UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

IBERDROLA RENEWABLES, INC.		
PACIFICORP		
NEXTERA ENERGY RESOURCES, LLC		
INVENERGY WIND NORTH AMERICA LLC		
HORIZON WIND ENERGY LLC		**DOCKET NO. EL11-44-000**
v.		
BONNEVILLE POWER ADMINISTRATION		

REQUEST FOR REHEARING OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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The National Rural Electric Cooperative Association ("NRECA"), pursuant to Section 313 of the Federal Power Act ("FPA")[1] and Rule 713 of the Commission's Rules and Practice of Procedure,[2] hereby requests the Commission to grant rehearing of its December 7, 2011 order[3] granting a petition filed by Iberdrola Renewables, Inc.; PacifiCorp; NextEra Energy Resources, LLC; Invenergy Wind North America LLC; and Horizon Wind Energy LLC (collectively "Complainants") against Bonneville Power Administration ("BPA") in the above-captioned proceeding. At issue in this proceeding is BPA's Environmental Redispatch Policy under which BPA redispatches wind generators in order to comply with statutory mandates and reliability rules. The Commission should grant rehearing and dismiss Complainants' petition because

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1 16 U.S.C. § 824l(a) (2006).

2 18 C.F.R. § 385.713 (2010).

3 *Iberdrola Renewables, Inc. v. Bonneville Power Administration*, 137 FERC ¶ 61,185 (December 7, 2011) ("December 7 Order").

BPA's Environmental Redispatch Policy is subject to the exclusive jurisdiction of the Ninth Circuit Court of Appeals; because the Commission's authority under Section 211A of the FPA is not applicable here, as the dispute concerns generation dispatch and not transmission; and because in any event BPA's Environmental Redispatch Policy does not result in non-comparable transmission service or undue discrimination against wind generation. If the Commission does not summarily reject the petition on rehearing, it should set the matter for hearing to resolve disputed issues of material facts with respect to the comparability and non-discrimination provisions of Section 211A.

I. EXECUTIVE SUMMARY

NRECA requests rehearing of the Commission's December 7 Order. The Commission does not have jurisdiction to review BPA's Environmental Redispatch Policy, which constitutes final agency action by BPA. Under the Northwest Power Act, any review of the policy is subject to the exclusive jurisdiction of the Ninth Circuit. The Commission does not have the authority under Section 211A of the FPA to intrude upon this jurisdiction, regardless of whether the Commission's actions are prospective or retroactive. Further, the Commission does not have the authority under Section 211A to override BPA's other statutory obligations.

Even if the Commission had the authority to intrude on the Ninth Circuit's jurisdiction and override BPA's statutory obligations, the Commission cannot exercise jurisdiction under Section 211A of the FPA because that section applies exclusively to the provision of transmission service. The Environmental Redispatch Policy does not affect transmission service and concerns only the scheduling and dispatch of generation resources. Accordingly, the Commission exceeded its statutory authority under Section 211A.

Even if the Commission were correct in its view that the Environmental Redispatch Policy affects transmission service, the Commission erred as a matter of law in determining that the policy results in non-comparable transmission service. Redispatch under the policy does not result in non-comparable treatment because BPA is treating its own generating facilities in the same way that it treats other generating facilities. In fulfilling its obligation to control non-hydro generation to prevent environmental damage, BPA makes its generation redispatch decision not on a "Federal versus non-Federal" basis, but on a hydro versus non-hydro (including Federal non-hydro) basis.

In addition, the Environmental Redispatch Policy does not result in unduly discriminatory transmission service because the renewable resources that are redispatched under the policy are not similarly situated to hydroelectric generators. There is also a legitimate reason for treating renewable generation differently from hydroelectric generation because the basis for the different treatment is grounded in statutory mandates and reliability rules. In some respects, renewable generators are actually favored under the Environmental Redispatch Policy because they are redispatched after the thermal generators. Also, the fact that BPA's Environmental Redispatch Policy results in a different economic impact on some generators is not relevant in determining whether the policy results in unduly discriminatory transmission service

In granting Complainants' petition, the Commission failed to adequately explain the basis for its conclusions and gave inadequate consideration to the arguments made by NRECA in its Comments. At the very least, the Commission should have set the matter for hearing to resolve contested issues of material fact.

Finally, the Commission should have dismissed the Petition because it does not have the authority to order the relief sought by the Complainants. The only relief that the Petitioners

proposed relates to non-transmission alternatives, none of which is within the jurisdiction of the Commission under Section 211A. Also, the only transmission-related remedies for the alleged undue discrimination are remedies that effectively eviscerate the Environmental Redispatch Policy, and that consequently are inconsistent with the exclusive jurisdiction of the Ninth Circuit.

II. REQUEST FOR REHEARING

A. STATEMENT OF ISSUES

In accordance with 18 C.F.R. § 385.713(c)(2), NRECA specifies the following issues:

1. Whether the Commission's order granting Complainants' petition is arbitrary, capricious, an abuse of discretion, not in accordance with the law and in excess of its statutory jurisdiction because the Commission does not have jurisdiction under the FPA to review BPA's Environmental Redispatch Policy, which is subject to the exclusive jurisdiction of the Ninth Circuit.[4]

2. Whether the Commission erred in failing to address the legal and policy implications of BPA's other statutory obligations as they relate to BPA's provision of transmission service.[5]

3. Whether the Commission's order granting Complainants' petition is arbitrary, capricious, an abuse of discretion, not in accordance with the law and in excess of its statutory authority because the Commission exceeded its authority under Section 211A of the FPA, which applies only to rates, terms and conditions under which an unregulated transmitting utility

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[4] 5 U.S.C. § 706(2)(A),(C); 16 U.S.C. § 839f(e)(5); *Northwest Resource Information Center, Inc., v. National Marine Fisheries Service, et al.*, 25 F.3d 872 (9th Cir. 1994); *Pacific Power & Light v. Bonneville Power Administration*, 795 F.2d 810, 814 (9th Cir. 1986).

[5] Bonneville Project Act of 1937, 16 U.S.C. § 832; Flood Control Act of 1944, 16 U.S.C. § 825s; Transmission System Act of 1974, 16 U.S.C. § 838-838k; Northwest Power Act, 16 U.S.C. § 839 *et seq.*; Clean Water Act, 33 U.S.C. § 1341; Endangered Species Act, 16 U.S.C. § 1536.

provides transmission service, and does not give the Commission jurisdiction over generation dispatch by unregulated transmitting utilities.[6]

4. Whether the Commission's order granting Complainants' petition is arbitrary, capricious and an abuse of discretion because it erred as a matter of law in determining that BPA's Environmental Redispatch Policy results in the provision of transmission service to others on terms that are not comparable to the transmission service it provides to itself, and that are unduly discriminatory or preferential.[7]

5. Whether the Commission's order granting Complainants' petition is arbitrary, capricious and an abuse of discretion because it failed to adequately explain the rationale for its decision or to address the issues raised by protestors.[8]

6. Whether the Commission's order granting Complainants' petition is arbitrary, capricious and an abuse of discretion because it failed to develop an adequate record to support its conclusions.[9]

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[6] 5 U.S.C. § 706(2) (A), (C); 16 U.S.C. § 824j-1 (2006); *Office of Consumers' Counsel v. Fed. Energy Regulatory Comm'n*, 655 F.2d 1132, 1149 (D.C. Cir. 1980) ("it is axiomatic that no order or regulation issued by an administrative agency can confer on it any greater authority than it has under statute.").

