

---

---

**In the United States Court of Appeals  
for the Ninth Circuit**

Nos. 13-70391, 13-70499, 13-70581, 13-72928

---

NORTHWEST REQUIREMENTS UTILITIES, *ET AL.*,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

---

ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

---

**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

---

David L. Morenoff  
Acting General Counsel

Robert H. Solomon  
Solicitor

Beth G. Pacella  
Senior Attorney

For Respondent Federal Energy  
Regulatory Commission  
Washington, D.C. 20426

February 20, 2014

---

---

## TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUES.....	1
STATUTORY AND REGULATORY PROVISIONS.....	3
STATEMENT OF JURISDICTION.....	3
STATEMENT OF FACTS.....	4
I. Statutory And Regulatory Background.....	4
A. The Federal Power Act.....	4
B. The Bonneville Power Administration.....	5
II. The Dispute Over Whether Bonneville Provides Comparable And Non-Discriminatory Transmission Service.....	7
A. The Wind Generators' Petition.....	7
B. The Challenged FERC Orders.....	8
SUMMARY OF ARGUMENT.....	9
ARGUMENT.....	10
I. Petitioners Have Not Established Standing And Aggrievement.....	10
II. Standard Of Review.....	16
III. The Commission Acted Appropriately Under Federal Power Act Section 211A.....	18
A. The Commission Appropriately Determined It Had Authority Under FPA Section 211A To Direct Bonneville To Prospectively Provide Comparable And Non-Discriminatory Transmission Service.....	18

**TABLE OF CONTENTS**

**PAGE**

B. The Commission’s Non-Comparable And Unduly  
Discriminatory Transmission Service Findings Were  
Reasonable.....23

CONCLUSION.....29

STATEMENT OF RELATED CASES.....30

**TABLE OF AUTHORITIES**

<b>COURT CASES:</b>	<b>PAGE</b>
<i>Ass’n of Pub. Agency Cust., Inc. v. Bonneville Power Admin.</i> , 126 F.3d 1158 (9th Cir. 1997).....	6
<i>Ass’n of Public Agency Cust. v. Bonneville Power Admin.</i> , 733 F.3d 939 (2013).....	11, 14
<i>Bonneville Power Admin. v. FERC</i> , 422 F.3d 908 (9th Cir. 2005).....	17
<i>Cal. Dep’t of Water Res. v. FERC</i> , 489 F.3d 1029 (9th Cir. 2007).....	21, 22
<i>Cal. Trout v. FERC</i> , 572 F.3d 1003 (9th Cir. 2009).....	16
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	17
<i>City of Arlington, Tex. v. FCC</i> , 133 S.Ct. 1863 (2013).....	18
<i>City of Redding, Cal. v. FERC</i> , 693 F.3d 828 (9th Cir. 2012).....	3, 4, 10, 11
<i>Clapper v. Amnesty Int’l USA</i> , 133 S.Ct. 1138 (2013).....	11, 14, 15
<i>Ecee, Inc. v. FERC</i> , 645 F.2d 339 (5th Cir. 1981).....	12
<i>Fall River Rural Elec. Co-op., Inc. v. FERC</i> , 543 F.3d 519 (9th Cir. 2008).....	17, 21, 22
<i>Helicopter Ass’n Int’l, Inc. v. FAA</i> , 722 F.3d 430 (D.C. Cir. 2013).....	18

<b>COURT CASES (continued)</b>	<b>PAGE</b>
<i>Koerner v. Grigas</i> , 328 F.3d 1039 (9th Cir. 2003).....	20
<i>Lopez-Vasquez v. Holder</i> , 706 F.3d 1072 (9th Cir. 2013).....	20
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	11, 15
<i>New England Power Gen. Ass’n, Inc. v. FERC</i> , 707 F.3d 364 (D.C. Cir. 2013).....	16
<i>NW. Env’tl. Def. Ctr. v. Bonneville Power Admin.</i> , 477 F.3d 668 (9th Cir. 2007).....	6
<i>Port of Seattle v. FERC</i> , 499 F.3d 1016 (9th Cir. 2007).....	10, 11
<i>Smith v. Marsh</i> , 194 F.3d 1045 (9th Cir. 1999).....	20
<i>Snoqualmie Indian Tribe v. FERC</i> , 545 F.3d 1207 (9th Cir. 2008).....	16, 17
<i>Transm. Access Policy Study Grp. v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000), <i>aff’d New York v. FERC</i> , 535 U.S. 1 (2002).....	4, 5, 7, 19, 21, 23
<i>U.S. v. Ullah</i> , 976 F.2d 509 (9th Cir. 1992).....	20
<i>Wash. Env’tl. Council v. Bellon</i> , 732 F.3d 1131 (9th Cir. 2013).....	15
<i>Whitman v. Am. Trucking Ass’ns</i> , 531 U.S. 457 (2001).....	17

**COURT CASES (continued) PAGE**

*Whitmore v. Arkansas*,  
495 U.S. 149 (1990).....14

*Wis. Pub. Power Inc. v. FERC*,  
493 F.3d 239 (D.C. Cir. 2007).....16

**ADMINISTRATIVE CASES:**

*Duke Elec. Transm.*,  
95 FERC ¶ 61,302 (2001).....19

*Iberdrola Renewables, Inc. v. Bonneville Power Admin.*,  
137 FERC ¶ 61,185 (2011), *order on reh’g*,  
141 FERC ¶ 61,233 (2012), *order on reh’g*,  
143 FERC ¶ 61,274 (2013).....2, 6-8, 12, 13, 18-20, 22-29

*Iberdrola Renewables, Inc. v. Bonneville Power Admin.*,  
141 FERC ¶ 61,234 (2012).....13

*Preventing Undue Discrimination and Preference in Transmission Serv.*,  
Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007).....5, 23

*Preventing Undue Discrimination and Preference in Transmission Serv.*,  
Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007).....22

*Promoting Wholesale Competition Through Open Access Nondiscriminatory  
Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils.  
& Transmitting Utils.*,  
Order No. 888, FERC Stats. & Regs. Preambles ¶ 31,036 (1996),  
*clarified*, 76 FERC ¶¶ 61,009 and 61,347, *order on reh’g*,  
Order No. 888-A, FERC Stats. & Regs. Preambles ¶ 31,048,  
*order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997),  
*order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998),  
*aff’d*, *Transm. Access Policy Study Grp. v. FERC*, 225 F.3d 667  
(D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*,  
535 U.S. 1 (2002).....4

**ADMINISTRATIVE CASES (continued) PAGE**

*Tenn. Power Co.*,  
 90 FERC ¶ 61,238 (2000).....19

**STATUTES:**

Administrative Procedure Act

5 U.S.C. § 706(2)(A).....16

Federal Power Act:

Section 201, 16 U.S.C. § 824(b)(1).....4

Section 211A, 16 U.S.C. § 824j-1.....1, 3, 5-8, 10, 14,  
 16,18, 20-22, 24-29

Section 313(b), 16 U.S.C. § 825l(b).....10, 11, 17

Pacific Northwest Electric Power Planning and Conservation Act

16 U.S.C. § 839.....6

16 U.S.C. § 839b.....6

16 U.S.C. § 839e(a)(1).....6

Pacific Northwest Federal Transmission System Act

16 U.S.C. § 838g.....6

**REGULATIONS:**

18 C.F.R. § 385.206(b)(8).....28

**In the United States Court of Appeals  
for the Ninth Circuit**

**Nos. 13-70391, 13-70499, 13-70581, 13-72928**

---

**NORTHWEST REQUIREMENTS UTILITIES, *ET AL.*,  
*Petitioners,***

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.***

---

**ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

---

**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

---

**STATEMENT OF THE ISSUES**

This proceeding involves the Federal Energy Regulatory Commission's ("FERC" or "Commission") review of a petition for relief filed by a group of Bonneville Power Administration ("Bonneville") wind power customers. The petition, filed under Federal Power Act ("FPA") section 211A, 16 U.S.C. § 824j-1, explained that Bonneville was curtailing these customers' wind generation without compensation and was using the firm transmission rights associated with that generation to instead deliver federal hydropower to the wind generators'

customers. As a result, the wind power customers complained, Bonneville was acting in an unduly discriminatory manner and was not providing wind power customers with service that was comparable to the service Bonneville provided itself.

