bonneville Power Administration Response to Notice Establishing Time for Filing, *U.S. Dept. of Energy – Bonneville Power Admin.*, FERC Docket No. NJ09-1-001, Jan. 28, 2011.

⁷⁴ Cathy Ehli, Vice-President, Transmission Marketing and Sales, Bonneville Transmission Services, Message to Customers, Feb. 4, 2011 (http://transmission.bpa.gov/Customer_Forum/tx_customer_forum/documents/message_to_customers.pdf).

For example, Complainants characterize nineteen of these issues as areas where Bonneville is not in compliance, implying that Bonneville is taking no action to bring itself into compliance.⁷⁵ On the contrary, issues 1-19 are issues where Bonneville is in the process of developing and implementing the automation and processes to permit compliance or will complete those processes within the next few years.⁷⁶ As these efforts require, in many cases, significant changes to existing software systems, sometimes multiple systems, this is not a wholly unreasonable timetable. If anything, it is a declaration of intent by Bonneville to comply with the Commission's wishes.

Of the remaining issues, it is important to note that some of the referenced provisions do differ, or would differ if Bonneville were to propose them, from the *pro forma* OATT because they reflect regional practices, practices that support regional markets, or are differences required by federal statutes applicable to Bonneville. But these are issues on which Bonneville is seeking input and has not made any decisions. Many, if not the majority, of Bonneville's customers are in agreement with Bonneville's approach on many of these issues.

Lurking beneath Complainants' request for an Order directing Bonneville to file an OATT for Commission approval within 120 days is a desire to make a non-regulated utility a more closely regulated utility. This is contrary to Congressional mandates and does not provide a basis for the Commission to award relief pursuant to the Complaint. Indeed, Complainants have failed to explain how in the context of the BOATT process a Commission order to file an OATT within 120 days addresses the alleged harm associated with a dispatch order issued pursuant to the Interim ERP.

⁷⁵ Complaint at 30.

⁷⁶ Complaint at Att. C, p. 12.

A final point regarding the inappropriateness of Complainants' request to have Bonneville file an OATT with the Commission involves Complainants' statements regarding Dispatch Standing Order 216 ("DSO 216").⁷⁷ Complainants state that, "Bonneville has begun to rely on this business practice process to institute OATT changes that should have been approved by the Commission."⁷⁸ Complainants then assert the following:

[d]espite the fact that a business practice is not supposed to contradict or supersede a tariff provision, Bonneville has been promulgating business practices and other policies that are inconsistent with its OATT, and has acknowledged that it is effectively making OATT changes in this manner because Bonneville is not currently filing OATT changes with the Commission. Some of Bonneville's current business practices – its implementation of Dispatch Standing Order ("DSO") 216, in particular – discriminate against wind generation in a manner that is similar to the Environmental Redispatch Protocol, but are less obviously discriminatory on their face.⁷⁹

Complainants' statements regarding DSO 216 should be rejected by the Commission. Complainants' statements are inconsistent with their statements about DSO 216 in Bonneville's 2010 Rate Case WP-10-A-02.⁸⁰ Complainants' statements in the 2010 Rate Case make clear that DSO 216 is an operational issue as opposed to a transmission service issue and that the cost of the operational requirements are properly borne by the wind generators.⁸¹

⁷⁷ See Complaint at 26.

⁷⁸ *Id.*

⁷⁹ *Id.* (citations omitted).

⁸⁰ The Bonneville ROD can be found at http://www.bpa.gov/corporate/ratecase/2008/2010_BPA_Rate_Case/docs/WEB_WP-10-A-02_TR-10-A-02.pdf.

⁸¹ The relevant portions of the Administrator's ROD in WP-10-A-02 read as follows:

With respect to the new operational requirements proposed by Staff, the record indicates that the wind generators are urging BPA to allocate that risk to the wind fleet in exchange for lower rates. Iberdrola Br., WP-10-B-IR-01, at 12; NWG Br., WP-10-B-NG-01, at 13; Hall, Oral Tr. at 48; Skidmore, Oral Tr. at 64; Skidmore, Oral Tr. at 168. Outside this rate proceeding, BPA has proposed a new set of reliability and operational requirements, referred to as DSO 216, that are designed to meet multiple objectives of ensuring reliability, improving wind scheduling accuracy, and limiting the amount of FCRPS capacity reserved for wind balancing. Mainzer et al., WP-10-E-BPA-22, at 20. These operating requirements would enable BPA to instruct wind generators to reduce output when BPA is close to exhausting the total amount of dec reserves for balancing, and revise transmission schedules within the hour when actual wind generation is far below schedules and BPA is close to exhausting total inc reserves. Mainzer et al., WP-10-E-BPA-

2. Complainants' Discussion of Section 212(i) of the Federal Power Act Is Incomplete and Complainants Failed to Establish a Basis on Which the Commission Can Exercise Its Section 212(i) Authority.

As noted earlier, a central flaw throughout the Complaint is Complainants' failure to accurately describe and acknowledge the context of the electricity markets in the Northwest and Bonneville's BAA. Complainants, for the most part, ignore the multiple statutory responsibilities under Bonneville's authorizing statutes and strain to describe the promulgation and implementation of the Interim ERP as an abuse of transmission market power to reach the Commission's remedial authority under the FPA.

An example of Complainants' selective discussion of statutory authority involves Section 212(i) of the FPA. Complainants state that if the Commission does not adopt their interpretation of Section 211A, they "request the Commission to direct Bonneville to provide interconnection service pursuant to FPA Sections 210 and 212(i)."⁸² Complainants then quote Section 212(i) setting forth that:

[t]he Commission shall have authority pursuant to section 210, section 824i of this title, section 824j of this title, this section and section 824l of this title, to (A) order the Administrator of the Bonneville Power Administration to provide transmission service and (B) establish the terms and conditions of such service.⁸³

22, at 20. To the extent that variation in wind fleet generation causes BPA to exhaust its balancing reserves, the risk of operational measures to preserve system reliability in that situation is properly shifted to the wind fleet.