[7] 5 U.S.C. § 706(2)(A); *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045, at P 115 (2003) (undue discrimination exists only where there is no legitimate basis for distinction); *Arkansas Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002) (rate is not "unduly" preferential or "unreasonably" discriminatory if the utility can justify the disparate effect); *Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 857 (D.C. Cir. 1979); *St. Michaels Utils. Comm'n v. FPC*, 377 F.2d 912, 915 (4th Cir. 1967) ("[D]ifferences in rates are justified where they are predicated upon differences in facts.").

[8] 5 U.S.C. § 706(2) (A)(2006); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *PSEG Energy Res. & Trade LLC v. FERC* 10-1103, 2011 WL 6450762 (D.C. Cir. Dec. 23, 2011) (Commission's failure to respond to "facially legitimate objections" rendered its decision arbitrary and capricious); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *G.I. Trucking v. United States*, 708 F.2d 1421, 1423 (9th Cir. 1983) (failure of agency to adequately explain the reasons for its action required the action to be set aside).

[9] 5 U.S.C. § 706(A); *Pub. Utils. Comm'n of State of Cal. v. FERC*, 814 F.2d 560, 562 (9th Cir. 1987) (if the failure to hold a hearing results in "an inadequate record for review, the case may be returned to the agency for further development of the record, and for a hearing if one should have been held.").

7. Whether the Commission's order granting Complainants' petition is arbitrary, capricious, and an abuse of discretion because the Commission does not have the authority to grant the relief requested by petitioners, which is to establish an energy market and implement negative pricing.[10]

B. SPECIFICATION OF ERRORS

In accordance with 18 C.F.R. § 385.713(c)(1), NRECA specifies the following errors:

1. The Commission erred by acting beyond the scope of its statutory jurisdiction. The Commission does not have jurisdiction under the FPA to review BPA's Environmental Redispatch Policy, which is subject to the exclusive jurisdiction of the Ninth Circuit Court of Appeals.

2. The Commission erred by failing to address BPA's competing statutory obligations.

3. The Commission erred by exceeding the scope of its statutory authority under Section 211A of the FPA, which applies only to rates, terms and conditions under which an unregulated transmitting utility such as BPA provides transmission service. The Commission's order impermissibly applies Section 211A to the scheduling and dispatch of generation resources under BPA's Environmental Redispatch Policy.

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[10] 5 U.S.C. § 706(2)(A),(C); *Office of Consumers' Counsel v. Fed. Energy Regulatory Comm'n*, 655 F.2d 1132, 1149 (D.C. Cir. 1980) ("it is axiomatic that no order or regulation issued by an administrative agency can confer on it any greater authority than it has under statute."); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 617 (D.C.Cir.1976); *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14, 47 L.Ed.2d 668 (1976); *Dixon v. United States*, 381 U.S. 68, 74, 14 L.Ed.2d 223 (1965); *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936); *International Railway Co. v. Davidson*, 257 U.S. 506, 514 (1922); *see also Real v. Simon*, 510 F.2d 557, 564 (5th Cir. 1975) ("There can be no doubt that the authority of an administrative agency to promulgate regulations is limited by the statute authorizing the regulations.").

4. Even if the Commission correctly concluded that the Environmental Redispatch Policy constitutes transmission service that is reviewable under Section 211A, the Commission erred in determining that the redispatch policy results in BPA's provision of transmission service to others on terms that are not comparable to the transmission service it provides to itself and that are unduly discriminatory or preferential.

5. The Commission erred by failing to explain adequately the rationale for its determination that BPA's provision of transmission service under the Environmental Redispatch Policy is inconsistent with principles of comparability and is unduly discriminatory.

6. The Commission erred in granting Complainants' petition because the record evidence is insufficient to support the Commission's conclusions. Therefore, if the Commission does not summarily dismiss the petition, it should set this matter for hearing to resolve contested issues of material fact.

7. Even if the Commission concludes that the Environmental Redispatch Policy results in the unduly discriminatory provision of transmission service, the Commission erred in failing to summarily dismiss the petition because it does not have the authority to grant the relief requested by the petitioners, which is to establish an energy market and implement negative pricing.

C. ARGUMENT

1. THE COMMISSION ERRED IN NOT DISMISSING THE PETITION BECAUSE THE NINTH CIRCUIT COURT OF APPEALS HAS EXCLUSIVE JURISDICTION OVER BPA'S ENVIRONMENTAL REDISPATCH POLICY.

a. BPA's Environmental Redispatch Policy Is a Final Agency Action of BPA.

BPA's Environmental Redispatch Policy is final agency action as that term is used in the Northwest Power Act. The Environmental Redispatch Policy is set forth in the *Administrator's*

Final Record of Decision, BPA's Interim Environmental Redispatch and Negative Pricing Policies, dated May 13, 2011 ("ROD").[11] Neither the Commission nor Complainants contend that the Environmental Redispatch Policy does not constitute a final agency action under the Northwest Power Act.

b. The Ninth Circuit Court of Appeals Has Exclusive Jurisdiction to Review Final Actions of BPA.

The Ninth Circuit is the only entity that has the authority to render decisions concerning final actions of BPA. Section 9f(e)(5) of the Northwest Electric Power Planning and Conservation Act ("Northwest Power Act")[12] provides that "Suits to challenge. . . final actions and decisions taken pursuant to this chapter. . . or implementation of such final actions. . . shall be filed in the United States court of appeals for the region."[13]

The Ninth Circuit has rejected previous challenges to BPA's Final Decisions. In *Northwest Resource Information Center, Inc., v. National Marine Fisheries Service, et al.*, the Court of Appeals affirmed a decision of the District Court dismissing a suit against BPA for lack of jurisdiction.[14] In that proceeding, several complainants had filed a complaint alleging that BPA's 1992 Water Management Record of Decision setting out a program designed to improve the life cycle of anadromous fish stocks violated the Endangered Species Act. In affirming the dismissal, the Court of Appeals stated, "We have consistently held that this court has exclusive jurisdiction to review challenges to final actions of the Bonneville Power Administration based

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

[12] 16 U.S.C. § 839 *et seq.*

[13] 16 U.S.C. § 839f(e)(5).