The challenged orders granted the petition. *See Iberdrola Renewables, Inc. v. Bonneville Power Admin.*, 137 FERC ¶ 61,185 (2011) (“Order Granting Petition”) (Pet. ER<sup>1</sup> 1), *order on reh’g*, 141 FERC ¶ 61,233 (2012) (“First Rehearing Order”) (Pet. ER 39), *order on reh’g*, 143 FERC ¶ 61,274 (2013) (“Second Rehearing Order”) (Pet. ER 72). The Commission found that, just as Bonneville is obligated to satisfy its responsibilities under other statutes, Bonneville is obligated to satisfy its responsibilities under the Federal Power Act to provide comparable and non-discriminatory transmission service.

A group of Bonneville customers and their representatives (collectively, “Northwest Utilities”) and Bonneville filed petitions for review. Bonneville later withdrew its petitions for review without filing a brief.

The issues on appeal are:

1. Whether Northwest Utilities have met their burden to establish that they are aggrieved by, and have Constitutional standing to challenge, the Commission orders on review, which are prospective only, and establish only that, among other

---

<sup>1</sup> Pet. ER refers to Petitioners’ Excerpts of Record.

statutory responsibilities, Bonneville, has the responsibility under the Federal Power Act to provide transmission service in a comparable, non-discriminatory manner.

2. Assuming jurisdiction, whether the Commission reasonably determined that the challenged Bonneville actions involve transmission service and, therefore, that the Commission has authority under Federal Power Act section 211A to direct Bonneville to provide transmission service under terms and conditions that are comparable to those under which Bonneville provides transmission service to itself and that are not unduly discriminatory or preferential.

### **STATUTORY AND REGULATORY PROVISIONS**

The pertinent statutory and regulatory provisions are contained in the Addendum.

### **STATEMENT OF JURISDICTION**

This Court does not have jurisdiction to review the orders challenged in the instant petitions for review. As discussed *infra* (Argument section I), Northwest Utilities have not established that they have standing to challenge, or that they are aggrieved by, the FERC orders before the Court. *See City of Redding, Cal. v. FERC*, 693 F.3d 828, 835 (9th Cir. 2012) (petitioners must show that they are aggrieved by, and meet the constitutional standing requirements of injury-in-fact, redressability, and causation regarding, the challenged FERC orders).

## STATEMENT OF FACTS

### I. Statutory And Regulatory Background

#### A. The Federal Power Act

Federal Power Act section 201, 16 U.S.C. § 824(b)(1), grants the Commission exclusive jurisdiction over the transmission and sale of electric energy in interstate commerce. *Redding*, 693 F.3d at 838. In 1996, to prevent utilities from denying transmission service to others altogether, or from offering it on terms less favorable than those offered to themselves, the Commission issued Order No. 888.<sup>2</sup> That rulemaking directed public utilities to adopt open access non-discriminatory transmission tariffs that contained minimum terms for non-discriminatory service. Because certain owners and operators of interstate transmission facilities are not subject to the Commission's jurisdiction, Order No. 888 included a reciprocity provision that obligates non-jurisdictional users of a public utility's open access services to offer non-discriminatory transmission

---

<sup>2</sup> *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶¶ 61,009 and 61,347, *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd*, *Transm. Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

services in return. Order No. 888 at 31,760; *see also Transm. Access*, 225 F.3d at 697 (discussing Order No. 888's reciprocity provision).

In August 2005, Congress enacted the Energy Policy Act of 2005, Pub. L. No. 109-58. As relevant here, that Act added section 211A to the Federal Power Act, 16 U.S.C. § 824j-1, which authorizes the Commission to require non-jurisdictional transmitting utilities (except for certain small entities) to provide access to their transmission facilities on a comparable and non-discriminatory basis. Specifically, FPA § 211A(b), 16 U.S.C. § 824j-1(b), provides that:

[T]he Commission may, by rule or order, require an unregulated transmission utility to provide transmission services -- (1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.

The Commission determined that, rather than adopt a generic rule to implement FPA section 211A, it would apply its provisions on a case by case basis in individual orders. *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 P 192 (2007).

## **B. The Bonneville Power Administration**

Bonneville, a federal agency within the Department of Energy, sells and transmits wholesale electricity from federal hydroelectric and nuclear power resources, and transmits energy from non-federal power resources, in the Columbia

River Basin. *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 672-73 (9th Cir. 2007); Bonneville's Answer, Pet. ER 117 (explaining that the Federal Columbia River Power System generates electricity at federally owned hydroelectric plants and one nuclear plant in the Columbia River Basin).

Bonneville controls "the massive federal high-voltage transmission system," which comprises approximately 80 percent of the bulk transmission capacity in the Pacific Northwest. *Ass'n of Pub. Agency Cust., Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1163 (9th Cir. 1997).

Federal statutes require, among other things, that Bonneville: set its rates for electric power at a level sufficient to meet its costs and to repay the federal debt incurred in building the hydroelectric projects in the Federal Columbia River Power System, 16 U.S.C. §§ 838g, 839(4), 839e(a)(1); "encourag[e] the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles," 16 U.S.C. § 838g; and be environmentally conscious, support energy conservation, and act to protect the fish and wildlife of the Columbia River Basin, 16 U.S.C. §§ 839, 839b. *Ass'n of Pub. Agency Cust.*, 126 F.3d at 1164. Since Congress enacted the Energy Policy Act of 2005, Bonneville also must comply with FERC orders to provide access to its transmission facilities on a comparable and not unduly discriminatory or preferential basis. FPA § 211A(b), 16 U.S.C. § 824j-1(b).

## **II. The Dispute Over Whether Bonneville Provides Comparable And Non-Discriminatory Transmission Service**

### **A. The Wind Generators' Petition**

In June 2011, a group of wind energy generators filed a petition under Federal Power Act section 211A (and other FPA provisions not relevant to this case), complaining that Bonneville was not providing comparable service and was acting in an unduly discriminatory manner. The wind generators pointed to Bonneville's then-effective "Environmental Redispatch Policy," under which Bonneville, if faced with excess hydropower resources, would curtail wind generation without compensation and use the firm transmission rights<sup>3</sup> associated with that wind generation to instead deliver Federal hydropower to the wind generators' customers. R. 6 (211A Petition) at Pet. ER 654, 665, 666, 693, 696; *see also* Order Granting Petition, Pet. ER 5 P<sup>4</sup> 8 (same).

A number of parties filed answers or comments in support of or against the petition. Order Granting Petition, Pet. ER 7 P 11.

---

<sup>3</sup> "Firm service permits customers to demand transmission at any time, while non-firm service permits the utility to cut service when there is not enough excess capacity." *Transm. Access*, 225 F.3d at 730.

<sup>4</sup> P refers to the internal paragraph in a FERC order.

## **B. The Challenged FERC Orders**

The Commission first found that Federal Power Act section 211A, 16 U.S.C. § 824j-1, provides it authority to direct Bonneville to prospectively provide transmission service under terms and conditions that are comparable to those under which Bonneville provides transmission service to itself and that are not unduly discriminatory or preferential. Order Granting Petition, Pet. ER 14-16 PP 30, 32-33; First Rehearing Order, Pet. ER 47-49 PP 19-24.