Iberdrola supports the adoption of operational solutions to reduce the need for balancing reserves. Skidmore, Oral Tr. at 64. NWG also supports the adoption of these operational solutions. Hall, Oral Tr. at 48; NWG Br., WP-10-B-NG-01, at 13. Iberdrola's support of these requirements is based on an expectation that the amount of reserves held by BPA will be reduced, because BPA could assume that the wind fleet would schedule more accurately for purposes of the generation reserve forecast. Iberdrola Br., WP-10-E-IR-02, at 7. When asked in oral argument if Iberdrola would prefer fewer curtailments or a lower rate, Iberdrola stated it preferred a lower rate based on its belief it can schedule to a level of accuracy equal to 30-minute persistence schedules. Skidmore, Oral Tr. at 62.

ROD in WP-10-A-02 at 254-255 (emphases added).

⁸² Complaint at 36.

⁸³ *Id.* (quoting Section 212(i) of the FPA).

However, Complainants blatantly ignore the rest of Section 212(i), which clearly recognizes the other federal laws applicable to Bonneville. The rest of Section 212(i) reads as follows:

In applying such sections to the Federal Columbia River Transmission System, the Commission shall assure that—

(i) the provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system; and

(ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section [824i of this title, section 824j of this title, this section, or section 824l] of this title, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.⁸⁴

As discussed throughout these comments and in the Interim ERP, Bonneville's actions in establishing and implementing the Interim ERP are in compliance with the "otherwise applicable Federal laws" mentioned in Section 212(i)(1)(B)(i) of the FPA. As noted earlier, the Complainants have not established that the Interim ERP involves either rates, or terms, or conditions of transmission service and since these topics (*i.e.*, the rates, terms and conditions of non-discriminatory transmission service) comprise the subject matter or scope of Section 212(i) of the FPA, the Complainants have failed to establish a basis on which the Commission can exercise its authority under Section 212(i) of the FPA and grant relief.

D. Bonneville Has Promulgated and Implemented the Interim ERP in a Non-Discriminatory and Non-Preferential Manner.

As discussed previously, Complainants' attempt to shoe-horn the facts and circumstances surrounding the development and implementation of the Interim ERP into a claim that Bonneville is exercising transmission market power is in error. The development and operation of the Interim ERP does not involve transmission rates or pricing, curtailment of transmission service, or any violation of Bonneville's OATT. Notwithstanding the infirmities of the

⁸⁴ 16 U.S.C. § 824k(i)(1)(B), Section 212 of the FPA (emphases added).

Complaint, however, Bonneville clearly has the obligation to act in a non-discriminatory way when reducing the output of generating facilities connected to the Bonneville transmission system.

Indeed, notwithstanding Complainants' statement that the executed LGIAs "do not permit curtailment as contemplated by the [Interim ERP],"⁸⁵ Section 9.7.2 of the LGIAs contemplates the interruption of service and requires that any such interruption or reduction ordered by Bonneville must "be made on an equitable, non-discriminatory basis with respect to all generating facilities directly connected to the Transmission System."⁸⁶ As demonstrated by the Interim ERP, the curtailment or reduction of generation is made by Bonneville on a non-discriminatory basis.

The Interim ERP is clear that the policy applies to *all generation* in the Bonneville BAA. This includes (i) Bonneville's own non-hydroelectric resources (including the output of wind resources under contract with Bonneville),⁸⁷ (ii) thermal resources within Bonneville's BAA, and (iii) non-Federal hydroelectric generation within Bonneville's BAA that have RECs. Complainants' statement that Bonneville is targeting wind generators and is not curtailing any of its own resources is patently false.⁸⁸ Federal generation is not excluded from the Interim ERP. Bonneville's implementation of the Interim ERP has been non-discriminatory and certainly has not singled out wind generation as compared to thermal generation and other non-thermal generation with RECs.

⁸⁵ Complaint at 46.

⁸⁶ Section 9.7.2.2 of the LGIA (Attachment L to the Bonneville OATT).

⁸⁷ ROD at 16 ("All generators interconnected to the FCRTS or within BPA's Balancing Authority Area have the obligation to reduce generation when ordered to do so by BPA.").

⁸⁸ Complaint at 5, 38.

As an example of the latter, see Attachment A to these comments, the affidavit of Dwight Langer, the General Manager of the Northern Wasco Peoples' Utility District ("Northern Wasco PUD"). Northern Wasco PUD is the owner and operator of the McNary Hydro Project ("Project"), which is nominally rated 10 MW hydro generation project located on the north fish ladder of the federally-owned McNary Dam.⁸⁹ The Project is subject to Bonneville's Interim ERP and has been dispatched off to zero output in May, June and July of this year.⁹⁰ The effect of the curtailment under the Interim ERP included the loss of potential REC sales and increased labor costs.⁹¹

The experience of Northern Wasco PUD and its McNary Hydro Project is an example of Bonneville's non-discriminatory application of the Interim ERP. Indeed, under the Interim ERP Bonneville has carefully set out the redispatch priorities such that wind resources have the *highest dispatch priority* of all non-federal generators (*i.e.*, wind resources have the highest dispatch priority other than those resources serving a reliability requirement).⁹² Cognizant of the fact that wind generators have an economic incentive to operate as much as possible because they receive financial benefits, Bonneville committed in the Interim ERP that "it will take all reasonable actions including measures that affect Federal generation, before redispatching any non-Federal generator in BPA's Balancing Authority Area."⁹³ Bonneville has clearly stated that it would redispatch wind generators only as a measure of last resort and only when necessary for it to comply with its statutory environmental obligations.⁹⁴ As set forth in the Interim ERP,

⁸⁹ See Attachment A, Langer Affidavit at P 6.

⁹⁰ *Id.* at P 8.

⁹¹ *Id.* at P 9.

⁹² Interim ERP at 15.

⁹³ ROD at 54.