[14] *Northwest Resource Information Center, Inc., v. National Marine Fisheries Service, et al.*, 25 F.3d 872 (9th Cir. 1994).

upon an administrative record."[15] The Court of Appeals rejected arguments that the District Court had jurisdiction based on the alleged violation of the Endangered Species Act, stating "The determinations here made were final actions by the agency carrying out its mission of managing the river system and enhancing the fish stock. They fall within the exclusive jurisdiction of this court."[16] The Court of Appeals also rejected assertions that the suit should not be dismissed because it would make it more difficult for the appellants to pursue their claims. The court stated, "It is no doubt true that the jurisdictional provision works against the plaintiffs. But the jurisdictional allocation was made by Congress. It would be even less satisfying if different district courts in the states of the Columbia Basin could entertain suits affecting the administration of the river system, instead of the single comprehensive jurisdiction of the Ninth Circuit…. The agency's final actions fulfilling its statutory mission can be examined only in this court."[17]

The Ninth Circuit has also held that district courts may not assert jurisdiction in actions concerning BPA where the effect of such actions challenges the substance of a final BPA action. In *Pacific Power & Light v. Bonneville Power Administration,* the Court of Appeals affirmed a decision by the District Court dismissing a suit for lack of jurisdiction where petitioners alleged that BPA breached its contractual obligations in approving a new average cost methodology.[18] The fact that the district court proceeding involved a breach of contract did not make the Ninth Circuit's exclusive jurisdiction any less controlling. The Ninth Circuit explained that the

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[15] 25 F.3d at 874 (citing *Pacific Power & Light v. Bonneville Power Administration*, 795 F.2d 810, 814 (9th Cir. 1986).).

[16] *Id.* at 875.

[17] 25 F.3d at 875.

[18] *Pacific Power & Light v. Bonneville Power Administration*, 795 F.2d 810 (9th Cir. 1986).

Northwest Power Act "does not permit district court jurisdiction *where the effect of an action is to challenge a BPA proceeding*, the substance of which eventually will be subject to direct review by this court."[19] The Court stated that it could not "sanction a scheme of review which would allow essentially the same BPA decision to be subject to interlocutory review by the district court and final review by this court."[20]

c. The Commission's Order Constitutes an Improper Review of BPA's Environmental Redispatch Policy.

The December 7 Order directly challenges BPA's ROD. The Commission held that the Environmental Redispatch Policy "significantly diminishes open access to transmission, and results in [BPA] providing transmission service to others on terms and conditions that are not comparable to those it provides itself."[21] The Commission also stated that "Through its use of dispatch orders, Bonneville's Environmental Redispatch Policy . . . impinges on the transmission service obtained by non-Federal generation . . . in order to deliver Federal hydropower from [BPA's] system."[22]

The December 7 Order has the effect of indirectly modifying BPA's Environmental Redispatch Policy because it requires BPA to take actions to rectify what the Commission concluded constitutes non-comparable and unduly discriminatory transmission service that results from the implementation of the Environmental Redispatch Policy. The Commission held, "Because we find that Bonneville's Environmental Redispatch Policy results in noncomparable transmission service, pursuant to section 211A of FPA, we direct Bonneville to file, within 90

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[19] *Id.* at 815 (emphasis added).

[20] *Id.*

[21] December 7 Order at P 33.

[22] *Id.* at P 62.

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."[23] In other words, the Commission is directing BPA to propose modifications to its Open Access Transmission Tariff ("OATT") that will eliminate the allegedly discriminatory impact of its Environmental Redispatch Policy.

d. The Commission's Order Exceeds Its Jurisdiction because It Lacks the Statutory Authority to Review or Modify BPA's Environmental Redispatch Policy.

The instant proceeding is analogous to *Northwest Resource Information Center, Inc.*, discussed in Section 1b, *supra*. Just as an alleged violation of the Endangered Species Act in *Northwest Resource Information Center, Inc.*, did not give the district court the authority to review BPA's 1992 Water Management Record of Decision, an alleged inconsistency with the standards established in Section 211A of the FPA does not give the Commission the authority to review BPA's Environmental Redispatch Policy. The Court of Appeals in *Northwest Resource Information Inc.*, also rejected the argument that action by the district court is justified to facilitate compliance with the Endangered Species Act. In the instant case, the Commission's justification for its action – the need to also comply with the FPA – is equally invalid.

The instant proceeding is also similar to the circumstances leading to the decision in *Pacific Power & Light v. Bonneville Power Administration*, discussed in Section 1b, *supra*. The ROD is currently under review in the Ninth Circuit.[24] Like the petitioners in *Pacific Power & Light*, the petitioners in the instant proceeding are impermissibly seeking review of final BPA

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[23] *Id.* at P 64.

[24] *Cannon Power Group, LLC, et al. v. BPA*, Case No. 11-72059.

action in competing jurisdictions. The Commission ordered BPA to take action that would negate the impact of the Environmental Redispatch Policy. The fact that the Commission ordered BPA to achieve that result by filing a transmission tariff pursuant to Section 211A of the FPA rather than ordering revisions to the Environmental Redispatch Policy does not change this conclusion. The December 7 Order holds that the Environmental Redispatch Policy causes BPA to provide non-comparable and unduly discriminatory transmission service and directs BPA to remedy that situation. Like the effect of a breach of contract action in *Pacific Power & Light*, the effect of the Commission's Section 211A order constitutes an impermissible review of final BPA action, which is subject to the exclusive jurisdiction of the Ninth Circuit.

e. Section 211A of the FPA Does Not Grant the Commission Concurrent Jurisdiction to Review Final BPA Action.

The fact that the Congress gave the Commission authority to require unregulated transmitting utilities to provide transmission service on comparable and not unduly discriminatory terms and conditions does not give the Commission authority to usurp the jurisdiction of the Ninth Circuit. Congress did not limit or otherwise affect the Court of Appeals' exclusive jurisdiction to review final agency actions of BPA under the Northwest Power Act when it enacted Section 211A of the FPA through the Energy Policy Act of 2005.[25] The Supreme Court has held that "absent a clearly expressed intention, repeals by implication are not favored."[26] Accordingly, section 9f(e)(5) Northwest Power Act, providing the Ninth Circuit with exclusive jurisdiction to review final BPA action, remains in full force and effect.

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[25] *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) ("EPAct 2005"). *See also* 16 U.S.C. § 824j-1 (2010).

[26] *Branch v. Smith*, 538 US 270, 273 (2003).

By holding that BPA's Environmental Redispatch Policy violates Section 211A of the FPA and stating that it is taking action "consistent with this statutory language,"[27] the Commission implicitly concluded that Congress, through Section 211A, intended to grant the Commission concurrent jurisdiction to review final BPA action. While the Commission did not state this conclusion explicitly, that is the only interpretation of the December 7 Order that would justify the Commission's conclusion that the Environmental Redispatch Policy is inconsistent with the provision of comparable and not-unduly discriminatory transmission service.