Furthermore, the Commission found that Bonneville would not provide comparable and non-discriminatory transmission service if it were to curtail wind generation without compensation and use the firm transmission rights associated with that wind generation to instead deliver federal hydropower to the wind generators' customers. Order Granting Petition, Pet. ER 16, 27-29 PP 33, 62-66; First Rehearing Order, Pet. ER 57-59, 61-63 PP 46-51, 57-62. Accordingly, the Commission directed Bonneville to revise its tariff to ensure that Bonneville prospectively provides 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. Order Granting Petition, Pet. ER 1 P 1; First Rehearing Order, Pet. ER 53-54 P 37.

## SUMMARY OF ARGUMENT

Northwest Utilities have not, and cannot, meet their burden to establish that they are aggrieved by, and have standing to challenge, the Commission orders here. Northwest Utilities' opening brief simply asserts that, but does not explain how, they are aggrieved and have standing. The subject of the wind generators' petition -- Bonneville's Environmental Redispatch Policy -- has expired. The Commission did not require any retroactive adjustment, nor did it direct any particular replacement for the expired policy. Rather, it simply instructed Bonneville to account for, along with its other statutory responsibilities, the Federal Power Act's comparability and non-discrimination requirements.

If the Court proceeds to the merits, the petitions for review should be denied. The Commission reasonably determined that the challenged Bonneville actions involve not only generation, but also transmission service. As the Commission explained, both the interconnection of a generator to the transmission system and a generator's right to inject its output into that transmission system are components of transmission service. In addition, Bonneville's actions would prevent the firm point-to-point wind power transmission customers from exercising their right to inject their wind generation at a specific point on the transmission grid.

Northwest Utilities assert that a Bonneville Record of Decision concludes that curtailing wind resources, and instead delivering federal hydropower, would

not constitute the curtailment of transmission service. But FERC, not Bonneville, administers the Federal Power Act. Accordingly, FERC's interpretation of what constitutes "transmission service" under FPA section 211A, not Bonneville's, is due deference.

There also is no merit to Northwest Utilities' challenge to the Commission's determination that the federal hydroelectric and wind power resources are similarly situated for purposes of considering the uncompensated transmission curtailments at issue here. Both are Bonneville firm transmission service customers. Northwest Utilities' additional claim that the Commission failed to account for Bonneville's other statutory obligations is also mistaken. The Commission repeatedly acknowledged Bonneville's other statutory obligations, but reasonably found, as Bonneville itself has acknowledged, that Bonneville does not need to curtail firm transmission resources without compensation in order to meet those statutory obligations.

## **ARGUMENT**

### **I. Petitioners Have Not Established Standing And Aggrievement**

"Section 313 of the FPA 'limits judicial review to those parties who have been aggrieved by an order of the Commission.'" *Redding*, 693 F.3d at 835 (quoting FPA section 313(b), 16 U.S.C. § 825l(b), and *Port of Seattle v. FERC*, 499 F.3d 1016, 1028 (9th Cir. 2007)) (some internal quotation omitted).

“Additionally, a party must meet the constitutional standing requirements of injury-in-fact, redressability, and causation.” *Id.*; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Thus, a party’s “injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Clapper v. Amnesty Int’l USA*, 133 S.Ct. 1138, 1147 (2013) (internal quotation marks omitted); *see also Lujan*, 504 U.S. at 560-61; *Redding*, 693 F.3d at 835 (“both aggrievement and standing require that petitioners establish, at a minimum, injury in fact to a protected interest”) (quoting *Port of Seattle*, 499 F.3d at 1028).

Northwest Utilities bear the burden to establish their aggrievement and standing. *See Clapper*, 133 S.Ct. at 1148; *Lujan*, 504 U.S. at 561; *Ass’n of Public Agency Cust. v. Bonneville Power Admin.*, 733 F.3d 939, 969 (2013). Nonetheless, their opening brief baldly asserts, without any explanation, that “[t]he Petitioners are aggrieved by FERC’s Orders and are entitled to seek judicial review,” and that “[a]ll Petitioners have standing to challenge the Commission’s Orders and timely filed petitions for review.” Br. 1-2 (citing FPA section 313(b)).

The bases on which Northwest Utilities moved to intervene in the underlying FERC proceeding do not support their aggrievement or standing to challenge the

orders on review here either.<sup>5</sup> Several petitioners moved to intervene in the underlying FERC proceeding because they were concerned that, “[if] the Commission were to order [Bonneville] to pay the requested compensation to the Complainants, [Bonneville] could pass on those costs to its customers, including [Northwest Utilities], in future rate proceedings.” R. 9, Motion to Intervene of Pacific Northwest Generating Coop., FERC Excerpts of Record (“F-ER”) 5; *see also* Motions to Intervene at FERC of Public Power Council (R. 5, F-ER 2) (asserting that Bonneville would pass on costs), Northwest Requirements Utilities (R. 13, F-ER 7) (same), City of Seattle (R. 18, F-ER 10) (same), and Public Utility District No. 1 of Snohomish County, Washington (R. 43, F-ER 13) (interest in cost-effective service by Bonneville). The challenged orders, however, did not direct Bonneville to pay any compensation. *See* Order Granting Petition, Pet. ER 15 P 30 (prospective action only; FERC “is making no determinations as to whether actions taken by Bonneville in the past, whether pursuant to the Environmental Redispatch Policy or otherwise, were prohibited under Bonneville’s statutory authorities”); First Rehearing Order, Pet. ER 48 P 23 & n.37

---

<sup>5</sup> FERC counsel recognize that parties need not establish statutory aggrievement or Constitutional standing to intervene in agency proceedings. *See Ecee, Inc. v. FERC*, 645 F.2d 339, 349 (5th Cir. 1981). Since Northwest Utilities’ brief does not substantiate their aggrievement or standing, however, FERC counsel looked elsewhere to try to discern the bases on which Northwest Utilities might assert aggrievement or standing in this Court.

(Environmental Redispatch Policy was implemented during only a few months in 2011 and expired in March 2012). Nor did the Commission direct Bonneville to implement any particular replacement policy or set particular rates, terms or conditions.

Rather, the challenged orders simply directed Bonneville, along with its other statutory responsibilities, to comply with its Federal Power Act responsibilities to provide 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. *E.g.*, Order Granting Petition, Pet. ER 1 P 1; First Rehearing Order, Pet. ER 53-54 P 37; *see* Br. 18 (same); *see also* Order Granting Petition, Pet. ER 28 P 65 (“we will not specify the precise terms and conditions that must be set forth in Bonneville’s [open access transmission tariff] in order to remedy the noncomparable service”); *id.* at Pet. ER 29 P 66 (declining to address whether Bonneville should compensate customers for the use of their firm transmission rights).

Bonneville chose to comply with the Commission’s broad directive by proposing to implement the “Oversupply Management Protocol,” under which Bonneville will compensate transmission customers for the firm transmission rights it uses to deliver federal hydropower instead of wind power. *See Iberdrola Renewables, Inc. v. Bonneville Power Admin.*, 141 FERC ¶ 61,234 (2012) (Pet. ER

759), *on reh'g*, 143 FERC 61,274 (2013) (Pet. ER 72) (addressing Oversupply Management Protocol).<sup>6</sup> Bonneville's independent decision regarding how to comply with the Commission's broad directive, however, does not provide Northwest Utilities with standing to challenge the FERC orders before the Court here.

