



Sherry A. Quirk
202/778-6475
squirk@schiffhardin.com

1666 K Street N.W., Suite 300
Washington, DC 20006

T 202.778.6400
F 202.778.6460

www.schiffhardin.com

March 27, 2012

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. EL11-44-002

Dear Secretary Bose and Deputy Secretary Davis:

Enclosed please find a copy of the *Comments of the Joint Intervenors on the Compliance Filing of Bonneville Power Administration* 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

Petitioners,

v.

Bonneville Power Administration

Respondent.

Docket No. EL11-44-002

**COMMENTS OF THE JOINT INTERVENORS
ON THE COMPLIANCE FILING OF
BONNEVILLE POWER ADMINISTRATION**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. § 385.211, the Public Power Council (“PPC”), Pacific Northwest Generating Cooperative (“PNGC”), and Northwest Requirements Utilities (“NRU”) (collectively “Joint Intervenors”) hereby submit Comments in response to the Compliance Filing¹ submitted by the Bonneville Power Administration (“Bonneville”) on March 6, 2012, pursuant to the Commission’s December 7, 2011 Order Granting Petition in the above-captioned docket² (“December 7 Order” or “Order”). In the December 7 Order, the Commission asserted authority under section 211A of the Federal Power

¹ Compliance Filing of the Bonneville Power Administration, Docket No. EL11-44-002 (filed March 6, 2012) (“Compliance Filing”).

² *Iberdrola et al v. Bonneville Power Administration*, 137 FERC ¶ 61,185 (2011) (“December 7 Order”).

Act (“FPA”) and directed Bonneville to file tariff revisions that provide for transmission service on terms and conditions that are comparable to those under which Bonneville provides transmission service to itself and that are not unduly discriminatory or preferential.

In providing these Comments, the Joint Intervenors preserve all of the arguments, objections, and assignments of error they have made on the record in this proceeding, including but not limited to those raised in their Request for Rehearing filed on January 6, 2012, and nothing contained in these comments should be construed as a waiver or an intention to waive those arguments, objections and assignments of error. The Joint Intervenors provide these Comments for the sole purpose of assisting the Commission in its decision-making process with regard to Bonneville’s Compliance Filing.

EXECUTIVE SUMMARY

This case concerns Bonneville’s proposal to manage oversupply of electric generation within its Balancing Authority Area (“BAA”) within the limits imposed by multiple environmental and other statutory requirements and Congressional mandates governing the operations of the Federal Columbia River Power System (“FCRPS”) and the Federal Columbia River Transmission System (“FCRTS”). Oversupply can occur in the Bonneville BAA when, in addition to non-federal generation, the federal hydroelectric units must generate to reduce spilling excess water. Spill produces high concentrations of total dissolved gas (“TDG”) in the water, which can be harmful and even deadly to fish, including endangered anadromous fish. Northwest states limit the allowable levels of TDG in the water under the Clean Water Act (“CWA”).³ Bonneville’s primary tool for minimizing TDG levels and maintaining safe conditions for fish is running the water through the FCRPS generators.

Joint Intervenors agree with members of the Northwest Congressional delegation that oversupply of generation in Bonneville’s BAA is a Northwest problem and that the solution can and should come from the region. However, the Commission has prevented Bonneville from continuing its 2011 Environmental Redispatch and Negative Pricing Policies (“Environmental Redispatch Policy”) into 2012 and, therefore, Bonneville currently finds itself in a position where a solution is needed immediately for the 2012 spring run-off season. Pursuant to the Commission’s December 7 Order, Bonneville has submitted changes to its Open Access Transmission Tariff (“OATT”) to address the issue of oversupply management. Bonneville’s changes are limited to addressing the Environmental Redispatch Policy as the Order requires. In

³ 33 U.S.C. § 1251 (2009); *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); *Natl. Wildlife Federation v. National Marine Fisheries Serv.*, Docket No. CV 01-640-RE, 2007 WL 1541730 (D. Or. May 23, 2007).

a future rate case, Bonneville will decide the issues of allocating and recovering the costs of the compensation that Bonneville proposes to pay. For that reason, cost allocation and recovery are not before the Commission.