The Commission's implicit conclusion that it has concurrent jurisdiction to review and evaluate the Environmental Redispatch Policy constitutes reversible error because it exceeds the Commission's statutory authority. In *PSEG Energy Resources Trade LLC v. FERC*, which was issued on December 23, 2011, the Court of Appeals for the D.C. Circuit held that the Commission may not exercise its authority through an unjustified assumption of Congressional intent. Specifically, the Court held that when an agency's decision is based on "the unjustified assumption that it was Congress' judgment that such an outcome is desirable or required," the agency has not reasonably exercised its discretion.[28] In light of the 9th Circuit's repeated and long-standing assertion of exclusive authority concerning Final Actions by BPA, the Commission should have held that it does not have the authority to issue an order that affects the Environmental Redispatch Policy.

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[27] December 7 Order at P 30.

[28] *PSEG Energy Res. & Trade LLC v. FERC*, No. 10-1103, 2011 WL 6450762 (D.C. Cir. Dec. 23, 2011) (citing *Transitional Hospitals Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000).).

f. The Commission Cannot Justify Its Order on the Ground that the Order Is Prospective rather than Retroactive.

The Commission's attempt to justify its jurisdiction on the ground that its order is prospective, rather than retroactive,[29] is invalid because the order nonetheless interferes with the Ninth Circuit's exclusive jurisdiction over the Environmental Redispatch Policy. If the Commission intends that the tariff that it has ordered BPA to file will take effect before the Environmental Redispatch Policy terminates, the December 7 Order interferes with the jurisdiction of the Ninth Circuit, as explained above. On the other hand, if the Commission does not intend the tariff to take effect until after the termination of the Environmental Redispatch Policy on March 30, 2012,[30] then the Commission has no basis for ordering BPA to file the tariff since the allegedly non-comparable and unduly discriminatory transmission service will have terminated before the Commission's order takes effect. Consequently, the prospective effect of the Commission's order does not legitimize the order.

2. THE COMMISSION ERRED IN FAILING TO ADDRESS BPA'S COMPETING STATUTORY OBLIGATIONS.

While the Commission's December 7 Order stated that the Commission "appreciates" and "recognizes" BPA's competing statutory mandates,[31] the Order failed to address the legal and policy implications of issuing a directive that overrides BPA's obligations under the Clean Water Act and the Endangered Species Act.[32] BPA is obligated by the Clean Water Act and the Endangered Species Act to ensure the protection of aquatic species. Its Environmental Redispatch Policy complies with those statutory obligations by providing for the dispatch of

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29 December 7 Order at P 30.

30 ROD at 17, 87.

31 December 7 Order at P 33.

32 33 U.S.C. §1341; 16 U.S.C. § 1536.

hydroelectric resources before non-hydroelectric resources when necessary to prevent water spill and the resulting harm to aquatic life. The Commission had an obligation to evaluate the Environmental Redispatch Policy in light of BPA's statutory obligations before issuing its order. However, the Commission failed to do so. Moreover, the December 7 Order provided no guidance as to how BPA might comply with the Commission's directives without violating the Clean Water Act and the Endangered Species Act. The Commission's order is arbitrary and capricious because it failed to give adequate consideration to BPA's other statutory obligations and to whether its order would require BPA to violate those obligations.[33]

3. THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY UNDER SECTION 211A OF THE FPA BECAUSE THE ENVIRONMENTAL REDISPATCH POLICY DOES NOT AFFECT TRANSMISSION SERVICE.

The December 7 Order exceeded the Commission's statutory authority under Section 211A of the FPA. Section 211A applies exclusively to the rates, terms and conditions under which an unregulated transmitting utility provides *transmission* service.[34] The dispute presented by the Complainants is limited to the scheduling and dispatch of generation resources for reliability purposes and does not address transmission service. The Commission's conclusion that BPA's redispatch policy is actionable under Section 211A because it results in non-comparable and unduly discriminatory transmission service is not justified by the Commission's policy as reflected in the *pro forma* OATT or the facts upon which the Commission erroneously relied.

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[33] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (agency must provide a "rational connection between the facts found and the choice made").

[34] 16 U.S.C. § 824j-1(b).

a. The Environmental Redispatch Policy Does Not Affect the Provision of Transmission Service.

The Environmental Redispatch Policy allows BPA to redispatch generation in order to comply with the Clean Water Act[35] and the Endangered Species Act[36] and to ensure reliability of the transmission system. The policy does not limit BPA's provision of transmission service or the rights of transmission customers to deliver energy to the loads specified in their transmission service reservations. Instead, it allows for dispatch of alternative generators to serve those loads when necessary to ensure compliance with BPA's environmental statutory obligations. The Environmental Redispatch Policy does not modify BPA's OATT. The only revision to BPA's transmission service that BPA made in implementing the Environmental Redispatch Policy was to modify Appendix C of its Large Generator Interconnection Agreements to require generators interconnected with BPA to follow BPA's redispatch orders.[37]

BPA's Environmental Redispatch Policy clearly states that it does not affect the transmission rights of BPA's transmission customers. The policy states, "BPA will temporarily substitute renewable, carbon-free hydropower for other generation when necessary to ensure FCRPS operations are consistent with BPA's environmental, statutory, and reliability responsibilities."[38] BPA concluded that "Environmental Redispatch does not affect a Transmission Customer's transmission rights, as all energy deliveries will be made."[39]

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35 16 U.S.C. § 1536.

36 16 U.S.C. § 1341.

37 December 7 Order at P 7.

38 ROD at 14.

39 *Id.* at 17.

BPA's conclusion that redispatch of generation to comply with statutory mandates does not affect transmission service is valid. BPA has not modified its OATT, it is not curtailing transmission service, and it is not using customers' reserved transmission capacity to deliver power to loads other than those specified in the customers' transmission reservations. Instead, BPA is continuing to deliver the specified quantities of power to the specified loads, but is doing so from alternative generation sources. The Commission's *pro forma* OATT explicitly permits redispatch of generation. Section 33.2 of the *pro forma* OATT provides that when a transmission provider determines that a constraint exists on its system, it may redispatch all network resources and its own resources on a least-cost basis. The Commission has also stated that "the provision of planning redispatch does not impair the use of . . . firm transmission rights."[40] Similarly, BPA's redispatch of generation to comply with its statutory mandates also does not interfere with the transmission rights of its transmission customers and is not unduly discriminatory.

In an effort to justify its conclusion that the Environmental Redispatch Policy is actionable under Section 211A, the Commission misused terminology from its orders on open access transmission service and the *pro forma* OATT. The Commission stated that BPA "interrupts" non-Federal customers' transmission service.[41] However, an "interruption" of transmission service is defined in the *pro forma* OATT as "a reduction in non-firm transmission service due to economic reasons."[42] Clearly, the actions that BPA takes under the Environmental Redispatch Policy are not interruptions of service since the redispatch applies to firm

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[40] Order 890-A at P 539.

