

Bonneville Power Administration

Day-Ahead Market Policy Paper Attachment 2

Preliminary Legal Assessment of Day-Ahead Market Participation

April 2024

1. Introduction

In July 2023, the Bonneville Power Administration began to engage the region in a public process to evaluate its potential participation in a day-ahead market. As one of the largest wholesale power and transmission providers in the Western Interconnection, Bonneville's decision regarding day-ahead markets will play a critical role in the energy and capacity market landscape for the region, and it will directly impact many other entities' decisions regarding day-ahead market participation. During the process, stakeholders requested clarity on how Bonneville will meet its statutory obligations if it participates in a day-ahead market. This preliminary assessment accompanies Bonneville staff's initial recommendation on a policy direction towards day-ahead market participation. Bonneville will continue to address its many legal obligations in a day-ahead market context as the public process continues.

Bonneville's decision to join any market must comport with multiple grants of authority including but not limited to power marketing, providing transmission service, and operating in a business-like manner. In exercising such authorities, the Administrator must balance his ability to meet multiple statutory obligations, such as providing preference and priority in the sale of power when there are conflicting or competing requests, making firm power sales under section 5(b) of the Northwest Power Act, providing transmission service and operating the transmission system, setting rates sufficient to repay the federal investment, and fulfilling environment, fish and wildlife obligations. This preliminary legal assessment describes how Bonneville could meet these obligations while participating in a day-ahead market.

As a high-level matter, Bonneville would join a day-ahead market by agreeing to a set of contracts which incorporate a day-ahead market tariff. Bonneville would exercise its contracting authority under section 2(f) of the Bonneville Project Act¹ to agree to a day-ahead market tariff. This would be similar to actions Bonneville has taken to participate in the California Independent System Operator's real-time Western Energy Imbalance Market (WEIM) and the Western Power Pool's Resource Adequacy Program (WRAP).² Similar to the EIM and WRAP agreements, and like any contract with a market operator implementing a day-ahead market subject to an applicable tariff, an agreement to participate in a day-ahead market must expressly acknowledge and not infringe upon Bonneville's authority to meet its statutory obligations and contractual requirements. Based on the day-ahead market tariff offerings to date, Bonneville has not identified legal barriers to satisfying its statutory obligations while participating in a day-ahead market.

2. Bonneville has the business flexibility to participate in a day-ahead market.

Since its inception, Congress has imbued Bonneville with broad statutory authority to market the power produced by the federal hydropower generating projects. In the Bonneville Project Act of

¹ 16 U.S.C. § 832a(f).

² Bonneville Power Administration, Energy Imbalance Market Policy, Administrator's Record of Decision at 54-56 (September 2019) (WEIM Policy ROD), *available at* <https://www.bpa.gov/-/media/Aep/projects/energy-imbalance-market/rod-20190926-energy-imbalance-market-policy.pdf>; Bonneville Power Administration, Bonneville's decision to participate in the Western Resource Adequacy Program Phase 3B (Dec. 16, 2022), *available at* <https://www.bpa.gov/-/media/Aep/projects/resource-adequacy/wrap-final-closeout-letter.pdf>

1937, Congress granted Bonneville broad contracting authority for the specific purpose of allowing Bonneville to operate like a business in the marketing of federal power.³ As the designated “marketing agent” for all electric power generated by the Federal Columbia River Power System.⁴ Bonneville’s statutes are unique with repeated focus on the business-related aspects of the agency’s authority.

Both Congress and the courts have reaffirmed Bonneville’s authority to operate in a business-like manner. As summarized in a 1977 Senate Report:

[The] legislative history [of the statutes governing BPA’s operations] reflects a congressional recognition of the significant role played by BPA in the Pacific Northwest, and an effort to enable this organization to operate in a businesslike fashion and to free it from the requirements and restrictions ordinarily applicable to the conduct of Government business. The transfer of the functions of BPA from the Department of the Interior to the Department of Energy is not intended to diminish in any way the authority or flexibility which is a requisite to the efficient management of a utility business.⁵

The ability of Bonneville to adapt to the ever-changing landscape of the wholesale electric power industry like a business is particularly important because the Administrator must implement many, and often competing, statutory directives.⁶ Similarly, the Ninth Circuit Court of Appeals has noted that “[The Administrator] must continue to run [Bonneville] like a business on a sound financial basis, enabling it to repay its debt to the federal treasury in a timely fashion, while discharging costly new public duties assumed after the Northwest Power Act’s passage.”⁷