Although the Joint Intervenors have disputed the Commission's findings that the Environmental Redispatch Policy results in unduly discriminatory and preferential transmission service,⁴ if the Commission accepts the Compliance Filing, it should do so subject to the modifications proposed in section III.C of these comments. Those modifications are:

- New generators that interconnect after March 6, 2012, should be ineligible for compensation for displacement. New generators have been on notice since 2010 that combined wind and hydroelectric generation during high flow conditions could lead to displacement of non-federal generation. These generators had and have the opportunity to enter into contracts that allocate the risk of displacement without compensation and should not be compensated for foregone revenues that result from their failure to take that action.
- Bonneville should not be required to continue to pay compensation to a generator if a complaint is filed with the Commission or an investigation is initiated by the Commission regarding compensation claimed by a generator.
- Compensation should not be provided for hours in which a generator is ramping down to or up from an ordered generation level if the generator is capable of reaching the ordered generation level during the customary scheduling ramp time of 20 minutes.
- Generators seeking compensation should be required to submit adequate supporting information to document the costs they are claiming.

⁴ Request for Rehearing of the Joint Intervenors, Docket No. EL11-44-000 (filed Jan. 6, 2012).

COMMENTS

I. INTRODUCTION

This case concerns Bonneville's proposal to manage oversupply of electric generation within its BAA within the limits imposed by multiple environmental and other statutory requirements and Congressional mandates governing the operations of the FCRPS and the FCRTS.

A. Description of the Oversupply Problem

Bonneville is a creature of statute that markets the output of the FCRPS and operates an extensive transmission system. In carrying out his statutory responsibilities, the Bonneville Administrator must protect, mitigate, and enhance the fish and wildlife that are listed as threatened or endangered under the Endangered Species Act ("ESA"),⁵ and particularly anadromous fish that are dependent on suitable environmental conditions in the Columbia River and its tributaries.⁶ Bonneville's environmental mandates make up a critical part of the agency's obligations.

Rapid spring runoff causes high flows in the Columbia River. Water that cannot be stored must either be released over the spillways or run through the generators. But spilling too much water produces high concentrations of TDG in the water, which can be harmful and even deadly to fish, including endangered species. To protect the fish, the states limit the allowable levels of TDG in the water under the CWA and the courts strictly enforce those limits.⁷ Since water that is run through the turbines does not significantly increase the TDG levels,

⁵ 16 U.S.C. § 839b(h)(11)(A)(i) (2009).

⁶ 16 U.S.C. § 839(6) (1980).

⁷ 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); *Natl. Wildlife Federation v. National Marine Fisheries Serv.*, Docket No. CV 01-640-RE, 2007 WL 1541730 (D. Or. May 23, 2007).

Bonneville's primary tool for managing the high flows while maintaining safe conditions for fish is running the water through the FCRPS generators. That, of course, produces energy, which sometimes exceeds load.

Until recently, Bonneville has been able to dispose of the surplus energy produced during high-flow/low-load periods and effectively keep generation and load in balance. However, the influx of new merchant wind generation into Bonneville's BAA has made it increasingly difficult for Bonneville to balance its system while complying with its statutory obligations to limit spill and protected endangered species.⁸ Recognizing a serious need to establish a protocol for dealing with oversupply situations in which endangered species were threatened, Bonneville implemented the Environmental Redispatch Policy in 2011.

The Environmental Redispatch Policy established that in low load conditions when full use of federal hydroelectric generation is necessary to protect water quality pursuant to the ESA and the CWA, and Bonneville has "[taken] all reasonable actions to protect fish,"⁹ Bonneville would dispatch federal hydropower at no cost to displace other non-hydro generation within its BAA. Bonneville's Record of Decision provided that Bonneville would not pay negative energy prices to induce entities to curtail their output and accept deliveries of federal hydropower offered at no cost.