⁹⁴ See Working Together to Address Northwest Oversupply of Power (May 2011); Statement on Environmental Redispatch and Negative Pricing (Dec. 3, 2010); see also ROD at 57 (environmental redispatch "will

before implementing the environmental redispach, Bonneville “will take all reasonable actions to reduce excess spill,” including:

- Sales through bilateral marketing, including offering to sell at zero cost;
- Cutting prescheduled Pacific Northwest Coordination Agreement storage;
- Deferring scheduled generation maintenance activities;
- Deferring scheduled transmission maintenance activities;
- Increased pumping into Banks Lake at Grand Coulee;
- Seeking flow reductions with BC Hydro;
- Seeking additional load under hourly coordination with Mid-Columbia Hydro Projects;
- Seeking access to additional reservoir storage space at Federal Projects;
- Generation Reductions at Columbia Generating Station;
- Requesting adjustments to mutually agreeable transactions;
- Operating hydro projects inefficiently and at speed-no-load, within BiOp parameters;
- Implementing additional spill at FCRPS projects per the Corps’ spill priority list within prevailing water quality standards; and
- Reducing available balancing reserves to maximize turbine flows.

V. THE COMMISSION IS NOT THE PROPER FORUM TO GRANT THE RELIEF REQUESTED.

A. The Commission Lacks a Congressional Mandate to Impose Negative Pricing.

None of the authorities invoked by Complainants in filing the Complaint give the Commission any jurisdiction to require Bonneville to adopt a rate structure to address the financial harm caused by the ROD. However, Complainants argue that the imposition of negative pricing would ameliorate the alleged harm caused by the ROD.⁹⁵ While not asking directly for an order requiring the implementation of a negative pricing mechanism, Complainants ask the Commission not to “countenance” the ROD because it fails to provide for

only be triggered when all other reasonable actions outlined in this Final ROD have been taken to reduce excess spill in the FCRPS power system.”).

⁹⁵ Complaint at 41.

negative pricing and allocate the costs associated with it to Bonneville's existing power customers.⁹⁶ In fact, the Complainants claim that "[t]he costs at issue in this proceeding" should be allocated to power rates in the same manner as the allocation of fish and wildlife costs pursuant to Section 7(g) of the Northwest Power Act.⁹⁷

As discussed *infra*, Complainants have improperly sought to attack the ROD in a venue where the Commission has limited authority and seek relief that the Commission cannot award. Indeed, the Commission readily acknowledges that the jurisdiction over regional power and transmission rates charged by Bonneville is akin to appellate type oversight.⁹⁸ Congress has not given the Commission the authority to instruct Bonneville on how to develop power and transmission rates as an initial matter. The Commission has explicitly acknowledged this in stating that "[u]nlike the Commission's statutory authority under the Federal Power Act, the Commission's authority under sections 7(a) and 7(k) of the Northwest Power Act does not include the power to modify the rates."⁹⁹

The limited jurisdiction that the Commission does exercise over Bonneville's rates does not afford the relief that the Complainants seek. Specifically, the Commission cannot order Bonneville to institute a new rate component pursuant to a request under Sections 210 and 212(i) or 211A. While the discussion in Section IV.B.3 of the Complaint reveals the Complainants'

⁹⁶ Complaint at 45-46.

⁹⁷ *Id.* at 45.

⁹⁸ *United States Department of Energy –Bonneville Power Administration*, 132 FERC ¶ 62,098 (2010) "Under the Northwest Power Act, the Commission's review of Bonneville's regional power and transmission rates is limited to determining whether Bonneville's proposed rates meet the three specific requirements of section 7(a)(2) of the Northwest Power Act: (A) they must be sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting Bonneville's other costs; (B) they must be based upon Bonneville's total system costs; and (C) insofar as transmission rates are concerned, they must equitably allocate the costs of the Federal transmission system between Federal and non-Federal power. Commission review of Bonneville's non-regional, non-firm rates also is limited. Review is restricted to determining whether such rates meet the requirements of section 7(k) of the Northwest Power Act, which requires that they comply with the Bonneville Project Act, the Flood Control Act of 1944, and the Federal Columbia River Transmission System Act (Transmission System Act)."

⁹⁹ *Id.*

true motivation for filing the petition, *i.e.*, the loss of PTCs and RECs, Complainants cannot explain what authority the Commission could rely upon to impose negative pricing.¹⁰⁰

Further evidence that imposition of negative pricing is not within the Commission's jurisdiction is found in light of the limitations imposed on the Commission by the Energy Policy Act of 2005 with regard to transmission rights. In 2005, Congress expressly prohibited the Commission from converting contractually held transmission rights into financial transmission rights.¹⁰¹ However, the negative pricing scheme that the Complainants desire would ask the Commission to take such action. Specifically, Complainants' theory for recovery would ask that they be paid in those instances where existing transmission rights are preempted pursuant to a dispatch order, converting a contractual transmission right into a financial right. Unless otherwise instructed by Congress in new legislation, the Commission cannot take such action.¹⁰²

In the context of a new rate structure for Bonneville, the Complainants lack standing because the Commission lacks the authority to provide the remedy sought. Well-settled principles of standing require redressability.¹⁰³ If the Commission lacks authority as an initial matter to require Bonneville to impose negative pricing, then Complainants lack standing to request such action from the Commission in the first place.¹⁰⁴ Indeed, there is no basis from a

¹⁰⁰ Several of the Complainants are aware of the limited authority that the Commission has over Bonneville's rates for power and transmission. Iberdrola, PacifiCorp, and Horizon all intervened in the most recent rate for Bonneville before the Commission. *See* Docket No. EF09-2011.

¹⁰¹ Federal Power Act, § 218, as added by Energy Policy Act of 2005, Title XII, Subtitle C, § 1235, Aug. 8, 2005, P.L.109-58, 119 Stat. 594.

¹⁰² *See* comments of Senator Cantwell, Congressional Record, July 29, p. 29343-44 (Explaining support of § 1235 and opposition to the auction of financial transmission rights in FERC's standard market design: "All of us from the Northwest were united in our opposition to [standard market design] because we recognized right away that it was a scheme with potential to result in tremendous amounts of cost-shifting onto our ratepayers, and to substantially undermine our cost-based system. The provision that protects the Northwest's existing system is thus an important achievement because it slams the door on any sort of future FERC-imposed proposal like standard market design.").

¹⁰³ *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct 2130, 119 L.Ed. 2d 351 (1992).