In 1995, Bonneville adopted a Business Plan with a market-driven direction and a goal to be a more active participant in the competitive market for power, transmission, and energy services.⁸ As stated in the 1995 Business Plan Record of Decision, Bonneville’s objective is to use its success in markets to ensure the financial strength necessary to better produce the public benefits that BPA affords to the region.⁹ The market-driven approach is designed to increase the value of Bonneville’s business and generate expanded benefits to share with customers and constituents--including energy conservation and fish and wildlife mitigation.¹⁰ By evaluating potential participation in a day-ahead market, Bonneville is continuing its long-standing business strategy to pursue options that could produce value for BPA’s customers and the region.

³ Bonneville Project Act, 16 U.S.C. § 832a(f). See S. R. No. 469, 79th Cong., 1st Sess. 13 (1945) (“[BPA] operates a business enterprise . . .”) (letter from Interior Secretary Ickes).

⁴ Transmission System Act of 1974, § 8, 16 U.S.C. § 838f.

⁵ S. R. No. 164, 95th Cong., 1st Sess. 30 (1977), reprinted in 1977 U.S.C.C.A.N. 854, 884.

⁶ *Ass’n of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1170-71 (9th Cir. 1997).

⁷ *Id.*

⁸ Bonneville Power Administration, Business Plan Record of Decision (Aug. 15, 1995), available at <https://www.bpa.gov/-/media/Aep/about/publications/records-of-decision/1995-rod/rod-19950815-business-plan-final-environmental-impact-statement.pdf>

⁹ *Id.* at 1.

¹⁰ *Id.* At 19.

How Bonneville will meet its statutory and contractual obligations is highly dependent on the business drivers for and the impacts of day-ahead market participation. The Staff Recommendation Policy Letter discusses how Bonneville and the region as a whole are experiencing significant and unprecedented changes in the industry. Faced with competitive drivers and new regulatory requirements, electric utilities are devoting significant resources to develop and transition to market-based solutions that aim to reduce inefficiencies, improve power and transmission system reliability, lower production costs, and bolster resource adequacy, among other things. Bonneville and other utilities' participation in the WEIM are an example of one such development. These new competitive drivers are creating opportunities for Bonneville to modernize its business to preserve and enhance the value Bonneville provides to its customers pursuant to its statutory mission.

As Bonneville evaluates potential participation in a day-ahead market, some of its key objectives rooted in statute are to ensure an adequate, efficient, economical, and reliable power supply and, to encourage the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles. Therefore, as explained in the Staff Recommendation, Bonneville continues to assess whether participation would provide value for customers in terms of greater efficiency, lower costs, and increased reliability.¹¹

3. Bonneville would fulfill its preference obligations and Northwest Power Act Section 5(b) firm power sales obligations while participating in a day-ahead market.

Bonneville's authority to market federal power is included in several statutes: the Bonneville Project Act of 1937, the Flood Control Act of 1944, the Pacific Northwest Consumer Power Preference Act of 1964, the Federal Columbia River Transmission System Act of 1974, and the Pacific Northwest Power Planning and Conservation Act of 1980. Collectively, these statutes form the basis for Bonneville's broad discretion to market power. For Bonneville to participate in a day-ahead market, it must market power consistent with these statutory authorities. Bonneville recognizes that many stakeholders have requested explanations of how Bonneville will meet obligations in these statutes to provide public bodies and cooperatives preference and priority to federal power, and to offer contracts for the sale of electric power under section 5(b) of the Northwest Power Act, considering the paradigm shift that a day-ahead market would represent. As explained below, Bonneville must continue to meet its preference and section 5(b) obligations included in these authorities if it participates in a day-ahead market.

a. Bonneville must provide preference in sales of power at all times in the event of competing or conflicting applications for power.