First, the possibility that Bonneville's rates might increase in the future if Bonneville provides compensation under the Oversupply Management Protocol does not constitute injury-in-fact. The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 133 S.Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphases and alteration by Court). If Northwest Utilities' rate concerns elevate from speculative to certain after final action on the Oversupply Management Protocol, they will have the opportunity to seek Court review at that time.

Moreover, Northwest Utilities cannot establish that this purported injury-in-fact is fairly traceable to the challenged FERC orders rather than to Bonneville's

---

<sup>6</sup> Bonneville's Oversupply Management Protocol is pending review in *Public Power Council v. Bonneville Power Admin.*, Nos. 13-71634, *et al.*, and is not before the Court in the instant proceeding. *See* Br. 49 n.14. Northwest Utilities' brief states that they "take no position here as to the legality of [the Oversupply Management Protocol] or the Commission's determinations with respect to [the Oversupply Management Protocol] under FPA section 211A." *Id.*

independent action. *See, e.g., Lujan*, 504 U.S. at 560; *Ass’n of Public Agency Customers*, 733 F.3d at 953. Nor can Northwest Utilities establish that there is “a substantial likelihood that the injury will be redressed by a favorable judicial decision.” *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013).

While Northwest Utilities speculate that “[p]resumably, Bonneville would return to the [original, no-compensation] Policy if the Court grants the relief sought in this appeal,” Br. 19 n.11, courts understandably are “reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.” *Clapper*, 133 S.Ct. at 1150; *see also id.* at 1150 & n.5 (“Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court.”) (citing *Lujan*, 504 U.S. at 562) (internal quotation marks omitted).

Petitioner National Rural Electric Cooperative Association’s motion to intervene below stated that it was “concerned that the Commission’s actions in this proceeding could establish a precedent that will directly affect [its] members that take service from [Bonneville], as well as other [of its] members that take service in other regions of the country.” R. 28, F-ER 12. *See also* petitioner American Public Power Association’s motion to intervene at FERC (R. 25, F-ER 11) (stating that “[a] substantial number of [Bonneville] customers are APPA members” who, as governmental entities, “have an interest in the Commission’s consideration of

complaints filed under Section 211A”) However, “neither a FERC decision’s legal reasoning nor the precedential effect of such reasoning confers standing unless the substance of the decision itself gives rise to an injury in fact.” *New England Power Gen. Ass’n, Inc. v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) (citing *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007)).

In short, Northwest Utilities have failed to, and cannot, establish that they are aggrieved by, and have standing to challenge, the FERC orders before the Court. Accordingly, their petitions for review should be dismissed.

## **II. Standard Of Review**

Assuming jurisdiction, the Commission’s determinations are reviewed under the Administrative Procedure Act’s “arbitrary and capricious” standard. 5 U.S.C. § 706(2)(A). Review under this standard is “highly deferential.” *Cal. Trout v. FERC*, 572 F.3d 1003, 1012 (9th Cir. 2009). “[A]gency decisions may be set aside only if ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008) (quoting 5 U.S.C. § 706(2)(A)). The Court “may reverse under the arbitrary and capricious standard if the agency relied on factors that Congress did not intend it to consider, or offered an explanation for its decision that runs counter to the evidence or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*

Under the Federal Power Act, “[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.” *Id.* (quoting FPA § 313(b), 16 U.S.C. § 825l(b)). Substantial evidence “constitutes more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Fall River Rural Elec. Coop., Inc. v. FERC*, 543 F.3d 519, 525 (9th Cir. 2008).

FERC’s construction of the Federal Power Act, which FERC administers, is reviewed under the well-settled *Chevron* analysis. *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 914 (9th Cir. 2005). If Congress has directly spoken to the precise question at issue, the Court “must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Bonneville*, 422 F.3d at 914 (same). If the statute is silent or ambiguous, the Court “must defer to a ‘reasonable interpretation made by the [agency].’” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 844); *see also Bonneville*, 422 F.3d at 914 (“if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”). “Such deference . . . extends to the agency’s interpretation of statutory ambiguity that concerns the scope of the agency’s jurisdiction.”

*Helicopter Ass’n Int’l, Inc. v. FAA*, 722 F.3d 430, 433 (D.C. Cir. 2013) (citing *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863 (2013)).

### **III. The Commission Acted Appropriately Under Federal Power Act Section 211A**

#### **A. The Commission Appropriately Determined It Had Authority Under FPA Section 211A To Direct Bonneville To Prospectively Provide Comparable And Non-Discriminatory Transmission Service**

Some of the petitioners<sup>7</sup> contend that, while Federal Power Act section 211A confers jurisdiction over Bonneville’s actions related to the transmission of electricity, Br. 23, 24, “Bonneville’s actions that are the subject of the Commission’s orders all take place at the federal dams and at other generation resources and therefore pertain solely to *generation* of electricity, and do not concern transmission.” Br. 24; *see also* Br. 23-32 (same). The Commission found, however, that Bonneville’s use of the firm transmission rights associated with the curtailed wind generation, to instead deliver federal hydropower to the wind generators’ customers, would involve not only generation, but also FPA transmission service. Order Granting Petition, Pet. ER 16 PP 32-33, Pet. ER 17 P 36, Pet. ER 27 P 62; First Rehearing Order, Pet. ER 58 P 47, Pet. ER 62 PP 58-59, Pet. ER 65 n.98.

---

<sup>7</sup> Petitioner American Public Power Association does not join in this issue. Br. 23 n.12.

Both the interconnection of a generator to the transmission system and a generator's right to inject its output into that transmission system are components of transmission service. First Rehearing Order, Pet. ER 62 P 59 (citing *Tenn. Power Co.*, 90 FERC ¶ 61,238 at 61,761 (2000), and *Duke Elec. Transm.*, 95 FERC ¶ 61,302 at 62,029 (2001)). Moreover, as firm point-to-point service<sup>8</sup> customers on Bonneville's transmission system, the wind generators have the right to inject the wind power they generate at a specific point on the transmission grid. First Rehearing Order, Pet. ER 62 P 58, Pet. ER 65 n.98; Order Granting Petition, Pet. ER 27 P 62. Accordingly, if Bonneville were to prevent its firm point-to-point wind generation customers from injecting their wind power onto the grid, Bonneville's action would affect transmission service. First Rehearing Order, Pet. ER 61-62 PP 57-59; *see also id.* at P 58 (replacing wind power with federal hydropower would change the point at which power is injected into the transmission grid and, thereby, would interrupt the wind generator's use of the transmission system); Order Granting Petition, Pet. ER 16 P 33 (preventing wind generators from transmitting their generation over Bonneville's transmission system would significantly diminish open access to transmission).

---

<sup>8</sup> "Firm point-to-point service . . . is transmission service reserved and/or scheduled between specified points of receipt and delivery." *Transm. Access*, 225 F.3d at 733.

Northwest Utilities’ opening brief ignores these determinations. *See* Br. 23 (asserting that the Commission “determined that it should assert jurisdiction because Bonneville’s actions somehow implicated electric transmission service”); *see also id.* at 23-32 (section of brief arguing that the Commission lacked jurisdiction to act). Accordingly, Northwest Utilities have waived their ability to challenge them. *See, e.g., Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) (the Court ““will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant’s opening brief.””) (quoting *U.S. v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992)); *Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1080-81 (9th Cir. 2013) (same); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (“arguments not raised by a party in its opening brief are deemed waived.”).