¹⁰⁴ Complainants Iberdrola, PacifiCorp, and Horizon are further collaterally estopped from attacking the Bonneville rate structure having participated in the most recent rate proceeding before the Commission and failing

jurisprudential or jurisdictional perspective to direct Bonneville to impose negative pricing. While this section offers a revealing glimpse of the Complainants' true motivations, the hue and cry over negative pricing should be raised, if at all, in other venues.

B. The Commission Cannot Preempt Other Statutory Obligations.

The Commission's ability to exert control over Bonneville's rate structure is limited by the grant of authority conferred upon the Commission by Congress, and by the other Federal laws applicable to Bonneville. The Commission is a "creature of statute," and has "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress."¹⁰⁵ Unless specifically required by statute, the Commission's authority created by its enabling statute does not supersede or supplant the other federal laws applicable to a regulated entity.¹⁰⁶ Moreover, in fulfilling its statutory duties, the Commission itself is required to comply with other federal statutes, such as those covering environmental reviews and protection, financial reporting, information technology reporting, and historic preservation.¹⁰⁷

The limitations on the Commission's authority and the respect afforded other statutory obligations has direct bearing in the instant proceeding in light of the petition for relief. In filing to raise concerns with the rate structure. *See* Docket No. EF09-2011 ("No substantive issues were raised" by intervenors). It is well settled that "[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged." *Investigation of Wholesale Rates of Public Utility Sellers of Energy and Ancillary Services in the Western Market Systems Coordinating Council*, 135 FERC ¶ 61,176 at n.43 (2011) (quoting *Energy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*, 112 FERC ¶ 61,117 at P 12 (2005)).

¹⁰⁵ *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); *see also Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002); *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004).

¹⁰⁶ *See, e.g., Regulations Implementing the Energy Policy Act of 2005; Coordinating the Processing of Federal Authorizations for Applications under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record* ("Order No. 687"), 117 FERC ¶ 61,076 at P 19 (2006) ("the Commission has no ability to contract or expand a schedule established by federal law.").

¹⁰⁷ *See, e.g., Duke Power Company*, 112 FERC ¶ 62,168 (2005) (Commission is required to comply with provisions of the National Historic Preservation Act); *Nebraska Public Power District*, 84 FERC ¶ 61,078 at 61,328 (1998) (noting the Commission's obligation under the ESA); *Tennessee Gas Pipeline Company*, 117 FERC ¶ 61,034 at P 8 (2006) ("Congress has given the Commission additional duties under the National Environmental Policy Act of 1969. . . and other related statutes.").

the Complaint, the Complainants ask the Commission to issue an order in complete disregard of the environmental, operational, reliability, fiscal and ratemaking responsibilities that Bonneville must meet as a matter of statutory responsibility. In fact, the Complaint ignores the myriad of statutory directives and authorities that direct Bonneville's program. More precisely, the Complainants ask the Commission to disregard these Congressional mandates and sanction an action that would be in contravention of Bonneville's myriad statutory obligations.

Complainants dismiss Bonneville's environmental and operational responsibilities claiming that the ROD does not serve environmental purposes and is simply a distillation of an economic decision. This is simply untrue. The ROD is replete with references to several of the environmental responsibilities that the Administrator must meet in balancing the multiple demands on the FCRPS. In fact, the ROD explicitly documents how Bonneville must manage operations in a manner that addresses TDG levels. The primary way to mitigate TDG levels is to limit spill and run water through turbines creating power. Bonneville explained that:

TDG is a serious concern in the Columbia River because excessive TDG levels threaten the health of the aquatic ecosystem, and salmonids in particular. Excessive TDG produces physiological problems known as gas bubble trauma that in extreme cases can be fatal to fish. The states of Washington and Oregon have delegated authority to set TDG levels under the [Clean Water Act]. Currently, the water quality standard for TDG levels is 110% for both states based on biological considerations.... For a number of years, the FCRPS Biological Opinions ("BiOps") have included flow augmentation and spill operations for fish passage to benefit [Endangered Species Act] listed fish at the Corps' mainstream Columbia and Snake River projects. The spill operations can sometimes generate TDG levels in excess of the 110% TDG level. Consequently, Oregon and Washington provide "waivers" with criteria for generating TDG for a 12 hour average up to 120% at the project tailrace. Washington has an additional limit of 115% at the project forebay when conducting operations to benefit [Endangered Species Act] listed fish during the months of April to August. These waiver levels are designed to allow some spill flexibility for fish passage while limiting biological harm. TDG constraints remain at 110% outside the fish migration period. In considering the ecological objectives of the [Endangered Species Act]

and [Clean Water Act], operations are planned to comply with the [Endangered Species Act] Biological Opinions (“BiOps”).¹⁰⁸

Complainants gloss over these requirements in general declaring that “Bonneville can meet its reliability and environmental requirements without the Environmental Dispatch Protocol, and Bonneville is taking these actions *solely for the economic benefit* of its power customers.”¹⁰⁹ In other words, in the Complainants’ view, Bonneville can disregard the environmental obligations that provided part of the foundation for the ROD to ensure the continued receipt of financial benefits associated with PTCs and RECs. Alternatively, Complainants would ask the Commission to issue an order to preempt the ROD and its associated compliance with environmental and statutory mandates. However, as discussed above, the Commission lacks the authority to preempt other Federal laws and must honor the obligations imposed by acts of Congress. Complainants offer no precedent or legal theory by which this legal hierarchy should be reordered to address a dispatch order associated with an occasional and exceptional event.

C. The Commission Cannot Mandate Results to Restore Diminished Investment Returns.

At the very core of the Complaint, the wind generators seek financial compensation for lost PTCs and RECs when Bonneville issues a dispatch order under the ROD. On a fundamental level, the requested relief overreaches the intent of Congress in providing a PTC for wind generation. Indeed, Complainants have provided no examples in the legislative history of the authorization and reauthorization of the PTC that suggests that congressional leaders sought to guarantee a financial benefit in the form of a PTC.

¹⁰⁸ ROD at 6. (Internal references omitted).

¹⁰⁹ Complaint at 44 (emphasis added).