Bonneville must continue to provide preference in the sale of power to public bodies and cooperatives in the event of competing applications if it moves from a bilateral sales construct to a construct incorporating a market dispatch framework. Section 4(a) of the Bonneville Project Act of 1937 specifies, "[i]n order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural customers, the administrator shall at all times, in disposing of electric

¹¹ See Staff Recommendation Policy Letter, Market Evaluation Principles at 2-3.

energy generated at said project, give preference and priority to public bodies and cooperatives.”¹² Section 4(b) further explains, “in the event that . . . there shall be conflicting or competing applications for an allocation of electric energy between any public body or cooperative on the one hand and a private agency of any character on the other, the application of such public body or cooperative shall be granted.”¹³ The Flood Control Act of 1944 similarly states that “[p]reference in the sale of such power and energy shall be given to public bodies and cooperatives.”¹⁴ Thus, Bonneville’s earliest legislation established the foundational principle that Bonneville shall afford preference to public bodies and cooperatives in the event of competing or conflicting requests for power. Bonneville understands that providing preference in the event of competing applications is a fundamental component of its power marketing obligation.

Section 5(a) of the Northwest Power Act reaffirms the preference and priority provisions from Bonneville Project Act by stating, “[a]ll power sales under this chapter shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937”¹⁵ The Northwest Power Act was enacted to resolve regional power customer fears about an impending allocation of low-cost Federal power. The House Report of the Commerce Committee on the Northwest Power Act emphasized that sales by the Administrator would be subject to existing preference provisions:

The purpose of this provision is clear. The Committee wants to insure that all preference customer contract requirements will continue to have a priority over sale to other customers and other sales would be, in effect, subordinate to preference provisions of the Bonneville Project Act, including the five-year withdrawal features for contracts with nonpreference customers and the 20-year limitation on the terms of the contract.¹⁶

In this preliminary assessment, Bonneville finds that it will be able to continue to satisfy preference when there is a competing or conflicting application for power in a day-ahead market. In a day-ahead market context, Bonneville would continue to make long-term forward sales of power and would apply preference if faced with a limited supply of power. After the day-ahead market clears, any out of market requests for electric power from Bonneville are likely to fall within the context of a surplus sale. These scenarios are described below.

b. Bonneville is authorized to acquire resources to meet all eligible customer requests for electric power under section 5(b) of the Northwest Power Act.

Bonneville’s acquisition authority generally ensures that Bonneville can acquire to meet the needs of all customers requesting contracts for electric power and thereby avoid a preference

¹² 16 U.S.C. § 832c(a).

¹³ 16 U.S.C. § 832c(b); *see also Aluminum Co. of America v. Central Lincoln People’s Util. Dist.*, 467 U.S. 380, 393 (1984) (“[T]he preference system merely determines the priority of different customers when the Administrator receives ‘conflicting or competing’ applications for power that the Administrator is authorized to allocate administratively.” (citing section 4(b) of the Bonneville Project Act)).

¹⁴ 16 U.S.C. § 825s.

¹⁵ 16 U.S.C § 839c(a)

¹⁶ H.R. Rep. No. 97-976, Pt. I, at 34 (1980).

allocation among competing or conflicting requests for power. Historically, there was no need for Bonneville to apply preference because Bonneville had an abundance of power for decades to sell its regional power customers as successive federal dams were constructed and added to the system. However, in the 1970s, projections showed that because of increased power demand, the Administrator would be required to apply preference and allocate the limited amount of federal power. Upon expiration of the power sales contracts with non-preference customers, the Administrator would no longer be able to sell power to non-preference entities because the preference clauses would obligate him to allocate the limited supply to public bodies and cooperatives. Congress drafted the Northwest Power Act in order to prevent the need for an allocation of power.¹⁷ The Act solved the pending allocation and reduces the potential application of preference in the future by providing the Administrator with resource acquisition authority to meet his sales obligation.

Section 5(b)(1) of the Northwest Power Act includes this sales obligation and provides,

Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 . . . and to each requesting investor owned utility electric power to meet the firm power load of such public body, cooperative or investor owned utility in the Region to the extent that such firm power load exceeds – [customer resources].¹⁸

Section 5(b) thus establishes the Administrator’s obligation to offer a contract for the sale of electric power to meet the firm power loads of any requesting regional public body, cooperative or investor-owned utility in excess of non-federal resources used by the customer to serve such load. The Act not only requires the Administrator to offer a contract for the sale of electric power to all eligible requesting customers, but also directed the Administrator to offer new power sales contracts to then-existing direct service industry customers.