⁸ As the Balancing Authority ("BA"), Bonneville must ensure that balance between generation and load is always intact to keep its system reliable. *See, e.g.*, North American Electric Reliability Corporation (NERC) Reliability Standard BAL-001-0.1a. For the power and transmission systems to operate reliably, the energy produced must be balanced with load. Generation in excess of load creates high frequency and, if the imbalance is sufficiently severe, can jeopardize Bonneville's system and lead to instability, electrical disturbances, and even the potential for blackouts.

⁹ Compliance Filing at p. 6.

B. Litigation of the 2011 Environmental Redispatch Policy and Settlement Negotiations

On June 13, 2011, in response to the Environmental Redispatch Policy, several wind generators and owners¹⁰ (collectively “Petitioners”) initiated this proceeding, asserting that Bonneville was “using its transmission market power to curtail competing generators in an unduly discriminatory manner” to protect its power customer base from the negative economic impacts of surplus power created under high flow conditions.¹¹ On December 7, 2011, the Commission granted the Petitioners’ petition and, asserting authority under section 211A, directed Bonneville to file tariff revisions.

Well before the December 7 Order, Bonneville began working closely with regional stakeholders, including the Joint Intervenors and most of the Petitioners, to develop solutions to the oversupply issue. The Northwest Congressional delegation¹² and many in the region, including the Joint Intervenors, supported this effort. Throughout these negotiations, which included non-decisional members of the Commission’s staff, Bonneville attempted to find a sustainable, long-term solution to the management of oversupply that works for all parties and has committed to continue its efforts.¹³

The Joint Intervenors negotiated in good faith. Joint Intervenors are disappointed that the process did not yield an acceptable long-term regional solution that provides protection for

¹⁰ Iberdrola Renewables, Inc. (“Iberdrola Renewables”); PacifiCorp; NextEra Energy Resources, LLC (“NextEra”); Invenergy Wind North America LLC; and EDP Renewables North America LLC (“EDPR NA”).

¹¹ 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) (“Petition”).

¹² See Correspondence from U.S. Senator Ron Wyden *et al.* to Bonneville Power Administration, Docket No. EL11-44-000 (filed Aug. 8, 2011).

¹³ See Compliance Filing at p. 4.

endangered aquatic species based on sound science and allows Bonneville to comply with all applicable statutes while fulfilling reliability obligations. Nonetheless, Joint Intervenors remain open to future negotiations to resolve these issues with Bonneville and the other parties in the region. This is a Northwest problem and, as Northwest Congressional delegation members have noted, the solution “can and should come from the Northwest.”¹⁴

II. BONNEVILLE’S COMPLIANCE FILING

In the Compliance Filing, Bonneville offered tariff revisions to its OATT to address the comparability concerns raised in this proceeding. It added a new section, section 38, and a new attachment, Attachment P, titled Oversupply Management Protocol, to its OATT.¹⁵ Bonneville explained that in order to meet its environmental responsibilities, it must have a mechanism to displace generation within its BAA.¹⁶ Other than curtailment of non-federal generation, “Bonneville has been unable to identify reasonable actions that, by themselves, will ensure that it can fulfill and balance its legal obligations, including protection of endangered fish and other aquatic species.”¹⁷

Pursuant to Attachment P, generation in the Bonneville BAA that must be redispatched to enable Bonneville to meet its environmental obligations would be displaced on the basis of a cost curve during oversupply events, until the necessary relief is achieved.¹⁸ Generators will have the option to either provide cost of curtailment information, participate in the cost curve, and be subject to future cost allocation of the costs of displacement, or to not provide cost of curtailment

¹⁴ Correspondence to U.S. Dept. of Energy Sec. Chu from Sen. Murray, *et al.*, Docket No. EL11-44-000 (filed Jan. 24, 2012) at p. 2 (lodged to this docket on January 25, 2012).

¹⁵ Compliance Filing at Exhibit A.

¹⁶ *Id.* at pp. 4, 8.

¹⁷ *Id.* at p. 6.

