

## **For the First Time, FERC Orders a Non-Jurisdictional Entity to File an Open Access Transmission Tariff, Finding that a Bonneville Power Administration Policy is Unduly Discriminatory**

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In a case that was highly controversial, the Federal Energy Regulatory Commission (FERC) has ordered the Bonneville Power Administration (BPA), an entity that is not within FERC's plenary electric transmission jurisdiction, to file a tariff that requires it to provide non-discriminatory transmission service. In its Dec. 7, 2011 order directing BPA to file an Open Access Transmission Tariff (OATT), FERC exercised its statutory authority under section 211A of the Federal Power Act (FPA) for the first time. Although FERC had been reluctant to use this authority, the facts in this case convinced FERC that BPA had taken actions that were unduly discriminatory to certain transmission customers, and that a remedy was necessary.

In June 2011, a group of wind energy developers in the Pacific Northwest (Wind Petitioners) filed a petition at FERC asking, among other things, that FERC exercise its section 211A authority to order BPA to remedy what the Wind Petitioners described as discriminatory transmission service. Their petition grew out of an unusual confluence of events and regulatory policies that occasionally result in an "over-generation" situation in the Northwest region.

When there are high river flows in the Northwest, the numerous hydroelectric projects generate large quantities of energy. BPA, in addition to being the largest transmission operator in the Northwest, also has responsibility to sell the energy generated by federal hydro projects in the region. At times, it may be difficult for BPA to dispose of all the energy generated by those projects even if it offers to give it away for free, because the supply is sometimes greater than the load in the region, and BPA has insufficient transmission capacity to export it. BPA believes it is bound by environmental restrictions to run high river flows through turbine generators, rather than spill them over the dams, because spilling water increases dissolved gases in the river which is thought to be harmful to fish, including endangered salmon species.

In anticipation that it might experience an over-generation situation last spring, BPA adopted an "Environmental Redispatch" policy. BPA posited that over-generation was exacerbated by new generation being built in the region, particularly wind generation. Thus, its new policy provided that BPA, at times of over-generation, would require non-BPA generators on its system to reduce or totally curtail their generation. BPA would then substitute its excess power at no cost to fulfill the shut-down generators' sales obligations. BPA further declared that it would not dispose of its excess power by paying entities to take it, known as negative pricing, because BPA did not want its power sales customers to have to bear the costs associated with over-generation.

BPA asserted the right to implement this policy by unilaterally amending its interconnection agreements with generators to give BPA the right to redispatch them during over-generation events. Although the policy applied to thermal as well as wind generators, the latter asserted that they suffered unique economic harm when they were shut down because they would lose valuable tax credits and renewable energy credits that are based on energy generated by the units. Environmental Redispatch was used on occasions in May and June, 2011 to shut down non-BPA generators.

The Wind Petitioners, and intervenors in support of them, argued to FERC that BPA's policy of shutting down wind generators in order to use their transmission capacity to export BPA's excess energy was an exercise of BPA's transmission market power to favor BPA's power customers, and was unduly discriminatory against the wind projects. They also asserted, among other things, that BPA's policy violates their interconnection agreements and their firm transmission rights. BPA, and intervenors in support of it, responded that FERC had no jurisdiction to address this matter because under BPA's

organic statutes, appeals of BPA's actions lie exclusively in the Ninth Circuit Court of Appeals. They also defended the policy as not being discriminatory and was a reasonable way to balance the competing interests in this complex situation.

Because BPA is a governmental entity, it is exempt from FERC's plenary jurisdiction over transmission rates and services, and thus is not subject to FERC's Order No. 888 requirement that public utilities must offer open access transmission service to all eligible transmission customers on a non-discriminatory basis pursuant to FERC's pro forma OATT. For a while, BPA abided by a voluntarily-filed "reciprocity" tariff that FERC determined to be consistent with the pro forma OATT, but, prior to 2005, FERC had no authority to impose an open access tariff on BPA.

In the Energy Policy Act of 2005, Congress added section 211A to the FPA giving FERC authority to require by rule or order that an "unregulated transmitting utility" such as BPA provide transmission services at rates, terms and conditions comparable to what it provides itself. Until now, FERC had declined to use this authority, stating that its use of section 211A was discretionary and not warranted in several cases. When FERC engaged in a major overhaul of its OATT in Order No. 890, it considered whether it should exercise section 211A authority by rule to make all "unregulated" utilities file OATTs. FERC chose not to, opting instead for an approach that encouraged such entities to voluntarily cooperate with public utilities' transmission planning.

In its Dec. 7, 2011 order, FERC granted the Wind Petitioners' petition to require that BPA provide non-discriminatory transmission. In using its section 211A authority for the first time, FERC gave the provision a broad interpretation, finding that BPA's organic statutes did not exempt BPA from FERC's authority. FERC concluded that section 211A gave it the authority to order BPA "to file a tariff providing for transmission service on terms and conditions that are comparable to those under which Bonneville provides to itself and that are not unduly discriminatory or preferential." FERC said that it does not take the exercise of its authority under section 211A lightly, but here there was "a compelling case" to exercise that authority "to ensure open access to transmission service at comparable terms, and conditions."

FERC specifically found that BPA's policy "results in noncomparable transmission service that unfairly treats non-Federal generating resources connected to Bonneville's transmission system." FERC found that non-federal resources should be comparable to federal resources for purposes of transmission curtailments, but that Environmental Redispatch interrupts non-Federal generator's firm transmission service without causing similar interruptions to BPA's transmission service for federal resources. FERC found that BPA was impinging on the transmission service obtained by non-Federal generation in order to deliver federal hydropower from Bonneville's system.

As a remedy, FERC stated that BPA may not continue to use the Environmental Redispatch policy, and ordered that BPA submit within 90 days "a revised OATT, pursuant to section 211A, that addresses the comparability concerns raised in this proceeding in a manner that provides comparable transmission service that is not unduly discriminatory or preferential." FERC was not prescriptive as to what type of provisions BPA must file, and strongly urged the parties to work together to find an appropriate solution.

As this is the first use of section 211A, both FERC and the parties are sailing in uncharted waters as to what BPA will need to do to satisfy FERC's order.

*Disclosure: DWT represented a party in these proceedings. This analysis is solely that of the author and is not intended to represent the views of any other person or entity.*

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