To implement the Act in a timely matter, Congress deemed the Administrator to have sufficient resources and, most importantly, granted him the authority to acquire resources to meet his long-term power supply obligations. Based upon the projections, Bonneville would need to acquire additional resources to meet the firm power supply of requesting public bodies, cooperatives, investor-owned utilities, and direct service industrial customers. In sections 6(b), (c), and (d) of the Northwest Power Act, Congress granted Bonneville the authority to acquire resources to meet his long-term power supply obligations.¹⁹ It is important to note that while section 5(b) requires the Administrator to supply the power requirements of all requesting public and

¹⁷ As the Supreme Court has explained, “Congress moved to avert what appeared to be an emerging customer struggle for Bonneville power by enacting the Northwest Power Act. *Aluminum Co. of America v. Central Lincoln People’s Utility Dist.*, 467 U.S. 380, 385 (1980) (citing 16 U.S.C. § 832c(b)). And as Congressman Swift remarked, “[t]he basic concept of this bill is simple: It permits BPA to avoid the need for an administrative reallocation of power by giving BPA the means to reduce loads and to acquire resources so that it should be able to meet the needs of all classes of customers. . . . This is a bill to solve a power allocation problem, . . . [.]” Congressman Swift remarks on S.885 (Cong. Rec. H9851; September 29, 1980).

¹⁸ 16 U.S.C. § 839c(b).

¹⁹ 16 U.S.C. § 839d(b)-(d).

investor-owned utility customers and to acquire resources when necessary, Congress provided price protections for preference customers in the Act's section 7(b) rate setting directives.²⁰

Importantly, section 5(b) contracts are not a response to "competing or conflicting" requests for power that would require an allocation of electric energy. The section 5(b) sales obligation operates in conjunction with the section 6 resource acquisition authority so that in general there will not be competing or conflicting requests for a limited quantity of power. Because Bonneville may acquire resources, there in general would be no need to allocate power among conflicting or competing applications. When a customer has a long-term power sales contract, they will receive power under that contract and preference is not triggered.

While the obligation remains of paramount importance, preference will only trigger if Bonneville is unable to acquire resources to satisfy its 5(b) obligations due to an insufficiency of resources or if Bonneville is offering to sell surplus electric power. The insufficiency and surplus scenarios are discussed in the following two sections.

c. Bonneville must apply preference in an allocation scenario.

In a scenario where Bonneville is faced with a limited supply of power in the planning horizon, preference would apply. In general, section 6 of the Northwest Power Act provides Bonneville with acquisition authority designed to ensure he can meet all requests for power. Section 11(b)(6) of the Transmission System Act also provides Bonneville with the authority to purchase electric power on a short-term basis to meet temporary deficiencies in power it is obligated to supply.²¹

Bonneville's ability to acquire power to meet its supply obligations generally avoids Bonneville having a limited amount of power that must be allocated through the operation of preference. Northwest Power Act section 5(b)(5) requires the Administrator to provide contractual mechanisms to apply preference in the unlikely event that Bonneville cannot acquire resources to meet its power supply obligations.²² If the Administrator "cannot be assured on a planning basis of acquiring sufficient resources to meet such loads during a specified period of insufficiency" he is obligated to apply preference and allocate electric energy among customers in accordance with the section 5(b)(6) allocation provisions.²³

Here, Bonneville's participation in a day-ahead market should substantially mitigate the risk of an insufficiency because the market would require each participant, including Bonneville, to demonstrate a commitment that it has sufficient resources available to meet its forecast load obligations in the planning horizon through WRAP. As explained in the Staff Recommendation, Bonneville expects day-ahead market participation to enhance, rather than negatively impact, its ability to meet requests for firm power. Bonneville would maintain its existing Resource Program which incorporates guidance from Northwest Power and Conservation Council's Power Plan. Bonneville would continue to plan its resources on an annual, monthly, daily and real-time

²⁰ 16 U.S.C. § 839e(a)-(b).

²¹ 16 U.S.C. § 838i(b)(6).

²² 16 U.S.C. § 839c(b)(5).

²³ 16 U.S.C. § 839c(b)(6).

basis to assure a firm power supply for its customers. Bonneville would also continue to acquire resources on a long-term and/or short-term basis as necessary to meet its firm power sales obligations. This would be accomplished both through bilateral transactions in the planning horizon prior to the market run. Bonneville would continue to participate in the Western Resource Adequacy Program.²⁴ Indeed, Bonneville expects that market resource adequacy frameworks, including those which incorporate the Western Resource Adequacy Program, would likely bolster overall regional resource planning efforts. Nevertheless, in the unlikely event of an absence of sufficient resources in the planning horizon, Bonneville would implement the section 5(b) subsection requirements for curtailment and restriction, and ultimately allocation of limited federal power to preference customers in the event of limited resources.