¹⁸ *Id.* at pp. 7, 13-17.

information, not participate in the cost curve, and not be subject to future cost allocation.¹⁹

Under either option, Bonneville will replace curtailed generation with hydropower from the Federal system at no charge.²⁰ Cost of displacement will be limited to lost revenue from the Federal production tax credit (“PTC”), Renewable Energy Certificates (“RECs”), and, for generators with certain existing power sales contracts, lost contract revenue. Generators entering into power sales contracts after March 6, 2012, will not receive compensation for any lost contract revenue.²¹

Generators will be allowed to submit minimum generation levels and maximum ramping rates and Bonneville will not direct a generator to reduce generation below its minimum generation level.²² Compensation under the cost curve will be based on the difference between scheduled generation and the generation level to which Bonneville orders a generator to reduce.²³ Generators will submit cost and scheduling information to an independent third-party evaluator for accuracy verification.

Bonneville is in a difficult position. In oversupply conditions, Bonneville must run the water through its hydroelectric resources, and therefore generate, to minimize TDG levels and comply with the ESA, CWA, and its own statutes. To do so, Bonneville must have a mechanism to displace other generation when necessary to comply with environmental laws. Bonneville asserts that curtailment of generation pursuant to Attachment P is the only such mechanism that will allow it to satisfy and balance all its legal obligations, including its fundamental obligation

¹⁹ *Id.* at Exhibit A, Attachment P at P 3.

²⁰ *Id.* at Exhibit A, Attachment P at p. 1.

²¹ *Id.* at Exhibit A, Attachment P at P 5.c.

²² *Id.* at Exhibit A, Attachment P at P 9.

²³ *Id.* at Exhibit A, Attachment P at P 6.

to protect endangered species.²⁴ The Commission should defer to Bonneville's interpretation of its statutes and its assessment of the options physically and legally available to it. Although the Joint Intervenors have disputed the Commission's findings that the Environmental Redispatch Policy results in unduly discriminatory and preferential transmission service, if the Commission accepts the Compliance Filing, it should do so subject to the modifications proposed below.

III. COMMENTS ON THE COMPLIANCE FILING

A. **Bonneville has limited its filing to tariff revisions addressing the Environmental Redispatch Policy as the December 7 Order requires; a full tariff was not ordered.**

In the Compliance Filing, Bonneville responded to the Commission's December 7 Order with tariff revisions that address the Environmental Redispatch Policy. It did so based on its understanding that the Order required it to file only tariff revisions and address only the Environmental Redispatch Policy, and not to file a full OATT.²⁵ Bonneville's understanding of the Order is correct; the Order required that the agency file with the Commission tariff revisions addressing the Environmental Redispatch Policy.

Simultaneously, but independently of this proceeding, Bonneville has been working with regional stakeholders to develop a full OATT. For over a year, Bonneville has been conducting workshops and collaborating closely with stakeholders from across the region,²⁶ including Petitioners in this case, to resolve outstanding issues and customer concerns with respect to a full OATT. It plans to file the OATT with the Commission at the end of March, seeking safe harbor reciprocity status under Order No. 888.²⁷

²⁴ Compliance Filing at p. 6.

²⁵ *Id.* at pp. 1-2.

²⁶ *Id.* at p. 11. See Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,281-87.

²⁷ *Id.* The Joint Intervenors understand that Bonneville's new OATT, because it will be a complete OATT, will contain the new tariff revisions pursuant to the Compliance Filing.

A plain reading of the December 7 Order demonstrates that its scope is limited to Bonneville's Environmental Redispatch policy. It specifically stated: "We find that Bonneville's *Environmental Redispatch Policy* results in noncomparable transmission service that unfairly treats non-Federal generating resources connected to Bonneville's transmission system."²⁸ The Commission then based its directive squarely on that finding, stating:

[W]e direct Bonneville to file, within 90 days from the date of this order, *tariff revisions* that address *the comparability concerns raised in this proceeding* in a manner that provides for transmission service on terms and conditions that are comparable to those under which Bonneville provides transmission services to itself and that are not unduly discriminatory or preferential.²⁹

The Commission did not address any Bonneville policy, practice or procedure in this proceeding other than the Environmental Redispatch Policy. Therefore, the phrase "comparability concerns raised in this proceeding" can be based only on the Commission's findings about the Environmental Redispatch Policy. Accordingly, the required "tariff revisions"³⁰ relate only to the Commission's comparability concerns arising out of the Environmental Redispatch Policy.³¹

²⁸ December 7 Order at P 62 (emphasis added).