[41] December 7 Order at P 62.

[42] Order No. 890-A, *pro forma* tariff, Section 1.16.

transmission service and the basis for the redispatch is not economic reasons. The Commission also termed BPA's actions "curtailments" of transmission service.[43] However, a "curtailment" is "a reduction in firm or non-firm transmission service in response to a transfer capability shortage as a result of system reliability conditions."[44] BPA's actions do not constitute a curtailment because there is no shortage of transfer capability or system reliability condition, and customers' service is not reduced; energy continues to flow to the loads designated by the transmission customers. The only correct term for BPA's actions under the Environmental Redispatch Policy is "redispatch." As noted above, the Commission's existing policy indicates that redispatch does not constitute an impermissible interference with transmission customers' transmission rights.[45] Accordingly, the December 7, 2011 Order represents an unexplained departure from the Commission's prior policies.

b. The Commission Acted Beyond the Scope of Its Section 211A Authority.

The December 7, 2011 Order granting Complainants' Petition impermissibly exceeds the Commission's statutory jurisdiction. The Commission's jurisdiction under Section 211A of the FPA applies only to the provision of transmission service by unregulated transmitting utilities. It does not confer on the Commission the authority to regulate generation redispatch by those unregulated transmitting utilities. Consequently, the Commission's order exceeds its jurisdiction.

The Commission's order constitutes reversible error because Administrative Procedures Act provides that a reviewing court will set aside any agency action found to be "in excess of

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[43] December 7 Order at P 62.

[44] Order No. 890-A, *pro forma* tariff, Section 1.8.

[45] *See supra* note 35 and accompanying text.

statutory jurisdiction, authority, or limitations, or short of statutory right."[46] The D.C. Circuit Court has held that it is "axiomatic that no order or regulation issued by an administrative agency can confer on it any greater authority than it has under statute."[47]

4. THE COMMISSION ERRED AS A MATTER OF LAW IN DETERMINING THAT BPA'S ENVIRONMENTAL REDISPATCH POLICY RESULTS IN NON-COMPARABLE TRANSMISSION SERVICE.

Even if the Commission is correct in determining that BPA's Environmental Redispatch Policy is actionable under Section 211A of the FPA because it affects transmission service, that policy does not result in non-comparable transmission service. Service is not comparable under Section 211A if the unregulated transmitting utility treats its own transmission uses differently from the uses by its transmission customers.[48] BPA's Environmental Redispatch Policy is consistent with the Commission's comparability standard because the policy applies to BPA's own generating resources in the same way it applies to other generating resources. The December 7 Order concluding that the Environmental Redispatch Policy results in non-comparable service is incorrect as a matter of law because the policy treats BPA's own resources in the same way that it treats other resources.

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[46] 5 U.S.C. §706(2)(A).

[47] *Office of Consumers' Counsel v. Fed. Energy Regulatory Comm'n*, 655 F.2d 1132, 1149 (D.C. Cir. 1980); *see National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 617 (D.C.Cir.1976) ("'wide latitude' in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer. . . Commission authority."); *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14, 47 L.Ed.2d 668 (1976); *Dixon v. United States*, 381 U.S. 68, 74, 14 L.Ed.2d 223 (1965); *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936); *International Railway Co. v. Davidson*, 257 U.S. 506, 514 (1922); *see also Real v. Simon*, 510 F.2d 557, 564 (5th Cir. 1975) ("There can be no doubt that the authority of an administrative agency to promulgate regulations is limited by the statute authorizing the regulations.").

[48] *Alabama Mun. Elec. Auth. v. FERC*, 10-1141, 2011 WL 6157494 (D.C. Cir. Dec. 13, 2011); *Am. Elec. Power Serv. Corp.*, 67 FERC ¶ 61,168, at P 61,490 (1994).

The Commission's order was based on three conclusions: (i) "non-Federal renewable resources are similarly situated to Federal hydroelectric and thermal resources"; (ii) the Environmental Redispatch Policy "direct[s] non-Federal generators under their respective interconnection agreements 'to reduce generation'"; and the policy "unfairly treats non-Federal generating resources."[49] Contrary to the Commission's statements, BPA does not base generation curtailments on whether the generating resource is owned by BPA. To prevent water spill and the resulting harm to aquatic life, as required by the Clean Water Act and the Endangered Species Act, BPA redispatches generation so that hydroelectric resources are dispatched before non-hydroelectric resources, *including BPA's own non-hydroelectric resources*. Nothing in the Environmental Redispatch Policy either explicitly or implicitly applies the redispatch only to non-BPA generation. On the contrary, the policy provides that:

> BPA will first redispatch thermal generators, who can avoid fuel costs and do not receive economic incentives such as RECs and PTCs…. Second, if BPA determines that additional generation relief is needed after redispatching thermal generators that do not have reliability requirements, BPA will redispatch variable energy resources ("VERs"), such as wind generation, on a pro rata basis.[50]

Consequently, in holding that the Environmental Redispatch Policy "impinges on the transmission service obtained by non-Federal generation,"[51] the December 7 Order mischaracterized BPA's redispatch as a "Federal versus non-Federal" decision. The Commission's error is crucial to evaluating the December 7 Order because it caused the Commission to incorrectly conclude that BPA's Environmental Redispatch Policy results in non-comparable transmission service. However, since BPA treats its own non-hydroelectric

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49 December 7 Order at P 62.

50 ROD at 15.

51 December 7 Order at P 62.

generation in the same way as non-Federal non-hydroelectric generation, BPA's policy does not result in the provision of non-comparable transmission service. Because the Commission's order is grounded in an incorrect statement of fact, it is not supported by substantial evidence.[52] Consequently, the Commission's decision constitutes reversible error.

5. THE COMMISSION ERRED AS A MATTER OF LAW IN DETERMINING THAT BPA'S ENVIRONMENTAL REDISPATCH POLICY RESULTS IN UNDULY DISCRIMINATORY TRANSMISSION SERVICE.

The Commission's order also is arbitrary and capricious because the Commission acted inconsistently with extensive prior precedent in concluding that the Environmental Redispatch Policy results in undue discrimination. Undue discrimination occurs when there is a "difference in rates or services among similarly situated customers that is not justified by some legitimate factor."[53] BPA's Environmental Redispatch Policy does not result in undue discrimination because non-renewable energy resources are not similarly situated to other generating resources. Even if non-renewable energy resources are similarly situated to the other resources, BPA's compliance with statutory mandates and reliability rules is a legitimate factor that justifies any differences in the provision of transmission service under BPA's Environmental Redispatch Policy.

a. The Commission Erred in Concluding that Renewable Resources Are "Similarly Situated" to BPA's Hydroelectric Resources Based solely on the Fact that they all Take Firm Transmission Service.