During the passage of the Energy Policy Act of 2005,¹¹⁰ several Senators expressed support for the PTC, but none expressed the intent of Congress that the PTC would be guaranteed.¹¹¹ In fact, Senator Jeffords' comments highlighted the firm commitment that Congress was offering nuclear power plants and not wind when he stated on the Senate floor that “[n]uclear power plants are large capital investments. *But so are other energy projects.* Just ask anyone who drills for oil, *sites a windmill,* or seeks to deploy a new energy technology. *We do not provide any other type of energy facility this type of guarantee.*” Nonetheless, the Complainants seek to shoehorn their expected rate of return as captured in a PTC into the precise type of guarantee that Congress has declined to provide.

In many respects the wind generators in the Pacific Northwest have enjoyed the benefits of a robust hydropower system to support the variable energy production associated with wind generation. For many years Bonneville has provided extraordinary assistance to the wind generators, many of whom export energy outside the Pacific Northwest.¹¹² Among other things, Bonneville has undertaken extensive construction projects to add new high-voltage transmission to provide 3,700 MW of new transfer capability to its transmission network, mostly to integrate 2,800 MW of wind generation and accommodate future planned generation.¹¹³ Bonneville developed DSO 216 in order to permit wind generation to significantly over- and under-generate without curtailments until system reliability is threatened.¹¹⁴ Bonneville is also investing in improved meteorological forecasting, developing improved tools to permit Bonneville system

¹¹⁰ Pub. L. No. 109-58, 119 Stat. 594 (2005).

¹¹¹ See Congressional Record, July 29, 2005, S9335 to 9367 (“A better bill would have maintained royalty payments and used these funds to extend the production tax credit for wind generation beyond the 2 years written in this bill. Unfortunately, the 2-year extension will continue the boom and bust cycle we’ve witnessed in the investment of wind generation.” Comments of Senator Durbin at S. 9355).

¹¹² See Comments of Bonneville Power Administration, Docket No. RM10-1, April 10, 2011, p. 11.

¹¹³ Bonneville, *How BPA supports Northwest wind power*, May 26, 2011, p. 1-2.

¹¹⁴ *Id.* at 2.

dispatchers to gain better “visibility” over the system, and offering pilot programs to test and refine self-supply of balancing reserves, the use of dynamic transfer capability, and intra-hour scheduling.¹¹⁵

Given the level of support that Bonneville and its existing customers have provided to the wind generators over the past several years, it is startling that the wind generators would now demand that Bonneville and its customers guarantee their subsidies and profits in instances where Bonneville must balance environmental, operational, and reliability concerns to ensure the integrity of the entire FCRPS. Nonetheless, the Complainants now demand that Bonneville step in and make the wind generators whole for losses of PTC and RECs, which Complainants have not quantified.¹¹⁶

Underlying Complainants’ dispute with Bonneville are changed investment expectations. However, the allocation of business risk associated with PTCs is customarily handled as a matter of contractual drafting with wind power purchasers and not realigned through a regulatory proceeding before the Commission. As explained in the treatise on Energy and Environmental Project Finance Law and Taxation,

There are some circumstances where an offtaker may choose to accept some of the risks associated with PTCs. For example, an offtaker could require that the generation from the unit be curtailed as instructed for merchant (as opposed to transmission) purposes. Since such curtailment can also deprive the generator of the PTC from generation that therefore did not occur, a PTC compensation for curtailed generation is not uncommon. *The PPA [Power Purchase Agreement] should, however, contain clauses specifically protecting the offtaker from liability, PTC or otherwise, for other types of curtailment events.*¹¹⁷

¹¹⁵ *Id.* at 2-3.

¹¹⁶ “The costs at issue in this proceeding are similar [to fish and wildlife costs] and should be similarly allocated to power rates.” Complaint at 45.

¹¹⁷ Energy and Environmental Project Finance Law and Taxation, Chapter 20, Contract Techniques for Renewable Resource Power Purchase Agreement Offtakers, p. 511.

Faulty power purchase agreements (“PPAs”) that fail to allocate business risk or changed investment expectations provide no basis for the Commission to take action. Moreover, the Commission should recognize that Complainants willingly accepted the business risks of siting wind farms in the Bonneville balancing area. In an honest recognition of reality, Complainants admit that “[c]onstraints on the Bonneville system are well known to all interested stakeholders.”¹¹⁸ The failure to account for potential loss of PTCs due to hydrologic and environmental circumstances should not be borne by Bonneville’s ratepayers as these parties are not properly guarantors of Complainants’ business models. Ultimately, however, Complainants can cite to no authority within the Commission or any other Federal law that would require as a federal matter the restitution for lost investment expectations associated with the slight decrease in RECs associated with the ROD. Complainants are seeking a remedy where no relief is available.

D. Complainants Have Sought the Wrong Venue to Contest the ROD.

Underlying the Complainants’ petition is frustration over the complexity of being an energy supplier from the Pacific Northwest. The well-described displeasure with the ROD is clearly set forth before the Commission, yet the proper venue to contest the ROD is before the Ninth Circuit pursuant to the Northwest Power Act. Indeed, Complainants have offered a litany of arguments that more appropriately fit within a challenge of the Administrator’s decision before the Ninth Circuit case rather than a demand for interconnection service under Section 210 and 212(i) or 211A of the FPA.

In particular, when the Complaint highlights the alternatives that Bonneville could have pursued in lieu of adopting the ROD, Complainants illustrate how the gravamen of the Complaint is focused on the ROD and not solely confined to whether a dispatch order amounts to

¹¹⁸ Complaint at 62, n.161.

undue discrimination.¹¹⁹ Clearly, the Commission cannot order Bonneville to enter into storage arrangements with entities in Canada, yet the Complainants present this as an example of how Bonneville has acted arbitrarily and capriciously in promulgating the ROD. The Commission does not have jurisdiction over the ROD and an “arbitrary and capricious” standard of review does not apply in this instance.

Upon further review, the Complaint and the Complainants’ actions suggest a more comprehensive effort that will ultimately end up with a filing before the Ninth Circuit. While the variety of arguments presented in the Complaint are more closely structured along the lines of a challenge of an agency decision, it appears that the Complainants are also exploring whether the Commission may provide relief on an expedited basis before filing a petition before the Ninth Circuit.