²⁹ *Id.* at P 64 (emphasis added).

³⁰ The term "tariff revisions" is intended to mean just that – limited changes to a tariff – and not a new full OATT. See e.g., *Southern Star Central Gas Pipeline, Inc.*, 113 FERC ¶ 61,110 at P 7 (2005) (The Commission directed Southern Star to file tariff "revisions" to ensure that all discount agreements use the same rate design as the pipeline's tariff rates. Southern Star filed revisions to its FERC Gas Tariff to comply with the Commission's directive and the Commission accepted the compliance filing in *Southern Star Central Gas Pipeline, Inc.*, 114 FERC ¶ 61,269 (2006)).

³¹ Other language in the December 7 Order strongly supports this conclusion. For example, the Commission opened the Order by directing Bonneville to file "*tariff revisions* to address the comparability concerns raised in this proceeding." December 7 Order at P 1 (emphasis added). And, at the conclusion of the Order, the Commission again stated: "*In sum*, the Commission finds that Bonneville's *Environmental Redispatch Policy* results in non-comparable transmission service that is unduly discriminatory and preferential." *Id.* at P 78 (emphasis added). That is to say, "in sum," the Order is about the Environmental Redispatch Policy and nothing else.

B. Cost allocation and rate design are not at issue in this proceeding.

Bonneville explains in its Compliance Filing that it intends to convene a rate case this spring to establish a rate for the recovery of costs incurred under Attachment P.³² Bonneville in its Compliance Filing also describes the cost allocation it intends to propose in that rate case.³³ However, Bonneville does not have the authority to allocate costs and develop rates outside of a formal rate proceeding that is governed by section 7 of the Northwest Power Act.³⁴ Therefore, cost allocation is not an issue before the Commission in this proceeding.

Bonneville's enabling statutes vest in the Bonneville Administrator the authority to allocate costs and establish Bonneville rates. Section 7(a) of the Northwest Power Act provides that the Bonneville Administrator "shall establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power."³⁵ Before the Administrator can exercise his authority to set rates, he must follow certain procedures set forth in Bonneville's enabling statutes. Specifically, section 7(i) of the Northwest Power Act requires that Bonneville's rates are established according to procedures that include, among other things, publishing the proposed rates in the Federal Register and providing parties the opportunity to present written and oral testimony, submit data requests, and conduct cross examination.³⁶

Bonneville did not have time to conduct a rate proceeding that would afford all interested parties their full procedural rights before submitting its Compliance Filing to the Commission on March 6th. As Bonneville notes in its filing, the cost allocation methodology is no more than "a

³² Compliance Filing at p. 21.

³³ *Id.*

³⁴ 16 U.S.C. § 839e.

³⁵ 16 U.S.C. § 839e(a)(1).

³⁶ 16 U.S.C. § 839e(i).

proposal at this stage because Bonneville is legally barred from establishing rates outside a formal rate case.”³⁷ Before the costs incurred under Attachment P are allocated, Bonneville must afford those customers that may bear such costs their full procedural rights provided by the Northwest Power Act. After completing this due process, the Administrator may make a decision based on a properly developed record and must provide, “a full and complete justification of the final rates.”³⁸ Until Bonneville has conducted a rate proceeding, developed a complete record, and submitted its proposed rate or rates to the Commission, Bonneville’s cost allocation and rate design for the costs incurred under Attachment P are not before the Commission.

C. If the Commission accepts Bonneville’s proposed tariff revisions, it should make the following modifications.

As noted above, Bonneville must reconcile the December 7 Order’s directives within the limits of its obligations to comply with environmental laws. Bonneville asserts that curtailment of generation pursuant to Attachment P is the only such mechanism that will allow it to satisfy and balance all its legal obligations, including its fundamental obligation to protect endangered species. While reiterating our continued opposition to the December 7 Order, the Joint Intervenors propose that Bonneville’s Attachment P should be modified as set forth below.