The Commission erred in concluding that the determination of whether renewable resources are "similarly situated" to BPA's hydroelectric resources depends solely on whether

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[52] 5 U.S.C. § 706(2)(E); *see United States v. Carlo Bianchi & Co.*, 373 U.S. 7009, 715 (1963); *Universal Camera Corp. v. NLRB*, 340 U.S. 474,488 (1951); *see also Braniff Airways, Inc. v. C. A. B.*, 379 F.2d 453, 462-63 (D.C. Cir. 1967).

[53] *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045, at P 115 (2003).

they take firm transmission service. The Commission held that "non-federal renewable resources are similarly situated to Federal hydroelectric and thermal resources for purposes of transmission curtailments because they all take firm transmission service."[54] In contrast to the December 7 Order, the Commission's and the courts' decisions that address undue discrimination do not base a determination of whether two groups of customers are similarly situated on whether they have any *single* common characteristic; they turn on whether there are *any* differences that justify a difference in treatment. In *Alabama Elec. Co-op, Inc. v. FERC,* the Court of Appeals rejected assertions that because two groups of customers shared some similar characteristics, they should be charged the same rate. The Court instead held that undue discrimination can exist if a utility treats in the same way two groups of customers that share a significant number of common characteristics, if those customers also have relevant characteristics that differ. The Court stated:

> While the typical complaint of unlawful rate discrimination is leveled at a rate design which assigns different rates to customer classes which are similarly situated, a single rate design may also be unlawfully discriminatory. Such would be the case where, as is alleged here, a uniform rate creates an undue disparity between the rates of return on sales to different groups of customers. It matters little that the affected customer groups may be in most respects similarly situated -- that is, that they may require similar types of service at similar (even if varying) voltage levels. If the costs of providing service to one group are different from the costs of serving the other, the two groups are in one important respect quite dissimilar.[55]

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[54] December 7 Order at P 62.

[55] *Alabama Elect. Co-op, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

b. BPA's Environmental Redispatch Policy Does Not Result in Unduly Discriminatory Transmission Service because It Redispatches Generation based on Relevant Differences in the Characteristics of that Generation.

The Commission's conclusion that Federal hydroelectric generation and other generating resources are similarly situated because they both take firm transmission service is inconsistent with *Alabama Electric* because the Commission has ignored the significantly different impact of generation by the two groups of customers on the BPA transmission system. There is a critical distinction between the non-hydroelectric generation that BPA is redispatching down or off-line and the hydroelectric facilities that BPA is dispatching to serve the loads in its footprint: If BPA is forced to spill water from its hydroelectric resources instead of generating electricity from them, it will harm salmon and other aquatic species, in violation of BPA's statutory mandates; whereas if it prohibits non-hydroelectric resources from generating electricity, no harm to salmon or other aquatic species will result and BPA will have fulfilled its statutory obligations.[56] That distinction in the impacts on the BPA system of generation by non-hydroelectric and hydroelectric generators is sufficient to support a determination that non-hydroelectric generators are not similarly situated to hydroelectric generators.

The December 7 Order ignores the Commission's prior determinations, as set forth in its *pro forma* OATT, that different impacts on the transmission system justify a difference in the treatment of customers who have reserved firm transmission service. Section 13.6 of the *pro forma* OATT provides that the transmission provider may curtail firm point-to-point

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[56] The importance of ensuring that open access transmission service does not result in spilling water from hydroelectric units was presented to the Commission's at the inception of the Commission's open access policy. In Order No. 888, the Commission acknowledged and deferred action on comments asserting that it should consider alternatives to pro rata curtailments of transmission service if necessary to avoid hydro spills. *See* Order 888 at PP 31,748-31,749.

transmission service that relieves a transmission constraint, and does not require curtailing all firm point-to-point transmission service on a pro rata basis. Section 14.7 of the *pro forma* OATT applies the same principle to non-firm point-to-point transmission service. In neither instance did the Commission require that all customers taking the same class of transmission service be treated identically. Instead, it implicitly concluded that the fact that some point-to-point transmission customers' transactions would relieve the constraint and others would not relieve the constraint justified a difference in the treatment of point-to-point transactions.

Similarly, Section 33.2 of the *pro forma* OATT provides that the transmission provider may redispatch the generating resources of its network integration transmission customers and its own generating resources on a least-cost basis, if doing so can relieve a transmission constraint, and does not require pro rata redispatch of all network resources. That provision is implicitly based on the conclusion that since some network customers' generators have lower incremental costs than others, it is appropriate to require the lower-cost generators to produce energy and require higher-cost generators to be redispatched down, even though all of the generators are network resources that are entitled to firm transmission service. The Commission has also stated that it is "not unduly discriminatory to require the use of transmission provider resources to provide planning redispatch to long-term point-to-point customers."[57] In short, the Commission's open access transmission policies recognize that differences in the characteristics of transmission customers other than the class of transmission service they are taking justify differences in the treatment of those customers, including differences in the redispatch of generation. However, the Commission has ignored those policies in the December 7 Order. The

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[57] Order 890-A at P 530.

Commission's failure to address the contradiction between the December 7 Order and its prior policy constitutes reversible error.[58]

By holding that BPA should treat all firm transmission customers in the same way, despite the fact that the customers are not similarly situated, the Commission is actually creating undue discrimination rather than eliminating it. The lesson of *Alabama Electric* is that while customarily, undue discrimination exists where similarly-situated customers are treated differently, undue discrimination also exists where differently-situated customers are treated the same.[59] The Commission's order, by holding that BPA should adopt transmission policies that ensure that all firm transmission customers are treated comparably despite the difference in the impact that those customers' dispatch of generation has on the BPA system, violates its policies, is inconsistent with Section 211A of the FPA, and consequently is arbitrary and capricious.[60]

c. Even if Renewable Generation and Hydroelectric Generation Are Similarly Situated, there Is No Undue Discrimination because the Difference in the Treatment of the Transmission Customers Is Justified by a Legitimate Factor.

The Commission's well-established policy is that "Discrimination is undue when there is a difference in rates or services among similarly situated customers that is not justified by some legitimate factor."[61] A rate is not "unduly" preferential or "unreasonably" discriminatory if the utility can justify the disparate effect.[62]

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58 *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (agency must provide a "rational connection between the facts found and the choice made").

59 *Alabama Elec.* at 22, 27.

60 5 U.S.C. § 706(2)(A); *see Motor Vehicle Mfrs.*, 463 U.S. at 43; *Burlington Truck Lines*, 371 U.S. at 168.

61 *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045, at P 115 (2003).

62 *Arkansas Elec. Energy Consumers* at 367 (citing *Metropolitan Edison Co.* at 857). *See also St. Michaels Utils. Comm'n* at 915 ("[D]ifferences in rates are justified where they are predicated upon differences in facts.").