Instead of acknowledging and addressing the bases on which the Commission determined that Bonneville’s actions would involve transmission, Northwest Utilities first argue that Federal Power Act section 211A provides FERC with jurisdiction over Bonneville’s transmission, not generation, services. Br. 24-26. This point was undisputed. *See, e.g.,* First Rehearing Order, Pet. ER 61 P 57 (finding that the Commission may act here under FPA section 211A because Bonneville’s actions affect transmission service).<sup>9</sup>

---

<sup>9</sup> Also undisputed is Bonneville’s status as an ‘unregulated transmitting utility’ obligated to provide comparable, non-discriminatory transmission service under FPA section 211A. *See* Br. 24 & n.13.

Next, Northwest Utilities assert that the Court should look to the nature of the conduct challenged rather than to the label given that action. Br. 26-30.<sup>10</sup> After doing just that here, the Commission concluded that, because Bonneville's challenged actions would affect Federal Power Act transmission service, it had jurisdiction under section 211A of that Act. The Commission's determination that the challenged actions fit within the ambiguous term "transmission services" in FPA section 211A was reasonable and is due deference by the Court. *See, e.g., Fall River Rural*, 543 F.3d at 525 (the Court owes deference to FERC's interpretation of the FPA); *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007) (same); *Transm. Access*, 225 F.3d at 687 (*Chevron* deference applies to FERC's interpretation of the FPA).

Northwest Utilities also point to a Bonneville Record of Decision setting out Bonneville's view that curtailing wind generation to deliver Federal hydropower would not curtail transmission service under its FERC Tariff because Bonneville would continue to deliver the full amount (albeit not the type) of energy that wind generation customers contracted to transmit over Bonneville's system. Br. 30 (citing Bonneville Record of Decision, Pet. ER 261). Again, Northwest Utilities ignore the Commission's contrary finding that this action would affect

---

<sup>10</sup> As part of this argument, Northwest Utilities assert that "[t]he very reason Bonneville chose to term its policy "Environmental Redispatch" is because it governs generation, not transmission." Br. 28.

transmission service under the Federal Power Act because, as firm point-to-point transmission service customers on Bonneville's transmission system, the wind generators have the right to inject wind power at a specific point on the transmission grid. First Rehearing Order, Pet. ER 62 P 58, Pet. ER 65 n.98; Order Granting Petition, Pet. ER 27 P 62; *see also* First Rehearing Order, Pet. ER 62 P 59 (finding that both the interconnection of a generator to the transmission system and a generator's right to inject its output into that transmission system are components of transmission service). Since FERC, not Bonneville, administers the Federal Power Act, FERC's interpretation of what constitutes "transmission service" under FPA section 211A, not Bonneville's, is due deference. *See, e.g., Fall River Rural*, 543 F.3d at 525; *Cal. Dep't of Water Res.*, 489 F.3d at 1036.

Northwest Utilities further contend that the Order Granting Petition, Pet. ER 27 P 62, erred by using the terms "curtailments" and "interrupts" in describing Bonneville's actions. They note that those terms have different and specific definitions in Order No. 890 and FERC's *pro forma* open access transmission tariff. Br. 30-32 (citing *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, Appendix C section 1.16 (2007)). But once again, Northwest Utilities ignore the Commission's response to their contention. As the Commission explained, it did not use those terms as terms of art as they are defined in the *pro forma* open access transmission

tariff or Order No. 890. First Rehearing Order, Pet. ER 62 P 60. Rather, the Commission used those terms to generally describe how the actions at issue here affect transmission service. *Id.*

**B. The Commission’s Non-Comparable And Unduly Discriminatory Transmission Service Findings Were Reasonable**

The Commission reasonably determined that Bonneville would provide non-comparable and unduly discriminatory transmission service if it were to curtail the firm transmission service it provides to wind generators without compensation and use the firm transmission rights associated with that generation to deliver federal hydropower to the wind generators’ customers. First Rehearing Order, Pet. ER 57-59 PP 46-49, Pet. ER 61-63 PP 57-61, Pet. ER 65 P 66; Order Granting Petition, Pet. ER 27-28 PP 62-25.

Both federal hydroelectric and wind power resources are firm transmission service customers (i.e., take service under which they can demand transmission at any time, *Transm. Access*, 225 F.3d at 730) on Bonneville’s system. The Commission found, therefore, that they are similarly situated for purposes of considering the uncompensated transmission curtailments at issue in this proceeding. First Rehearing Order, Pet. ER 58 PP 47, 49; Order Granting Petition, Pet. ER 27 P 62.

Northwest Utilities agree that it was appropriate for the Commission to consider the fact that wind power and hydroelectric resources are both firm

Bonneville transmission customers. Br. 35; *see also* First Rehearing Order, Pet. ER 58 P 47 (“It is undisputed that both Bonneville’s hydroelectric facilities and those that are subject to curtailment . . . take firm transmission service.”); *id.* at Pet. ER 65 P 66 (same). They contend, however, that the Commission failed to also consider Bonneville’s other statutory obligations. Br. 34-47. Northwest Utilities are mistaken.

The Commission repeatedly acknowledged that Bonneville has a number of statutory obligations, including protecting endangered species, providing low-cost power to its preference customers, and integrating significant amounts of variable energy resources. Order Granting Petition, Pet. ER 16 P 33, Pet. ER 28 P 65; First Rehearing Order, Pet. ER 44 P 10, Pet. ER 51 P 31, Pet. ER 59 P 49; Second Rehearing Order, Pet. ER 88 P 49. The Commission found, however, that Bonneville is also obligated under Federal Power Act section 211A to provide transmission service that is comparable to the service it provides itself and that is not unduly discriminatory or preferential. Order Granting Petition, Pet. ER 28-29 P 65; First Rehearing Order, Pet. ER 59 P 49; Second Rehearing Order, Pet. ER 88 P 49.

Moreover, the Commission considered, but reasonably found no merit in, the claim that Bonneville needed to curtail the firm transmission service of non-hydroelectric power customers without compensation so that it could comply with

its statutory obligations. First Rehearing Order, Pet. ER 58-59 PP 47, 49-51. In fact, Bonneville has acknowledged that it does not need to curtail its non-hydroelectric firm transmission customers without compensation in order to meet its other statutory obligations. *See* First Rehearing Order, Pet. ER 52 P 33 & n.52 (quoting and citing R. 111, Bonneville’s March 6, 2012 Compliance Filing, at 26, F-ER 65, in which Bonneville states that its proposal to compensate curtailed firm transmission customers “reconciles the standard of comparability and not unduly discriminatory or preferential transmission service with Bonneville’s statutory responsibilities” and “achieves a reasonable balance of statutory responsibilities.”); *id.* at Pet. ER 59 P 50 (citing Bonneville’s Compliance Filing at 26, F-ER 65, in which Bonneville acknowledges that there are options other than curtailing non-hydroelectric customers without compensation, and states that its proposal to compensate curtailed generation would enable Bonneville to comply with its FPA section 211A obligations while also satisfying its other statutory obligations); Bonneville’s March 6, 2012 Compliance Filing at 12, F-ER 51 (“This protocol applies to all generators, federal and non-federal, within Bonneville’s balancing authority area and provides comparable treatment by compensating generation, primarily wind, who incur displacement costs even after being displaced with free federal hydro power.”).

Northwest Utilities also contend that the Commission's conditional approval of Bonneville's Oversupply Management Protocol undercuts the Commission's findings here. Br. 48-51. In Northwest Utilities' view, the petition underlying the challenged orders simply alleged that Bonneville would provide non-comparable and discriminatory transmission service if it curtailed wind customers' firm transmission service. Br. 48. In fact, however, the petition complained that Bonneville was curtailing wind generators without compensation for doing so. *See* R. 6 (211A Petition) at Pet. ER 654, 665, 666, 693, 696; *see also* Order Granting Petition, Pet. ER 6 P 9, Pet. ER 17 P 36, Pet. ER 18 n.58 (same). Moreover, as just discussed, the Commission determined that the challenged Bonneville actions would constitute non-comparable and unduly discriminatory service. *See* First Rehearing Order, Pet. ER 58-59 PP 47, 49-51; *see also id.* at Pet. ER 63 P 62 (finding that the Commission's determinations here were consistent with its approval of another transmission provider's proposal to compensate curtailed generators). Accordingly, the Commission's conditional approval of Bonneville's proposal to provide comparable and not unduly discriminatory transmission service by compensating curtailed customers does not undercut the findings challenged here.