1. New generators in the Bonneville balancing authority are on notice of Bonneville’s potential need to displace them and should not be compensated.

Bonneville proposes to compensate generators for losses under power sales contracts entered into before March 6, 2012 but not power sales contracts entered into after that date. Both

³⁷ Compliance Filing at pp. 22-23.

³⁸ 16 U.S.C. § 839e(i)(5).

existing generators and those coming online after March 6, 2012 (new generators), however, would receive compensation for REC and PTC values.³⁹

As Bonneville points out in its Compliance filing,⁴⁰ there is Commission precedent for treating new transmission customers differently than existing customers. In *PJM Interconnection, LLC* (“*PJM*”),⁴¹ the Commission upheld a difference in treatment of new and existing customers based on customers’ expectations at the time of entrance to the interconnection queue. In *PJM*, existing generators were responsible for the costs of certain network upgrades. Then, PJM changed its interconnection rules to exempt new entrants to the PJM market from the costs of those upgrades. The Commission allowed the distinction in treatment, because existing generators and new generators had different expectations for rules and different notice of those rules. The Commission ruled that a generator subject to differing treatment “was on notice that it would bear its proportionate share of Network Upgrade 28 and all parties in the queue were under the expectation that the costs of the network upgrade would be allocated in that manner.”⁴²

The Commission also allowed for different treatment of new and existing generators in Order No. 890.⁴³ In that order, the Commission allowed for different treatment of new and existing generators in applying the Commission’s policy on transmission credits, because existing facilities were developed prior to the policy.⁴⁴

³⁹ Compliance Filing at p. 27.

⁴⁰ *Id.* at pp. 27-28.

⁴¹ *PJM Interconnection, LLC*, 136 FERC ¶ 61,195 at P 35 (2011).

⁴² *Id.*

⁴³ Preventing Undue Discrimination and Preference in transmission Service, Order No 890-A, 121 FERC ¶ 61,297 at P 361 (2007).

⁴⁴ *Id.* at P 361.

Similarly, new generators and existing generators in Bonneville's BAA have received different notice, have differing expectations, and, therefore, should be treated differently. Without commenting on whether generators that were operating before 2010 knew or should have known that the growth of the variable generation fleet would contribute significantly to oversupply conditions that require displacement of non-environmental must-run units that are not subject to environmental must-run requirements, developers of new generation certainly cannot make such claims. Attachment P, the events and process leading up to its proposal, including Bonneville's 2011 Environmental Redispatch Policy and litigation in this docket, have provided notice and will set expectations for developers of new generation in Bonneville's BAA. The potential for displacement is a known risk, as is the possibility that compensation will not be provided.

Equipped with that information, generators signing new contracts and applying for federal tax subsidies can avoid making decisions that might cause them to incur costs in the event of curtailment mandated by environmental conditions. It is important that Bonneville clearly establish that new entrants will not be compensated so that the market takes account of these rules in the prices for these power sales. As Bonneville stated in its Compliance Filing, new generators have "notice of the rules in place so that they can structure their economic models and contracts accordingly."⁴⁵ With such differing expectations, there is no just cause for Bonneville to provide compensation for PTC and REC values for new generators. Attachment P should be modified to exclude compensation for curtailment of new generation.

⁴⁵ Compliance Filing at p. 28.

2. Bonneville should not have to continue compensating a generator if that compensation has been challenged pursuant to Attachment P.

Pursuant to Attachment P, to be compensated for displacement during oversupply conditions, generators in Bonneville's BAA must submit to an independent third-party evaluator their (1) installed generating capacity and (2) costs of displacement (in dollars per megawatt-hour) for each month.⁴⁶ This independent evaluator will then aggregate the costs and construct the cost curve so that Bonneville can cost-effectively displace generators and appropriately compensate the displaced generators.⁴⁷ Bonneville will also use the independent evaluator to ensure accurate submission of cost information and accurate scheduling practices.