The expectation that Complainants will exercise their rights to contest the ROD before the Ninth Circuit should dissuade the Commission from taking any action on the Complaint, including directing the parties to participate in Commission sponsored mediation or settlement discussions. As discussed *supra*, the Commission lacks substantive jurisdiction to direct Bonneville to take actions that will address the Complainants’ loss of PTCs or RECs. Moreover, there appears to be little benefit to instituting mediation or a settlement judge proceeding if the Complainants’ relief properly lies with the Ninth Circuit.¹²⁰ In fact, pursuant to Section 9(e)(5) of the Northwest Power Act, a challenge of the Administrator’s action must be filed with the Ninth Circuit.¹²¹

¹¹⁹ See Complaint at 61.

¹²⁰ In fact, if the Complainants do file a petition for review of the ROD before the Ninth Circuit, the question arises as to whether the Complainants were serious about prosecuting the Complaint at FERC.

¹²¹ 16 U.S.C. § 839f(e)(5). Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act [16 U.S.C. 832 et seq.],

Even if the Commission finds that it has *some* jurisdiction over matters raised in the Complaint, before taking any action, the Commission should be assured that the Complainants are not seeking relief before the Ninth Circuit while also attempting to litigate issues tangentially related to the ROD before the Commission. Efficiencies and economies would encourage the Commission not to review or take any action on the Complaint until it is clear that Complainants are not contesting the ROD in multiple venues. In the event that a filing is made before the Ninth Circuit, the Joint Intervenors would ask the Commission to dismiss this Complaint with prejudice.

Ultimately, the better venue for Complainants to address lost PTCs is on Capitol Hill. As the branch of the federal government with the power to create the PTC in the first instance and define the terms under which an entity may claim it, Congress is best suited to address Complainants' grievance that a PTC may not be available when certain hydrologic conditions have occurred in the Pacific Northwest. Indeed, Congress retains the power of the purse and the Complainants are basically seeking financial remuneration.

VI. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO MEET THE COMMISSION'S REQUIREMENTS REGARDING COMPLAINTS.

As discussed *supra*, it becomes clear with some study of the Complaint that the Complainants have taken issue with the issuance of the ROD because of the loss of PTCs and RECs. While the Complainants have cast their concern with the Interim ERP in context of a request for relief under Sections 210, 211A and 212(i), it is clear that the true gravamen of the

the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this chapter to be published in the Federal Register, within ninety days from such notice, or be barred. In the case of a challenge of the plan or programs or amendments thereto, such suit shall be filed within sixty days after publication of a notice of such final action in the Federal Register. Such court shall have jurisdiction to hear and determine any suit brought as provided in this section. The plan and program, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this chapter or any other law. Suits challenging any other actions under this chapter shall be filed in the appropriate court.

Complainants case lies in a dispute with the ROD and not the isolated and tangential transmission issues that Complainants argue are implicated by it. This conclusion is supported in part by examining how Complainants have failed to meet key components of the Commission's rules in filing a complaint.

The Commission's Rules of Practice and Procedure require a complainant to meet certain minimal requirements. Specifically, Rule 206(b) requires Complainants to "[e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements" and "[i]nclude all documents that support the facts in the complaint ... including, but not limited to, contracts and affidavits."¹²² The Complaint fails to meet these Commission regulations related to complaints because it merely makes unsubstantiated allegations and fails to proffer evidence supporting these allegations. Furthermore, the Complaint neglects to include any documents supporting facts in the Complaint that would be germane to any allegations that Bonneville violated statutes, FERC orders or tariffs administered by the Commission.

A. The Complaint is Procedurally Defective and Should Be Dismissed.

The Complaint is procedurally defective because it does not comply with the procedural requirements of Rule 206 of the Commission's Rules of Practice and Procedure.¹²³ As a preliminary matter, the Complaint fails to comply with the most basic requirements of a complaint as codified in 18 C.F.R. § 385.206 of the Commission's Regulations. Because the Complaint lacks critical information required by Rule 206(b), the Commission and interested parties do not have sufficient information to adequately review or respond to the Complaint, and the Complaint should therefore be dismissed.

¹²² 18 C.F.R. § 385.206(b) (2011).

¹²³ 18 C.F.R. § 385.206 (2011).

Specifically, the Complaint fails to “[e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements” and “[i]nclude all documents that support the facts in the complaint ... including, but not limited to, contracts and affidavits.”¹²⁴ Because the Complaint is procedurally defective, it must be dismissed. These procedural defects are discussed further below.

1. The Complaint Fails to Explain How the Interim ERP Violates Applicable Statutory Standards or Regulatory Requirements.

Rule 206(b) requires that a complaint must “[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements” and “[e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements.”¹²⁵ The gravamen of the Complaint is that Bonneville curtailed wind generators without compensation (*i.e.* payment of negative pricing) and substituted its own generation for delivery to the wind generators’ customers to benefit its “preferred” (in the Complainants’ words) customer base. Neither of these claims constitutes a violation of any statutory standard or regulatory requirement administered by the Commission.

2. The Complaint is Devoid of any Information or Documents that Support the Allegations Asserted in the Complaint.

Rule 206(b)(8) requires that complainants include documents that support the facts in the complaint, “including, but not limited to, contracts and affidavits.”¹²⁶ The Complaint neglects to include any documents supporting facts in the Complaint that would be germane to any allegations that Bonneville violated statutes, FERC orders or tariffs. As explained further below,

¹²⁴ *Id.* at 385.206(b)(2), (8).

¹²⁵ 18 C.F.R. § 385.206(b) (2011).

¹²⁶ 18 C.F.R. § 385.206(b)(8) (2011).

Complainants did little more than attach a one paragraph Affidavit and irrelevant background materials.

First, the materials submitted with the Complaint fail to support Complainants' key allegation that Bonneville engaged in undue discrimination. Complainants' Affidavit merely asserts in one paragraph that there was export capability available during the times when Bonneville implemented its Interim ERP on a single day in May. Clearly, a single affidavit describing one day under the Interim ERP does not and cannot prove Complainants' case.