Based on the facts in the Staff Policy Recommendation, Bonneville finds that its existing practices and participation in the Western Resource Adequacy Program to ensure prudent planning would continue to make an insufficiency projection very unlikely. That said, as required by statute, Bonneville will continue to include requirements in its power sales contracts and related agreements to ensure that Bonneville will meet the section 5(b)(5) and 5(b)(6) obligations in the event of a projected insufficiency on a planning basis.

d. Bonneville will apply preference for competing and conflicting applications for surplus power sales.

The most common application of statutory preference is when Bonneville offers to make a surplus power sale. The Bonneville Project Act of 1937²⁵ and the Pacific Northwest Consumer Power Preference Act of 1964²⁶ specify the application of statutory preference when Bonneville markets surplus power. The Regional Preference Act specifies that in the event of competing applications for available surplus power, and terms and conditions are mutually agreed upon, BPA will meet customer requests in the following order: 1) Pacific Northwest public utilities, 2) Pacific Northwest investor owned utilities and direct service industrial customers, and 3) Southwest public utilities. Thereafter, if additional power is available, BPA may also make surplus sales to non-preference customers.

In the WEIM Policy Record of Decision, Bonneville explained the specific mechanics of the notice of surplus power. Consistent with that analysis, in a day-ahead market, Bonneville intends to continue the regional notice format the agency has used for over 20 years.²⁷ Since the advent of modern markets, Bonneville has provided notice to its preference customers regarding the availability of short-term surplus power using a combination of: (1) annual letters providing notice of surplus availability and how regional customers can exercise their rights; (2) product-specific letters/emails when Bonneville is preparing to sell a new type of product to a non-preference customer; and (3) a standing daily notification on Bonneville's website regarding the

²⁴ For information regarding Bonneville's participation in the Western Resource Adequacy Program, *see* Bonneville's final decision to participate in the Western Resource Adequacy Program Phase 3B Final Close Out Letter (Dec. 26, 2022), *available at* <https://www.bpa.gov/learn-and-participate/projects/western-resource-adequacy-program>

²⁵ 16 U.S.C. §§ 832 *et seq.*

²⁶ 16 U.S.C. § 837 *et seq.*

²⁷ WEIM Policy ROD at 62

availability of surplus and instructing regional customers on how to obtain it if they are interested. Bonneville is unaware of any instance during the past 20 years where regional preference customers took issue with the format of Bonneville's notice requirements. This format has been an efficient and effective way for Bonneville to participate in the short-term market while also notifying regional customers that Bonneville may have surplus power available for sale on a rolling basis.²⁸

When Bonneville began to participate in the WEIM, it updated its daily standing notice to specify that if surplus remains available prior to the market run, it may bid into the market at its discretion. If Bonneville were to join a day-ahead market, it would follow the same approach. The agency would continue to provide public preference and Pacific Northwest regional preference to requests for surplus power prior to the day-ahead market run.

It follows that Bonneville may at its discretion bid any surplus into the day-ahead market. Bonneville would continue to honor public and regional preference when making any additional surplus sales after the day-ahead market run. It is important to emphasize that Bonneville would not always bid a maximum amount of surplus and/or be awarded a maximum dispatch from the market. Bonneville would continue to welcome customer inquiries regarding potential purchases of surplus power before and after the day-ahead market submission timeframe.

For the reasons described above, Bonneville's preliminary legal assessment is that it can participate in a day-ahead market consistent with its preference obligations, 5(b) firm power sales obligation, obligations to allocate power consistent with preference in the event of an insufficiency, and obligations to provide preference when making surplus sales.

4. Day-ahead market participation would be akin to an interregional exchange of power.

Bonneville's preliminary assessment is that a day-ahead market will operate akin to an exchange of power. Participation is akin to an exchange because all market participants must bring sufficient resources to the market to serve their loads, which is designed to prevent participants from leaning on other participants. Therefore, the market operation would be similar to an exchange because power will flow among the participants to make the most economical use of the transmission system. Thus, the power available under a day-ahead market is in effect exchanged between and among the participants resulting in all participants maintaining their load and resource balance.