Next, Northwest Utilities argue that the Commission erred in stating that Bonneville's curtailment policy resulted in non-comparable transmission service

between federal and non-federal resources. The curtailment policy purportedly “did not make a distinction between federal and non-federal generation,” Br. 32, and “federal non-hydroelectric resources were subject to redispatch in the same way that all non-federal resources were,” Br. 33. The record establishes otherwise.

As Bonneville explained, before implementing its curtailment policy Bonneville would take all reasonable actions to reduce excess spill, including reducing generation at the federal Columbia Generating Station nuclear plant. Record of Decision, Pet. ER 232; Bonneville Answer, Pet. ER 190 (same); *see also* 211A Petition at Att. E, Pet. ER 742 (Bonneville letter stating that one of the steps it took to avoid the need to implement its curtailment policy was to ask the Columbia Generating Station nuclear plant to shut down). If Bonneville determined these actions were insufficient to resolve its concerns, Bonneville would then implement its curtailment policy, i.e., it would replace non-federal thermal and variable energy resource (i.e., wind) customers’ transmission with federal hydropower. Record of Decision, Pet. ER 233; *see also, e.g.*, Bonneville Answer, Pet. ER 134 (same); R. 71 (Protest of Joint Public Parties) at 4-6, 11-13, F-ER 17-19, 24-26 (same); R. 101 (Request for Rehearing of Western Public Agencies Group) at 22, F-ER 37 (same) (cited and discussed in First Rehearing Order, Pet. ER 57 P 45); R. 75 (211A Petitioners’ Answer) at Att. A (Bonneville’s Environmental Redispatch Business Practice), F-ER 29 (Bonneville document

explaining that curtailment policy will apply to all non-federal generators in Bonneville's Balancing Authority Area).

Finally, some of the petitioners<sup>11</sup> contend that the record does not contain substantial evidence to support the Commission's non-comparability and undue discrimination findings. Br. 52-55. First, they argue that the wind generators' petition did not comply with the Commission's rule requiring that complaints filed with the Commission include documents supporting the facts alleged in the complaint. Br. 52 (citing 18 C.F.R. § 385.206(b)(8)). Northwest Utilities ignore the Commission finding that this rule does not apply to petitions for Commission action under FPA section 211A. Order Granting Petition, Pet. ER 15 n.54. In any event, as the Commission explained, its findings were based on the undisputed fact that the federal hydroelectric and wind resources are both firm Bonneville transmission customers. First Rehearing Order, Pet. ER 65 P 66. No additional record support was necessary.

These petitioners also complain that there was no documentation in the record of the harm alleged by the wind generators and purportedly relied upon by the Commission to support its exercise of authority under Federal Power Act section 211A. Br. 53-55. While the Commission determined that there was

---

<sup>11</sup> Petitioner American Public Power Association does not join in this contention. Br. 52 n.54.

sufficient record evidence demonstrating the economic harm caused by Bonneville's curtailment policy, the Commission did not consider economic harm in making its non-comparability determination. First Rehearing Order, Pet. ER 65-66 P 67. Rather, the Commission considered economic harm only in determining whether it should choose to exercise its discretion under FPA section 211A here. *Id.*; Order Granting Petition, Pet. ER 28 P 63.

### **CONCLUSION**

For the foregoing reasons, the petitions for review should be dismissed for lack of standing and aggrievement. Otherwise, the petitions should be denied on the merits.

## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Commission states that, other than those stated in Northwest Utilities' Statement of Related Cases, there are no additional cases related to this one.

Respectfully submitted,

David L. Morenoff  
Acting General Counsel

Robert H. Solomon  
Solicitor

*/s/ Beth G. Pacella*  
Beth G. Pacella  
Senior Attorney

Federal Energy Regulatory  
Commission  
888 First Street, N.E.  
Washington, D.C. 20426  
Phone: 202-502-6048  
E-mail: [beth.pacella@ferc.gov](mailto:beth.pacella@ferc.gov)  
February 20, 2014

## CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points, and contains 6,251 words, not including the tables of contents and authorities, the glossary, the certificate of counsel, and the addendum.

/s/ Beth G. Pacella  
Beth G. Pacella  
Senior Attorney

Federal Energy Regulatory  
Commission  
Washington, DC 20426  
TEL: (202) 502-6600  
FAX: (202) 273-0901  
beth.pacella@ferc.gov

February 20, 2014

**ADDENDUM**  
**Statutes & Regulation**

# TABLE OF CONTENTS

## PAGE

### Statutes:

#### Administrative Procedure Act

5 U.S.C. § 706(2)(A) .....A1

#### Federal Power Act

Section 201, 16 U.S.C. § 824(b)(1) .....A2

Section 211A, 16 U.S.C. § 824j-1(b) .....A3

Section 313(b), 16 U.S.C. § 825l(b) .....A4

#### Pacific Northwest Federal Transmission System Act

16 U.S.C. § 838g .....A5

### Regulation:

18 U.S.C. § 385.206(b)(8) .....A7

**§ 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

**CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING**

Sec.	
801.	Congressional review.
802.	Congressional disapproval procedure.
803.	Special rule on statutory, regulatory, and judicial deadlines.
804.	Definitions.
805.	Judicial review.
806.	Applicability; severability.
807.	Exemption for monetary policy.
808.	Effective date of certain rules.

**§ 801. Congressional review**

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;
- (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

- (A) the later of the date occurring 60 days after the date on which—
  - (i) the Congress receives the report submitted under paragraph (1); or
  - (ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

- (i) on which either House of Congress votes and fails to override the veto of the President; or
- (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by oper-

may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final condition would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

**(b) Alternative prescriptions**

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information

as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, §33, as added Pub. L. 109-58, title II, §241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

**§ 824. Declaration of policy; application of subchapter**

**(a) Federal regulation of transmission and sale of electric energy**

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

**(b) Use or sale of electric energy in interstate commerce**

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

**EFFECTIVE DATE OF 1986 AMENDMENT**

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

**STATE AUTHORITIES; CONSTRUCTION**

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 796 of this title.

**§ 824j-1. Open access by unregulated transmitting utilities**

**(a) Definition of unregulated transmitting utility**

In this section, the term “unregulated transmitting utility” means an entity that—

- (1) owns or operates facilities used for the transmission of electric energy in interstate commerce; and
- (2) is an entity described in section 824(f) of this title.

**(b) Transmission operation services**

Subject to section 824k(h) of this title, the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services—

- (1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and
- (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.

**(c) Exemption**

The Commission shall exempt from any rule or order under this section any unregulated transmitting utility that—

- (1) sells not more than 4,000,000 megawatt hours of electricity per year;
- (2) does not own or operate any transmission facilities that are necessary for operating an interconnected transmission system (or any portion of the system); or
- (3) meets other criteria the Commission determines to be in the public interest.

**(d) Local distribution facilities**

The requirements of subsection (b) of this section shall not apply to facilities used in local distribution.

**(e) Exemption termination**

If the Commission, after an evidentiary hearing held on a complaint and after giving consideration to reliability standards established under section 824o of this title, finds on the basis of a preponderance of the evidence that any exemption granted pursuant to subsection (c) of this section unreasonably impairs the continued reliability of an interconnected transmission system, the Commission shall revoke the exemption granted to the transmitting utility.