Complainants' lack of documents supporting the facts in the Complaint also leaves unsupported other important allegations asserted in the Complaint. For example, while the Complaint alleges competitive injury to wind generators, these naked assertions are completely unsupported. According to the Complaint, the Complainants "face significant harm due to forgone wind energy sales," including the value of federal PTCs and state RECs. Complainants further assert that generators may forgo revenue associated with lost power sales under PPAs.¹²⁷ However, Complainants failed to quantify and support with contracts, affidavits, or any documentation whatsoever the magnitude of the "significant harm due to forgone wind energy sales."¹²⁸ Moreover, while the Commission's regulations require that Complainants include all documents "in possession of, or otherwise attainable by, the complainant," "including ... contracts", the Complainants have failed to tender the PPAs that would bear on the

¹²⁷ Complaint at 3-4.

¹²⁸ *Id.* Complainants merely recite Bonneville's own estimate of the financial impact of the ROD with regard to PTCs and RECs for 2011, without attempting to quantify the future impact, if any, of continued implementation of the Interim ERP. Moreover, Complainants fail to quantify the value of foregone wind energy sales and revenue associated with lost power sales under the PPAs, asserting only that such loss is "significant." Complaint at 4.

Complainants' claim that "generators may forgo revenue associated with lost power sales" under the PPAs.¹²⁹

Finally, while Complainants assert that Bonneville's action or inaction has violated its interconnection agreements with the wind generators, Complainants have failed to provide any documents supporting this allegation. Complainants allege that Bonneville's "discriminatory actions affect both interconnection service under the wind generators' LGIAs or earlier versions of Bonneville's interconnection agreements and related firm transmission service agreements under the Bonneville Open Access Transmission Tariff ("OATT")." Notably, the majority of the Complainants assert that they have interconnection and transmission agreements that "have been subject to the Environmental Redispatch Protocol[,]"¹³⁰ yet the Complaint is devoid of any documentation, other than isolated excerpts and an attachment simply referencing the *pro forma* language on interruption of service, supporting the allegation that Bonneville violated those agreements. An allegation that Bonneville has violated the terms of those agreements cannot stand based on this alone. In fact, while the Complainants submitted an attachment (Attachment A) "referencing language of Complainants' LGIAs and other interconnection agreements" this attachment simply refers to Bonneville's *pro forma* provision on Interruption of Service, with no recitation of that language or an explanation of how Bonneville's actions violated the non-discriminatory curtailment terms of the interconnection agreements.¹³¹

Ultimately, the failure to support the Complaint is captured in several notable statements, which if true, would lend credence to their overall case. However, a closer examination of these statements reveals not only a dearth of support for the assertions presented but a factual basis for

¹²⁹ The Complainants' failure to provide excerpts of the PPAs, if motivated by confidentiality concerns, is not justified given the Commission's filing procedures that accommodate the submission of privileged documents under seal. *See* 18 C.F.R. § 385.112 (2011).

¹³⁰ Complaint at 10-12.

¹³¹ *Id.* at 36.

the opposite proposition. Several of these statements addressed below demonstrate how Complainants have not met their burden as set forth in Rule 206.

For example, Complainants claim that the Interim ERP “curtails competing generators in an unduly discriminatory manner,”¹³² “blatantly discriminates against wind generation,”¹³³ and is targeted specifically at wind generators.¹³⁴ None of these statements are adequately supported in the Complaint. In fact, the opposite is established in reading the ROD. As discussed *supra*, wind will be redispatched last and only to the extent necessary to achieve relief. Thermal generation and other generation in the Bonneville Balancing Area including other renewable and non-federal hydro will be redispatched before wind generation and only to as low of a generating level as possible without threatening reliability. If additional generation relief is needed after redispatching other generation within Bonneville Balancing Area generation, only then will Bonneville redispatch variable energy resources on a pro rata basis.¹³⁵

However, the pattern of unsupported allegations is repeated when Complainants argue that the Interim ERP violates “the wind generators’ interconnection contracts”¹³⁶ and Bonneville does not have the contractual right to implement its environmental redispatch under the LGIAs or its OATT.¹³⁷ Again, as discussed *supra*, this is not true, because all generators interconnected to the FCRTS or within Bonneville’s Balancing Area have the obligation to reduce generation when ordered to so by Bonneville. All generators with an interconnection agreement with Bonneville must follow Bonneville’s dispatch orders to maintain system reliability. Specifically,

¹³² *Id.* at 2.

¹³³ *Id.* at 37.

¹³⁴ *Id.* at 42.

¹³⁵ ROD at 15.

¹³⁶ Complaint at 2.

¹³⁷ *Id.* at 46.

LGIA Article 9.7.2 gives Bonneville the authority to interrupt interconnection service for reliability reasons. The LGIA also conditions interconnection service on Bonneville's compliance with applicable laws and regulations. In these circumstances, it is understandable that the Complainants have failed to support their assertions with the support that Rule 206 commands.

At bottom, the Complaint fails to satisfy the requirements for alleging and documenting the Complainants' claims. In fact, given the intensity of the Complainants' interest in the ROD, it is truly surprising that a more robust effort was not put forth in supporting their request for relief. Nonetheless, given the paucity of materials supporting the Complainants' case before the Commission, the Complaint should be dismissed for this reason alone.¹³⁸

¹³⁸ See, e.g., *O'Connor & Hewitt, Ltd. v. Energy Transfer Partners, L.P.*, 122 FERC ¶ 61,103 (2008)(dismissing complaint based on unsupported allegations and no evidence); *Energy Management Corp. v. Peoples Gas System, Inc.*, 78 FERC ¶ 61,044 (1997)(dismissing complaint consisting of conclusory statements and devoid of any factual support); *Sunrise Energy Co. v. Transwestern Pipeline Company*, 62 FERC ¶ 61,087 (1993)(dismissing complaint based on vague and unsupported allegations).

VII. REQUEST FOR RELIEF

The Commission should deny the Complaint because it fails to establish that FERC has jurisdiction over this matter, it is procedurally defective in that it makes unsubstantiated allegations and fails to proffer evidence supporting these allegations, and the Complaint fails on the merits. Furthermore, as was explained in Section V.D, above, the Commission is not the appropriate forum in which to challenge the actions of non-jurisdictional entities.