Even if the Commission correctly concluded that renewable generation and hydroelectric generation are similarly situated because both groups of generators take firm transmission service, BPA's Environmental Redispatch Policy is not unduly discriminatory because there is a legitimate basis for treating renewable generation differently from hydroelectric generation. BPA implemented the Environmental Redispatch Policy to comply with the Northwest Power Act, which requires that BPA exercise its responsibilities "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 operating."[63] BPA has similar obligations under the Clean Water Act and the Endangered Species Act. As noted in the ROD, water spill from the Federal Columbia River Power System Projects produces excessive levels of Total Dissolved Gas that threaten the health of the aquatic ecosystem.[64] To prevent excess spill and the resulting harm to aquatic life, BPA must limit spill over its dams by generating hydroelectric energy. In the event of an overload situation in which generation far exceeds load, BPA is obligated under the Commission-approved North American Electric Reliability Corporation ("NERC") reliability standards to ramp down or curtail generation. To ensure simultaneous compliance with environmental statutory obligations and the reliability standards, from time to time BPA must temporarily substitute hydropower for other non-hydropower resources. Such action does not constitute undue discrimination because the redispatch decisions under the policy are implemented in order to comply with BPA's statutory and reliability obligations.[65] Compliance with statutory

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[63] 16 U.S.C. § 839(6).

[64] ROD at 6.

[65] *See Arkansas Elec. Energy Consumers* at 367; *Metropolitan Edison Co.* at 857; *St. Michaels Utilities Comm'n* at 915.

obligations is a legitimate factor that justifies treating renewable generation differently from hydroelectric generation.

d. The December 7 Order Is Not Based on Substantial Evidence because It Failed to Address the Fact that Renewable Resources Receive Preferential Treatment under the Environmental Redispatch Policy.

The Commission also erred in failing to give adequate consideration to the fact that BPA actually provides favorable treatment to renewable generation, as compared to thermal generation, in implementing its redispatch policy. The Environmental Redispatch Policy provides that all thermal generation will be curtailed prior to the curtailment of renewable resources.[66] The basis for the December 7 Order – that renewable generation should not be redispatched differently from Federal hydroelectric generation because both groups of generators are using firm transmission service – would be equally applicable to thermal generation since thermal generation also uses firm transmission service. However, the Commission did not find that the Environmental Redispatch Policy treats thermal generation unfairly, and instead held only that the Environmental Redispatch Policy treats renewable generation unfairly.

In the absence of any discussion of the treatment of thermal generation in the December 7 Order, the only conclusion that can logically be drawn is that the Commission recognized that thermal generation is not similarly situated to Federal hydroelectric generation and renewable generation, and that the characteristics of thermal generation justify curtailing that generation before curtailing renewable generation. However, that logic also compels the conclusion that the different characteristics of renewable generation justify curtailing it before Federal hydroelectric

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[66] ROD at 15.

generation is curtailed. Consequently, the December 7 Order is internally inconsistent, and is not based on reasoned decision-making.[67]

e. The Commission Impermissibly Considered the Consequential Impacts on Renewable Generators in Determining that the Environmental Redispatch Policy Is Unduly Discriminatory.

The Commission's conclusion that renewable resources suffer undue discrimination is arbitrary and capricious because it was based in part on the Commission's consideration of matters that are outside the scope of an appropriate evaluation of whether undue discrimination exists.

The December 7 Order was based in part on estimates of harm to renewable generators associated with lost Federal Production Tax Credits and Renewable Energy Credits as well as the harm to load serving entities from the curtailment of generation that could have been used to help satisfy state renewable portfolio requirements.[68] The Commission erred in considering the secondary (i.e., economic) impacts of these out-of-market subsidies when evaluating whether the Environmental Redispatch Policy resulted in undue discrimination because the issue of such impacts is outside the scope of the issues that it should have considered. The evaluation of comparability and undue discrimination should be based on (i) an evaluation of the terms and conditions of the service that the unregulated transmitting utility provides; and (ii) whether any differences in the terms and conditions of that service are justified by any differences in the characteristics of the transmission customers, to the extent those characteristics have an impact

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[67] *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374-75 (1998) (agency adjudication is subject to the requirement of reasoned-decision making); *see also Motor Vehicle Mfrs. Assn* at 52.

[68] December 7 Order at P 63.

on the service that the customers receive or the costs of providing that service.[69] Nothing in Section 211A gives the Commission the authority to take into consideration, for instance, the economic impact of a curtailment of transmission service on transmission customers. Similarly, nothing in Order Nos. 888 or 890 or the numerous orders on rehearing of those orders[70] indicates that the Commission can take economic impact or other impacts on customers of redispatch or curtailments of transmission service into account in evaluating claims of undue discrimination in a transmission provider's open access transmission service.

The consideration of economic harm in determining whether undue discrimination exists is particularly inappropriate when the harm alleged is the loss of out-of-market subsidies, rather than direct costs such as increased generation or transmission costs. The Commission has expressed extraordinary opposition in the PJM Capacity Market to permitting out-of-market subsidies to affect the prices received by generators.[71] The Commission should not take action in this proceeding that would distort the markets in the Northwest by forcing BPA to take action that would preserve the out-of-market subsidies – the Production Tax Credits and Renewable Energy Credits – that the renewable generators are interested in preserving.

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69 *See El Paso Natural Gas Co.* at P 115; *Arkansas Elec. Energy Consumers* at 367; *Metropolitan Edison Co.* at 857; *St. Michaels Utils. Comm'n* at 915.

70 *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pub.* Utils.; *Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) ("Order No. 888"), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997) ("Order No. 888-A"), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997) ("Order No. 888-B"), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998) ("Order No. 888-C"), *aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *clarified*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

71 *See PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011), *order on reh'g*, 135 FERC ¶ 61,228 (2011), *clarified*, 137 FERC ¶ 61,145 (2011).

If the economic impact of granting transmission service were a legitimate factor to consider in providing not-unduly discriminatory transmission service, transmission providers would be required to place transmission and interconnection requests in the queue based on the economic benefit that would result from granting those requests, instead of placing requests in the queue based on when they were submitted. Also, if transmission providers were required to consider the economic impact on customers of curtailments of transmission service, they would be required to curtail customers whose transactions impact a constraint based on economics rather than on a pro rata basis. Of course, the Commission has not adopted such policies. Consequently, the Commission's determination that BPA is unduly discriminating against renewable resources, in part based on the economic impact of its redispatch decisions on the generators, is inconsistent with its prior policy.

6. THE COMMISSION'S ORDER IS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO ADDRESS THE ISSUES RAISED BY THE PARTIES TO THE PROCEEDING AND FAILED TO ADEQUATELY EXPLAIN THE BASIS FOR ITS CONCLUSIONS.