The generators are required to certify that the costs of displacement they submit to the evaluator are accurate and must also provide supporting data and documentations so that the evaluator can review the costs for accuracy.⁴⁸ If, after evaluating the submitted data, the independent evaluator believes that a generator's costs warrant further review, the evaluator will provide the cost information, including the supporting data and documentation, to Bonneville.⁴⁹ Bonneville may then file a complaint or another request with the Commission asking for investigation of the costs and other appropriate action.⁵⁰ If, based on its internal wind forecasting systems, Bonneville believes that a generator is inaccurately scheduling, Bonneville will ask the independent evaluator to request and review data supporting the generator's submitted schedules.⁵¹ If the evaluator determines that the generator's scheduling practices are

⁴⁶ Compliance Filing at p. 16.

⁴⁷ *Id.*

⁴⁸ *Id.* at p. 17.

⁴⁹ *Id.* at pp. 17-18.

⁵⁰ *Id.* at p. 18.

⁵¹ *Id.*

questionable, Bonneville may file a complaint with the Commission requesting investigation of the generator's scheduling practices and other appropriate action.⁵²

The Compliance Filing, however, is silent as to Bonneville's obligation to continue to compensate the generator if Bonneville suspects that the generator is submitting inaccurate schedules or displacement costs and files a complaint with the Commission or the Commission initiates an investigation. The Commission has broad investigatory power and may conduct investigations relating to any matter subject to its jurisdiction, including investigation for submission of inaccurate information.⁵³ If Bonneville suspects that a generator is submitting inaccurate schedules or displacement costs and files a complaint with the Commission, or if the Commission initiates an investigation, Bonneville should suspend compensation to the suspected bad actor pending the outcome of the Commission's investigation. If the Commission closes the investigation with no findings of misconduct, Bonneville will then pay the displaced generator what was owed to it for displacement. If the Commission finds the generator in violation of its rules and regulations, then the Commission can fashion the appropriate remedy for the violation.

The Commission has at its disposal various enforcement tools, including disgorgement of unjust profits and civil penalty authority,⁵⁴ and its discretion is at its zenith when fashioning remedies for violations.⁵⁵ Under normal circumstances, mere disgorgement of unjust profits by the wrongdoer may adequately compensate the injured party and restore it to being whole again

⁵² *Id.*

⁵³ 18 C.F.R. § 1b.3; 18 C.F.R. § 35.41(b).

⁵⁴ Policy Statement on Penalty Guidelines, 130 FERC ¶ 61,220 at P 5 (2010).

⁵⁵ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.").

without serious side-effects. But given the Northwest economy, and Bonneville's statutory requirement to operate using sound business principles, Bonneville is in no position to advance disputed compensation to the displaced generators. By the time the Commission initiates a proceeding, completes its investigation, and orders the wrongdoer to disgorge the unjust profits, the harm already caused to the Bonneville's ratepayers may well be irreparable. Therefore, Attachment P should be modified to permit Bonneville to discontinue compensation as soon as it files a complaint with the Commission or the Commission initiates an investigation.

3. Bonneville should not have to compensate a generator for ramp time.

Pursuant to Attachment P, Bonneville will compensate a displaced generator "for each hour of displacement."⁵⁶ An "hour of displacement" is defined as "an hour in which [Bonneville] has directed the Generator to reduce generation under [Attachment P] and the Generator has complied with the direction, *including hours in which the Generator is ramping down to comply with the direction or ramping up to return to normal operations.*"⁵⁷ On the basis of this definition, a displaced generator will receive compensation for an entire hour even when it was not affected by the displacement orders or affected only for a small part of the hour. This creates an opportunity for a windfall, is unjustified and should not be retained in Attachment P.

As a practical matter, wind generators can ramp up and down in a matter of minutes and should not be compensated for their ramp time. If the generator receives an order to ramp to a stated level in the next hour, the generator should not be compensated for the hour in which the order was given, but only for the subsequent hour to which the order applies. The fact that the generator follows the customary practice of ramping during the 20 minutes across the top of the hour does not justify compensation for the hour preceding the one to which the order applies.

⁵⁶ Compliance Filing, Exhibit A, Attachment P at P 6.

⁵⁷ *Id.* (Emphasis added).