Finally, the Complaint should be denied because the Commission lacks the authority to grant the relief requested in the Complaint. Complainants request the Commission to order Bonneville to submit a compliance filing revising its curtailment practices, order Bonneville under FPA Sections 210 and 212(i) to cease its redispatch practices, and to order Bonneville, pursuant to FPA Section 211A, to file an OATT for Commission approval.¹³⁹ However, as explained in Section V.A, the Commission does not have authority to mandate negative pricing. Moreover, for all the reasons explained above, the Commission does not have the authority to order Bonneville to file an OATT for FERC approval, nor may it order Bonneville to cease its redispatch practices.

The Complainants have failed to demonstrate that their preferred solution complies with applicable statutory standards and regulatory requirements and that the remedy sought falls within the Commission's jurisdiction. Accordingly, the Commission should deny the Complaint with prejudice.

¹³⁹ Complaint at 64.

VIII. CONCLUSION

For the reasons set forth above, the Joint Intervenors respectfully request that the Commission deny the Complaint.

Respectfully submitted,

By: /s/ Irene A. Scruggs

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Dated: July 19, 2011

ATTACHMENT A

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

Complainants,

v.

Bonneville Power Administration

Respondent.

Docket No. EL11-44-000

**AFFIDAVIT OF
DWIGHT LANGER
ON BEHALF OF JOINT INTERVENORS**

I. INTRODUCTION

1. This affidavit is being filed by Dwight Langer, General Manager of the Northern Wasco Peoples' Utility District ("Northern Wasco PUD" or "PUD"), located in The Dalles, Oregon, in support of the comments of Public Power Council ("PPC"), Pacific Northwest Generating Cooperative ("PNGC"), and Northwest Requirements Utilities ("Joint Intervenors") ("Joint Intervenors"), filed in response to the June 13, 2011 complaint filed by Iberdrola Renewables, Inc. ("Iberdrola Renewables"); PacifiCorp; NextEra Energy Resources, LLC ("NextEra"); Invenergy Wind North America LLC; and Horizon Wind Energy LLC ("Horizon") (collectively "Complainants") in this proceeding. Northern Wasco PUD is a member of both PPC and NRU.

Background and Qualifications

2. My name is Dwight Langer. My business address is 2345 River Road, The Dalles, Oregon. I am currently the general manager of the Northern Wasco PUD. I have been general manager at Northern Wasco County PUD since February 1993. Prior to working for the PUD, I was general manager of the City of Peru Utilities in Peru, Indiana, from 1985 to 1993. I have worked continuously in public power since February 1972.
3. I have a B.S. degree from Indiana State University, Terre Haute, Indiana, with majors in Economics, History and Sociology. I have completed many post-graduate courses in accounting and many training courses in utility management and operations.
4. I am responsible for the day-to-day operations of the PUD and for successful implementation of all policies adopted by the PUD's elected Board of Directors.

II. PURPOSE OF AFFIDAVIT

5. The purpose of this affidavit is to describe the curtailment due to Environmental Redispatch of Northern Wasco PUD's McNary Hydro Project located in Hermiston, Oregon ("McNary Hydro Project" or "Project").
6. Northern Wasco PUD is the owner and operator of the McNary Hydro Project. The McNary Hydro is a nominally rated 10 MW hydro generation project located on the north fish ladder of the federally owned McNary Dam. Northern Wasco PUD and Klickitat County PUD, which is located in Goldendale, Washington, jointly own the Project. Per a joint operating agreement, Northern Wasco PUD operates and maintains the Project. Since its commercial operation date in 1998, the Project has had an availability rating of over 91 percent, including all planned and forced outages. Past curtailments have been

nearly exclusively for planned outage arranged by the U.S. Army Corps of Engineers for annual maintenance. Due to the operating characteristics of the plant, the McNary Hydro Project must run either at full output or not at all. As a result, the PUD does not normally staff plant operations 24-hours a day, but when curtailments occur, operators must be physically present at the plant to curtail output.

7. As a small hydro-electric plant, McNary Hydro Project produces Renewable Energy Credits, which Northern Wasco PUD is reserving for its future compliance requirements.
8. From May 17, 18 and 19 and for the period from June 2, 2011 through July 18, 2011, inclusive except for the night of July 12th, at the direction of BPA, the project has been dispatched off (*i.e.*, zero output) each day from midnight (1200 hours) to 5 a.m. (0500 hours). BPA contemporaneously replaced the amounts of Project generation curtailed during these hours at no cost to the PUD. Early in the redispatch period, due to confusion about redispatch times and the fact that the plant is not normally manned 24 hours a day to effect curtailments, the plant was not dispatched off from May 20 through June 1, but my understanding is that BPA would have dispatched the plant off if it could have. Due to the operating characteristics, staffing considerations and very small size of the Project, BPA has scheduled the McNary Hydro Project's curtailments for Environmental Redispatch in advance on a fixed basis. Therefore, the curtailments will continue until the next call with BPA on July 18th.
9. The curtailment of the McNary Hydro Project has caused Northern Wasco to incur extra labor costs in the approximate amount of \$140 per day and the loss of Renewable Energy Credits totaling approximately 1,845 MW. The value of these Renewable Energy Credits

has not been determined but I believe that they have substantial current and future value to the PUD. Although we regret the incurrence of these costs and the loss of Renewable Energy Credits, the PUD acknowledges that BPA must protect the endangered fish species in the Columbia and Snake River system by generating at the federal hydro-electric plants and supports BPA's actions as outlined in the BPA Final Record of Decision, *Interim Environmental Redispatch and Negative Pricing Policy* (May 13, 2011).

10. This concludes my Affidavit.

Dated this 14th day of July 2011.

Dwight Langer
Dwight Langer

Signed and sworn to (or affirmed) before me on July 13, 2011 (date)

Patricia J. Ostdiek
Notary Public for Oregon
My commission expires 7/29/12



CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 19th day of July, 2011.

/s/ E-filed

Sherry A. Quirk

Attorney for Joint Intervenors

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