The Commission's order is arbitrary and capricious because it did not give adequate consideration to the arguments that NRECA made in its Comments. The Commission is obligated to give reasoned consideration to all arguments raised by protestors. In *PSEG, supra*, the D.C. Circuit held that the Commission's failure to respond to a party's "facially legitimate objections" rendered its decision arbitrary and capricious."[72] The Supreme Court has similarly

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[72] *PSEG Energy Res. & Trade LLC v. FERC*, 10-1103, 2011 WL 6450762 (D.C. Cir. Dec. 23, 2011).

held that "unless the [agency] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned."[73]

The Commission erred in the instant matter by failing to address the merits of NRECA's assertions that BPA is providing comparable service because it is redispatching down its own non-hydro generation on a basis that is comparable to its redispatch of non-Federal thermal and renewable resources.[74] The Commission also did not address NRECA's assertions (i) that renewable resources are not similarly situated to BPA's hydroelectric facilities because of BPA's statutory obligation to protect aquatic species by not spilling water, which it can do only by generating electricity from its hydroelectric facilities; (ii) that BPA is actually treating renewable generation preferentially since that generation is curtailed after thermal generation; and (iii) that any adverse impacts on renewable generation result from the impact of the Environmental Redispatch Policy on the out-of-market subsidies that renewable generation receives, and not from the transmission policy itself.

7. THE COMMISSION'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE IT FAILED TO DEVELOP AN ADEQUATE RECORD TO SUPPORT ITS CONCLUSIONS.

In granting the petition, the Commission improperly awarded summary judgment to the Petitioners despite the existence of genuine issues of material fact. The Commission's decision was arbitrary and capricious and not supported by substantial evidence because summary judgment is appropriate only when there are no genuine issues of material fact and the moving

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[73] *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001). *See also G.I. Trucking v. United States*, 708 F.2d 1421, 1423 (9th Cir. 1983) (failure of agency to adequately explain the reasons for its action required the action to be set aside).

[74] *See* argument in Section II.C.3, *supra*.

party has established that it is entitled to judgment as a matter of law.[75] At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[76] A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[77] The Supreme Court has also held that on summary judgment, "inferences to be drawn from the underlying facts … must be viewed in the light most favorable to the party opposing the motion."[78]

The Commission should not have summarily held that the Environmental Redispatch Policy is inconsistent with Section 211A of the FPA because the factual allegations, as interpreted most favorably to BPA, demonstrate that the policy does not result in non-comparable or unduly discriminatory transmission service. As discussed in Section II.C.3, *supra*, there is ample evidence indicating that the Environmental Redispatch Policy does *not* violate principles of comparability because BPA treats its own non-hydroelectric generation in the same way as it treats its customers' non-hydroelectric generation. Similarly, as discussed in Section II.C.4, *supra*, the Environmental Redispatch Policy is not unduly discriminatory because BPA's disparate treatment of non-hydroelectric generation is justified because hydroelectric generation and non-hydroelectric generation are not similarly situated and in any event there is a

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75 Fed.R.Civ.P. 56(a); *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247-248 (1986); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

76 *Anderson*, 477 U.S. at 249-250.

77 *Id.*, at 248.

78 *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962); *see Scott v. Harris*, 550 U.S. 372, 378 (2007).

legitimate basis for treating the two types of generation. Therefore, the Commission should have set this matter for hearing to resolve the contested issues of material fact.

The Commission's failure to set this proceeding for hearing constitutes reversible error. In the administrative law context, the Ninth Circuit has held that where the failure to hold a hearing results in "an inadequate record for review, the case may be returned to the agency for further development of the record, and for a hearing if one should have been held."[79] The Supreme Court has also recognized that if the Court of Appeals "finds that the administrative record is inadequate, it may remand to the agency."[80] Consequently, the Commission should set this proceeding for hearing to determine whether BPA is providing transmission service on a comparable and not unduly discriminatory basis.

8. THE COMMISSION SHOULD HAVE DISMISSED THE PETITION BECAUSE IT DOES NOT HAVE THE AUTHORITY TO GRANT THE RELIEF THAT THE PETITIONERS ARE SEEKING.

The Commission should have dismissed the Petition because it does not have the authority to order the relief that the Petitioners are seeking. The only way that BPA can ensure that the Environmental Redispatch Policy does not result in the redispatch of renewable generators to allow for hydroelectric generation is to implement policies that are completely unrelated to transmission or to take action that eviscerates the Environmental Redispatch Policy.

Neither the parties to this proceeding nor the Commission have proposed a remedy for the alleged undue discrimination that is within the scope of the Commission's authority under Section 211A. The only remedies that the Petitioners proposed to alleviate over-generation during high water periods were: (1) entering into storage arrangements with entities in British

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79 *Pub. Utilities Comm'n of State of Cal. v. FERC*, 814 F.2d 560, 562.

80 *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 469 (1984) (citing *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 593-594 (1980)).

Columbia; (2) entering into agreements with regional investor-owned utilities for displacement of thermal and non-thermal generation outside Bonneville's balancing authority area; and (3) paying negative prices that will cause renewable generators to voluntarily reduce their output.[81] However, the Commission cannot order BPA to adopt any of these remedies because none of the remedies constitute transmission service, and therefore the Commission cannot order BPA to implement them under Section 211A. The Commission also has not proposed any transmission-related modifications that BPA could make to its OATT that would remedy the alleged undue discrimination.

Moreover, the only remedies that could be adopted under BPA's OATT that would alleviate the alleged undue discrimination are remedies that would usurp the exclusive jurisdiction of the Ninth Circuit. If, as the Commission has concluded, the Environmental Redispatch Policy results in undue discrimination against renewable generation, the only way to alleviate that undue discrimination is to adopt OATT provisions that effectively eviscerate the policy. Regardless of whether the OATT modification directly or indirectly affects the Environmental Redispatch Policy, it would be outside the Commission's jurisdiction since only the Ninth Circuit has jurisdiction over the Environmental Redispatch Policy.

The fact that the Commission ordered BPA to propose modifications to its OATT that eliminate the allegedly unduly discriminatory transmission service, rather than requiring BPA to implement specific modifications to its OATT, does not legitimize the December 7 Order. As the Court of Appeals has held in a different context, the Commission cannot do by indirection that which it does not have the authority to do directly.[82] Since the only way BPA can

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[81] December 7 Order at P 39 (citing Petition at 15-16).

[82] *See Associated Gas Distribs. v. FERC*, 898 F.2d 809, 810 (D. C. Cir. 1990).

implement the Commission's order without interfering with the Ninth Circuit's jurisdiction is to adopt non-transmission remedies, and the Commission cannot order BPA to adopt such remedies, the Commission's order requiring BPA to propose modifications to its OATT to eliminate the adverse effect of its Environmental Redispatch Policy constitutes reversible error.

D. CONCLUSION

Wherefore, the Commission should grant rehearing of the December 7 Order and should dismiss the Petition. If the Commission does not dismiss the Petition it should set the matter for hearing.

Respectfully submitted,

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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January 6, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I have served this day copies of the foregoing on the official service list compiled by the Office of the Secretary in accordance with Rule 2010 of the Commission Rules of Practice and Procedure.

Dated at Washington, D.C. this 6th day of January, 2012.

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