Therefore, Attachment P’s definition of “hour of displacement” should be modified to “an hour in which Transmission Provider has directed the Generator to reduce generation under this Attachment and Generator has complied with the direction, *not* including hours in which the Generator is ramping down to comply with the direction or ramping up to return to normal operations *so long as the Generator is capable of ramping to the specified level over the customary 20-minute ramp period.*”

4. Attachment P should specify which “supporting data and documentation” generators must submit to certify that their costs of displacement are accurate.

As noted above, under Attachment P each generator must make an election to either not submit the costs of displacement, in which case the costs of displacement will be deemed to be \$0/MWh, or submit the costs of displacement,⁵⁸ which will be used to develop the Least-Cost Displacement Cost Curve⁵⁹ and compensate the generator for each hour of displacement.⁶⁰ Each generator that wishes to be compensated for its hours of displacement must submit the nameplate generating capacity and the costs of displacement for each month of the following April through March for each facility.⁶¹ Attachment P requires the generator to “certify that the nameplate capacity and the costs are accurate,” and “include supporting data and documentation for the costs.”⁶² However, Attachment P does not specify how each generator should certify the nameplate capacity and displacement costs, or what supporting data and documentation must be submitted in support of the claimed costs.

⁵⁸ Compliance Filing, Exhibit A, Attachment P at P 3.

⁵⁹ *Id.* at P 4.

⁶⁰ *Id.* at P 6.

⁶¹ *Id.* at P 5a.

⁶² *Id.*

In order to create an accurate Least-Cost Displacement Cost Curve and effectively evaluate the displacement costs submitted by each generator, Attachment P should clearly identify specific documentation and supporting data that must be provided to the evaluator. Joint Intervenors recognize that different generators may have different business models and contracts, and may need to have some flexibility in submitting supporting documentation. However, to ensure that the independent evaluator can adequately assess the submitted costs of displacement and compare various generators' costs, there needs to be some common baseline of information. Attachment P should specify what supporting data and documentation should be included and should reserve the right of the evaluator to request more information if such data and documentation are insufficient to determine and evaluate the costs of displacement for each facility. At a minimum, Attachment P should identify that the generator should provide to the independent evaluator (1) all contracts for sale of power, (2) all relevant IRS information about the nature and status of any tax incentives for the generating facility, and (3) information necessary to establish whether RECs are sold separately or bundled with power generated by the generator. This would help ensure an accurate Least Cost Displacement Cost Curve and that generators do not exaggerate the cost of displacement for which they are compensated.

IV. CONCLUSION

Although the Joint Intervenors have disputed the Commission's findings that the Environmental Redispatch Policy results in unduly discriminatory and preferential transmission service, if the Commission accepts the Compliance Filing, it should do so subject to the modifications proposed in section III.C of these comments.

Respectfully submitted,

By: /s/ Irene A. Scruggs

Irene A. Scruggs
Public Power Council
825 NE Multnomah, Suite 1225
Portland, OR 97232
(503) 595-9779
iscruggs@ppcpdx.org

Attorney for Public Power Council

By: /s/ Sherry A. Quirk

Sherry A. Quirk, Esq.
David A. Fitzgerald, Esq.
Roger E. Smith, Esq.
Monica M. Berry, Esq.
Schiff Hardin LLP
1666 K Street NW, Suite 300
Washington, DC 20006
Tel: (202) 778-6475
Fax: (202) 778-6460
E-mail: squirk@schiffhardin.com

Attorneys for Joint Intervenors

By: /s/ Betsy Bridge

Betsy Bridge
The Law Office of Betsy Bridge, LLC
6426 NE Rodney Ave.
Portland, OR 97211
(503) 208-3369
betsy@betsybridge.com

Attorney for Northwest Requirements Utilities

By: /s/ Zabyn Towner

Zabyn Towner
Pacific Northwest Generating Cooperative
711 NE Halsey St.
Portland, OR 97232
(503) 528-5308
ztowner@pngcpower.com

Attorney for Pacific Northwest Generating Cooperative

March 27, 2012

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 27th day of March, 2012.

/s/ E-filed

Sherry A. Quirk

Attorney for Joint Intervenors

DC\80236976.2