**(f) Application to unregulated transmitting utilities**

The rate changing procedures applicable to public utilities under subsections (c) and (d) of

section 824d of this title are applicable to unregulated transmitting utilities for purposes of this section.

**(g) Remand**

In exercising authority under subsection (b)(1) of this section, the Commission may remand transmission rates to an unregulated transmitting utility for review and revision if necessary to meet the requirements of subsection (b) of this section.

**(h) Other requests**

The provision of transmission services under subsection (b) of this section does not preclude a request for transmission services under section 824j of this title.

**(i) Limitation**

The Commission may not require a State or municipality to take action under this section that would violate a private activity bond rule for purposes of section 141 of title 26.

**(j) Transfer of control of transmitting facilities**

Nothing in this section authorizes the Commission to require an unregulated transmitting utility to transfer control or operational control of its transmitting facilities to a Transmission Organization that is designated to provide non-discriminatory transmission access.

(June 10, 1920, ch. 285, pt. II, §211A, as added Pub. L. 109-58, title XII, §1231, Aug. 8, 2005, 119 Stat. 955.)

**§ 824k. Orders requiring interconnection or wheeling**

**(a) Rates, charges, terms, and conditions for wholesale transmission services**

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility’s existing wholesale, retail, and transmission customers.

vertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

CODIFICATION

“Sections 1535 and 1536 of title 31” substituted in text for “sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])” on authority of Pub. L. 97-258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

**§ 825I. Review of orders**

**(a) Application for rehearing; time periods; modification of order**

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

**(b) Judicial review**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall

be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**(c) Stay of Commission's order**

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85-791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), “section 1254 of title 28” substituted for “sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)” on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58 inserted “electric utility,” after “Any person,” and “to which such person,” and substituted “brought by any entity unless such entity” for “brought by any person unless such person”.

1958—Subsec. (a). Pub. L. 85-791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted “transmitted by the clerk of the court to” for “served upon”, substituted “file with the court” for “certify and file with the court a transcript of”, and inserted “as provided in section 2112 of title 28”, and in third sentence, substituted “jurisdiction, which upon

**§ 838c. Acquisition by condemnation of transmission facilities**

**(a) Approval by Congress; exceptions**

Unless specifically authorized by Act of Congress, the Administrator shall not expend funds made available under this chapter, other than funds specifically appropriated by the Congress for such purpose, to acquire any operating transmission facility by condemnation: *Provided*, That this provision shall not restrict the acquisition of the right to cross such a facility by condemnation.

**(b) Notice of request for approval for construction or condemnation to contracting or interconnected entities in Pacific Northwest**

At least sixty days prior to the time a request for approval or authority under this section or section 838b of this title is sent to Congress, the Administrator shall give notice of such request to entities in the Pacific Northwest with which the Administrator has power sales or exchange contracts or transmission contracts or which have a transmission interconnection with the Federal transmission system.

(Pub. L. 93-454, § 5, Oct. 18, 1974, 88 Stat. 1377.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Interior with respect to Bonneville Power Administration transferred to Secretary of Energy by section 7152(a)(1)(D), (2) of Title 42, The Public Health and Welfare, with Bonneville Power Administration to be preserved as a distinct organizational entity within Department of Energy and headed by an Administrator.

**§ 838d. Transmission of non-Federal power**

The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

(Pub. L. 93-454, § 6, Oct. 18, 1974, 88 Stat. 1377.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Interior with respect to Bonneville Power Administration transferred to Secretary of Energy by section 7152(a)(1)(D), (2) of Title 42, The Public Health and Welfare, with Bonneville Power Administration to be preserved as a distinct organizational entity within Department of Energy and headed by an Administrator.

**§ 838e. Acquisition of property**

Subject to the provisions of section 838c of this title the Administrator may purchase or lease or otherwise acquire and hold such real and personal property in the name of the United States as he deems necessary or appropriate to carry out his duties pursuant to law.

(Pub. L. 93-454, § 7, Oct. 18, 1974, 88 Stat. 1377.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Interior with respect to Bonneville Power Administration transferred to Secretary of Energy by section 7152(a)(1)(D), (2) of Title 42, The Public Health and Welfare, with Bonneville Power Administration to be preserved as a distinct organizational entity within Department of Energy and headed by an Administrator.

**§ 838f. Marketing of Federal power; sales agent**

The Administrator is hereby designated as the marketing agent for all electric power generated by Federal generating plants in the Pacific Northwest, constructed by, under construction by, or presently authorized for construction by the Bureau of Reclamation or the United States Corps of Engineers except electric power required for the operation of each Federal project and except electric power from the Green Springs project of the Bureau of Reclamation.

(Pub. L. 93-454, § 8, Oct. 18, 1974, 88 Stat. 1377.)

TRANSFER OF FUNCTIONS

Functions of Secretary of the Interior with respect to Bonneville Power Administration transferred to Secretary of Energy by section 7152(a)(1)(D), (2) of Title 42, The Public Health and Welfare, with Bonneville Power Administration to be preserved as a distinct organizational entity within Department of Energy and headed by an Administrator.

Power marketing functions of Bureau of Reclamation, including construction, operation, and maintenance of transmission lines and attendant facilities, transferred to Secretary of Energy by section 7152(a)(1)(E), (3) of Title 42, and are to be exercised by Secretary through a separate Administration within Department of Energy.

**§ 838g. Schedules of rates and charges for sale of Federal power and transmission of non-Federal power; confirmation and approval; criteria for modification and establishment**

Schedules of rates and charges for the sale, including dispositions to Federal agencies, of all electric power made available to the Administrator pursuant to section 838f of this title or otherwise acquired, and for the transmission of non-Federal electric power over the Federal transmission system, shall become effective upon confirmation and approval thereof by the Secretary of Energy. Such rate schedules may be modified from time to time by the Secretary of Energy, acting by and through the Administrator, subject to confirmation and approval by the Secretary of Energy, and shall be fixed and established (1) with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles, (2) having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric power, including the amortization of the capital investment allocated to power over a reasonable period of years and payments provided for in section 838i(b)(9) of this title, and (3) at levels to produce such additional revenues as may be required, in the aggregate with all other revenues of the Administrator, to pay when due the principal of, premiums, discounts, and expenses in connection with the issuance of and interest on all bonds issued and outstanding pursuant to this chapter, and amounts required to establish and maintain reserve and other funds and accounts established in connection therewith.

(Pub. L. 93-454, § 9, Oct. 18, 1974, 88 Stat. 1377; Pub. L. 95-91, title III, §§ 301(b), 302(a)(1)(D), Aug. 4, 1977, 91 Stat. 578.)

## TRANSFER OF FUNCTIONS

“Secretary of Energy” substituted in text for “Secretary of the Interior” and “Federal Power Commission” pursuant to Pub. L. 95-91, §§301(b), 302(a)(1)(D), which are classified to sections 7151(b) and 7152(a)(1)(D) of Title 42, The Public Health and Welfare.

Federal Power Commission terminated and its functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42.

Functions of Secretary of the Interior with respect to Bonneville Power Administration transferred to Secretary of Energy by section 7152(a)(1)(D), (2) of Title 42, with Bonneville Power Administration to be preserved as a distinct organizational entity within Department of Energy and headed by an Administrator.

**§ 838h. Uniform schedules of rates and charges for sale of Federal power and transmission of non-Federal power; allocation of cost recovery**

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

(Pub. L. 93-454, §10, Oct. 18, 1974, 88 Stat. 1378.)