Since enactment of the Bonneville Project in 1937 through passage of the Pacific Northwest Electric Power Planning and Conservation Act in 1981, Congress contemplated and included within the scope of the Administrator's authorities the authority to interconnect with power systems both within and outside the Pacific Northwest region and leverage these interconnections to make mutually beneficial interregional exchanges.

For example, section 2(b) of the Bonneville Project provides:

²⁸ *Id.*

In order to encourage the widest possible use of all electric energy that can be generated and marketed and to provide reasonable outlets therefor, and to prevent the monopolization thereof by limited groups, the administrator is authorized and directed to provide, construct, operate, maintain, and improve such electric transmission lines and substations, and facilities and structures appurtenant thereto, as he finds necessary, desirable, or appropriate for the purpose of transmitting electric energy, available for sale, from the Bonneville project to existing and potential markets, and, *for the purpose of interchange of electric energy, to interconnect the Bonneville project with other Federal project and public owned power systems* constructed on or after August 20, 1937.²⁹

In addition, the Northwest Power Act includes provisions promoting interregional exchanges. Section 6(l)(1) provides:

The Administrator is authorized and directed to investigate opportunities for adding to the region's power costs through the accelerated or cooperative development of resources located outside the States of Idaho, Montana, Oregon, and Washington if such resource are renewable resources, and are now or in the future planned or considered for eventual development by nonregional agencies or authorities that will or would own, sponsor, or otherwise develop them.

Section 6(l)(2) further provides:

The Administrator is authorized and directed to investigate periodically opportunities for mutually beneficial interregional exchanges of electric power that reduce the needs for additional generation or generating capacity in the Pacific Northwest and the regions with which such exchanges may occur. ...³⁰

Congress understood that substantial benefits are obtainable through interregional transmission interties between the Pacific Northwest and adjoining regions, such as the Pacific Northwest-Pacific Southwest Intertie. At the time of the enactment of the Northwest Power Act in 1981 then-existing transactions reduced the need for new generating capacity, helped provide more reliable service to load, reduced the need to rely on fossil fueled resources, and reduced the costs of electricity. In a June 1981 report on Interregional Resource Potentials, Bonneville committed to continuing to work with entities in the region and adjoining regions to optimize the use of existing generating facilities and reduce the need for new generating facilities through mutually beneficial exchanges and other transactions.

Bonneville has a longstanding definition of interchange energy in the power marketing context.³¹ "Interchange energy" means energy received by one utility system from another, usually in exchange for energy delivered to the other utility at another time or place. It is distinguished from a direct purchase or sale, although accumulated energy balances are sometimes settled in cash. Through interchange and interconnection, Bonneville has been able to enter into power-for-

²⁹ 16 U.S.C. § 832a(b)(emphasis added).

³⁰ 16 U.S.C. § 839d(l)(2).

³¹ See BPA Definitions (1993).

power exchanges, including some with payments of money incidental to the power that were justified as a suitable exchange term. Indeed, exchanges need not be simultaneous and the places where an exchange occurs may vary.

Here, Bonneville's potential participation in a day-ahead market in regions adjacent to the Pacific Northwest would fall within the scope of the section 6(l) directives to investigate such markets and the resources exchanged therein, including to increase supplies of electric power produced by renewable resources. Bonneville's goal is to provide electric power to consumers at the most economical and least environmental cost, and engaging in transactions similar to interregional exchanges by participating in a day-ahead market may present an opportunity to do so.

5. Bonneville policies will ensure that section 5(b) customers receive power with environmental attributes reflecting the system resource mix.

Bonneville's preference customers have requested that Bonneville expressly acknowledge the inherent value of the resources from which it supplies power and the value they obtain from Bonneville's low carbon system mix. As a matter of policy, Bonneville committed in its Provider of Choice Policy to convey the environmental attributes of the power sold, including emissions and any RECs, commensurate with a customer's firm power purchase amount and rate elections. Bonneville has discretion in this area, and it is reasonable to conclude that these non-power characteristics should accompany Bonneville's physical sales of power. Bonneville's objective as an active participant in developing the day-ahead market greenhouse gas framework designs has been to ensure that it can uphold its policy that non-power characteristics will accompany Bonneville's sales of power.

Bonneville's statutory mission includes, among other things, to ensure an adequate, efficient, economical, and reliable power supply and to encourage the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles. Bonneville acknowledges that under the status quo, Bonneville's supply of firm power provides valuable base load and is dispatchable, and it is produced by resources that are largely free of carbon emissions. Customers receive a system mix of federal and non-federal resources available to supply Bonneville's 5(b) electric power contract obligation to its public customer loads, including what some jurisdictions have concluded are environmental attributes associated with the power. From a legal standpoint, such environmental attributes are defined through variously differing state laws and local regulations and are subject to change beyond Bonneville's control. Nevertheless, Bonneville believes a critical policy consideration to participation in a day-ahead market is that the market rules support conveyance of environmental attributes associated with sales of power to Bonneville's public customers and avoid diminishing the low carbon quality of the Bonneville power supply.

Bonneville finds that the recent changes to the Southwest Power Pool's Markets+ tariff strike the right balance towards meeting these expectations, but Bonneville recognizes there is significant work yet to be completed on greenhouse gas accounting. Bonneville also notes that the recent market design governing greenhouse gas emissions accounting in Markets+ received unanimous

support from public power customers. Bonneville is committed to continuing to work with its customers, and in the appropriate market design forums, as work on greenhouse gas accounting in Markets+ continues. The agency will also continue to engage in development of the California Independent System Operator’s greenhouse gas accounting market design for its Extended Day Ahead Market. Bonneville’s objective is to guard against proposals that would adversely impact the environmental attributes customers receive under their section 5(b) contracts and to mitigate impacts that could diminish the value proposition that customers and the Pacific Northwest region receive from the Federal Columbia River Power System.

6. Bonneville would participate in a day-ahead market consistent with its authorities to provide transmission service and operate the transmission system.

Bonneville has broad authority under its statutes to set the terms and conditions of transmission service, as well as how to operate the system in order to provide transmission service and maintain reliability.³² In a day-ahead market, Bonneville would continue to offer transmission service under its Open Access Transmission Tariff (OATT), which ensures that Bonneville and its customers take transmission service on a comparable basis. Bonneville would also continue to provide Ancillary and Control Area Services under its OATT as the current market proposals do not include ancillary services markets.

Joining a day-ahead market will require that transmission be made available for market use. Making transmission available for day-ahead market use falls within Bonneville’s broad transmission authorities.³³ Bonneville is monitoring day-ahead market policies to ensure benefits to transmission rights holders including through congestion rent policies, and to ensure compensation for any lost transmission sales through market transmission use charges. In addition, Bonneville will work through issues presented by entities holding transmission rights on the Bonneville system that want to participate in various day-ahead markets, as well as with Bonneville customers in other balancing authority areas that may be affected by a transmission provider’s market participation.

7. Congress granted federal utilities authority to join transmission organizations.

In the Energy Policy Act of 2005 (EPAct ’05), Congress provided authority for federal utilities including power marketing administrations to participate in transmission organizations such as regional transmission organizations (RTOs) consistent with their existing statutory authorities, obligations, and limitations.³⁴ When considering EPAct ’05, the House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality discussed the economic dispatch

³² See *California Energy Comm’n v. Bonneville Power Admin.*, 909 F.2d 1298, 1314 n. 17 (1990) (holding that the Administrator’s authority to operate the transmission system “is broad, allowing the Administrator substantial discretion” and that “[t]his discretion is tempered only by the implied limitation that the Administrator’s action not be inconsistent with other congressional decrees”).

³³ See Bonneville Project Act, 16 U.S.C. § 832a(b) (2016) (“To encourage the widest possible use of all electric energy that can be generated and marketed . . . the administrator is authorized and directed to provide, construct, operate, maintain, and improve such transmission lines . . . as he finds necessary, desirable, or appropriate for the purpose of transmitting electric energy . . . to existing and potential markets.”).

³⁴ 42 U.S.C. § 16431.

associated with organized markets and its potential benefits for fostering competitive electric markets and ultimately reducing costs to the consumer.³⁵ A day-ahead market would use a security constrained unit economic dispatch commitment to optimize a participant's loads, resources and transmission within the market footprint on a day-ahead basis with hourly granularity.³⁶

By 2005, RTO and independent system operator market designs had matured significantly since deregulation formally began in 1996.³⁷ RTOs had formed in many parts of the country and some included day-ahead and real-time energy markets based upon economic dispatch.³⁸ Congress enacted the EAct '05 with awareness of the context of evolving electricity markets, including Federal Energy Regulatory Commission Order No. 2000 regarding RTOs, as Commissioner Bromwell discussed in her House committee testimony regarding the bill.³⁹