**§ 838i. Bonneville Power Administration fund**

**(a) Establishment; composition; availability of transferred funds for expenditures**

There is hereby established in the Treasury of the United States a Bonneville Power Administration fund (hereinafter referred to as the “fund”). The fund shall consist of (1) all receipts, collections, and recoveries of the Administrator in cash from all sources, including trust funds, (2) all proceeds derived from the sale of bonds by the Administrator, (3) any appropriations made by the Congress for the fund, and (4) the following funds which are hereby transferred to the Administrator: (i) all moneys in the special account in the Treasury established pursuant to Executive Order Numbered 8526 dated August 26, 1940, (ii) the unexpended balances in the continuing fund established by the provisions of section 832j of this title, and (iii) the unexpended balances of funds appropriated or otherwise made available for the Bonneville Power Administration. All funds transferred hereunder shall be available for expenditure by the Secretary of Energy, acting by and through the Administrator, as authorized in this chapter and any other Act relating to the Federal Columbia River transmission system, subject to such limitations as may be prescribed by any applicable appropriation act effective during such period as may elapse between their transfer and the approval by the Congress of the first subsequent annual budget program of the Administrator.

**(b) Authorized purposes of expenditures**

The Administrator may make expenditures from the fund, which shall have been included in

his annual budget submitted to Congress, without further appropriation and without fiscal year limitation, but within such specific directives or limitations as may be included in appropriation acts, for any purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law, including but not limited to—

(1) construction, acquisition, and replacement of (i) the transmission system, including facilities and structures appurtenant thereto, and (ii) additions, improvements, and betterments thereto (hereinafter in this chapter referred to as “transmission system”);

(2) operation, maintenance, repair, and relocation, to the extent such relocation is not provided for under subsection (1) above, of the transmission system;

(3) electrical research, development, experimentation, test, and investigation related to construction, operation, and maintenance of transmission systems and facilities;

(4) marketing of electric power;

(5) transmission over facilities of others and rental, lease, or lease-purchase of facilities;

(6) purchase of electric power (including the entitlement of electric plant capability) (i) on a short-term basis to meet temporary deficiencies in electric power which the Administrator is obligated by contract to supply, or<sup>1</sup> (ii) if such purchase has been heretofore authorized or is made with funds expressly appropriated for such purchase by the Congress, (iii) if to be paid for with funds provided by other entities for such purpose under a trust or agency arrangement, or (iv) on a short term basis to meet the Administrator’s obligations under section 4(h) of the Pacific Northwest Electric Power Planning and Conservation Act [16 U.S.C. 839b(h)];

(7) defraying emergency expenses or insuring continuous operation;

(8) paying the interest on, premiums, discounts, and expenses, if any, in connection with the issuance of, and principal of all bonds issued under section 838k(a) of this title, including provision for and maintenance of reserve and other funds established in connection therewith;

(9) making such payments to the credit of the reclamation fund or other funds as are required by or pursuant to law to be made into such funds in connection with reclamation projects in the Pacific Northwest: *Provided*, That this clause shall not be construed as permitting the use of revenues for repayment of costs allocated to irrigation at any project except as otherwise expressly authorized by law;

(10) making payments to the credit of miscellaneous receipts of the Treasury for all unpaid costs required by or pursuant to law to be charged to and returned to the general fund of the Treasury for the repayment of the Federal investment in the Federal Columbia River Power System from electric power marketed by the Administrator;

(11) acquiring such goods and services, and paying dues and membership fees in such professional, utility, industry, and other soci-

<sup>1</sup> So in original. The word “or” probably should not appear.

## § 385.204

each tariff or rate filing must include, as appropriate:

(1) If known, the reference numbers, docket numbers, or other identifying symbols of any relevant tariff, rate, schedule, contract, application, rule, or similar matter or material;

(2) The name of each participant for whom the filing is made or, if the filing is made for a group of participants, the name of the group, provided that the name of each member of the group is set forth in a previously filed document which is identified in the filing being made;

(3) The specific authorization or relief sought;

(4) The tariff or rate sheets or sections;

(5) The name and address of each person against whom the complaint is directed;

(6) The relevant facts, if not set forth in a previously filed document which is identified in the filing being made;

(7) The position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position;

(8) Subscription or verification, if required;

(9) A certificate of service under Rule 2010(h), if service is required;

(10) The name, address, and telephone number of an individual who, with respect to any matter contained in the filing, represents the person for whom filing is made; and

(11) Any additional information required to be included by statute, rule, or order.

(b) *Requirement for any initial pleading or tariff or rate filing.* The initial pleading or tariff or rate filing submitted by a participant or a person seeking to become a party must conform to the requirements of paragraph (a) of this section and must include:

(1) The exact name of the person for whom the filing is made;

(2) The location of that person's principal place of business; and

(3) The name, address, and telephone number of at least one, but not more than two, persons upon whom service is to be made and to whom communications are to be addressed in the proceeding.

## 18 CFR Ch. I (4–1–13 Edition)

(c) *Combined filings.* If two or more pleadings, or one or more pleadings and a tariff or rate filing are included as items in a single filing each such item must be separately designated and must conform to the requirements which would be applicable to it if filed separately.

(d) *Form of notice.* If a pleading or tariff or rate filing must include a form of notice suitable for publication in the FEDERAL REGISTER, the company shall submit the draft notice in accordance with the form of notice specifications prescribed by the Secretary and posted under the Filing Procedures link at <http://www.ferc.gov> and available in the Commission's Public Reference Room.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 647, 69 FR 32439, June 10, 2004; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006; Order 714, 73 FR 57538, Oct. 3, 2008]

### § 385.204 Applications (Rule 204).

Any person seeking a license, permit, certification, or similar authorization or permission, must file an application to obtain that authorization or permission.

### § 385.205 Tariff or rate filings (Rule 205).

A person must make a tariff or rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant.

### § 385.206 Complaints (Rule 206).

(a) *General rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

#### (b) *Contents. A complaint must:*

(1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;

(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;

(3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;

(4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;

(5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;

(6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;

(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;

(9) State

(i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;

(ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint;

(iii) What types of ADR procedures could be used; and

(iv) Any process that has been agreed on for resolving the complaint.

(10) Include a form of notice of the complaint suitable for publication in the FEDERAL REGISTER in accordance with the specifications in §385.203(d) of this part. The form of notice shall be on electronic media as specified by the Secretary.

(11) Explain with respect to requests for Fast Track processing pursuant to section 385.206(h), why the standard processes will not be adequate for expeditiously resolving the complaint.

(c) *Service*. Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with §385.2010(f)(3), facsimile, express delivery, or messenger.

(d) *Notice*. Public notice of the complaint will be issued by the Commission.

(e) [Reserved]

(f) *Answers, interventions and comments*. Unless otherwise ordered by the Commission, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers will be due.

(g) *Complaint resolution paths*. One of the following procedures may be used to resolve complaints:

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with §§385.604–385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with §385.603;

(2) The Commission may issue an order on the merits based upon the pleadings;

(3) The Commission may establish a hearing before an ALJ;

(h) *Fast Track processing*. (1) The Commission may resolve complaints using Fast Track procedures if the complaint requires expeditious resolution. Fast Track procedures may include expedited action on the pleadings by the Commission, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the Commission or an ALJ.

*Northwest Requirements Utilities, et al. v. FERC*  
*9th Cir. Nos. 13-70391, 13-70499, 13-70581, 13-72928*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 20, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Beth G. Pacella  
Beth G. Pacella  
Senior Attorney

Federal Energy Regulatory  
Commission  
Washington, DC 20426  
Tel: (202) 502-6048  
Fax: (202) 273-0901  
Email: [beth.pacella@ferc.gov](mailto:beth.pacella@ferc.gov)