Bonneville views its EAct '05 authority and Congress's understanding of organized markets as informative for its consideration of whether to participate in a day-ahead market. A day-ahead market is one element that is present across RTOs.⁴⁰ In contrast to a full RTO, the proposed day-ahead market designs are less restrictive because Bonneville would retain substantial control over its transmission assets and its balancing authority area responsibilities would be preserved. Thus, Bonneville could participate in these markets while maintaining operational responsibility for the transmission system to maintain reliable service. While the development of a day-ahead market is not an RTO, it is reasonable to conclude that Congress contemplated federal utilities would be authorized to participate in subcomponents of an RTO like a day-ahead market as part and parcel of that express authority.

As the Supreme Court has explained, “[t]he intention of Congress can be gleaned, at least in part, by reference to prior law, as Congress is presumed to be knowledgeable about existing law

³⁵ *Comprehensive National Energy Policy: Hearings Before the Subcomm. on Energy and Air Quality of the H. Comm. On Energy and Commerce*, 108th Cong. 429 (2003).

³⁶

³⁷ Order No. 888, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Order No. 889, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 75 F.E.R.C. ¶ 61,080 (1996); Open Access Same-Time Information System and Standards of Conduct, Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,586 (1996), order on reh'g, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), order on reh'g, Order No. 889-B, 81 FERC ¶ 61,253 (1997), order on reh'g, Order No. 889-C, 82 FERC ¶ 61,046 (1998); Order No. 2000, Regional Transmission Organizations, 89 F.E.R.C. ¶ 61,285 (Dec. 20, 1999)

³⁸ Am. Pub. Power Ass'n, Wholesale Electricity Markets and Regional Transmission Organizations (July 2019), <https://www.publicpower.org/system/files/documents/70%20Wholesale%20Electricity%20Markets%20and%20Regional%20Transmission%20Organizations%20July%202019.pdf>

³⁹ *Comprehensive National Energy Policy: Hearings Before the Subcomm. on Energy and Air Quality of the H. Comm. On Energy and Commerce*, 108th Cong. 429 (2003). Commissioner Bromwell explained that “RTOs that are fully independent of market participants can ensure non-discriminatory operation of the transmission facilities under their control. RTOs have FERC-approved market monitors, implement FERC-approved market mitigation plans, and conduct long-range planning all for the protection of customers. RTOs can perform economic dispatch over large geographic areas that will ensure the selection of least-cost generators. Finally, RTOs can offer organized markets and one-stop shopping that reduce transaction costs, provide transparent market rules and allow the opportunity for price discovery.”

⁴⁰ Am. Pub. Power Ass'n, *supra* n. 17.

pertinent to any new legislation it enacts.”⁴¹ It follows that, as delineated in EPAAct ‘05, Bonneville may join a day-ahead market, consistent with its existing statutory authorities, obligations, and limitations.

8. Bonneville participation in a day-ahead market must be effectuated through rates and tariff terms and conditions.

If Bonneville participates in a day-ahead market, it will continue to establish its power and transmission rates in Northwest Power Act section 7(i) rate proceedings, and it will set the terms and conditions for transmission service in tariff proceedings.⁴² Under Section 7(a)(1) of the Northwest Power Act, the Administrator establishes “rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Such rates shall be established...to recover...the cost associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment... over a reasonable period of years and the other costs and expenses incurred by the Administrator...[.]”⁴³ Under section 7(a)(2), the Federal Energy Regulatory Commission reviews Bonneville’s proposed rates to ensure they are 1) sufficient to assure repayment of the Federal Columbia River Power System over a reasonable number of years after first meeting the Administrator’s other costs, 2) based upon the Administrator’s total system costs, and 3) insofar as transmission rates are concerned, equitably allocate the costs of the Federal transmission system between Federal and non-Federal power utilizing such system.⁴⁴

In a day-ahead market, Bonneville’s rates must continue to be sufficient to recover total system costs including the Fish and Wildlife program, the Residential Exchange Program, amortization of existing debt, Columbia Generating Station financing, conservation, depreciation expenses, costs associated with achieving financial policy objectives, and costs associated with market participation. Bonneville’s rates must also equitably allocate the cost of the transmission system between federal and non-federal uses. Bonneville’s rates are based on forecasts and risk adjustment mechanisms respond holistically to actuals differing from forecast. Bonneville anticipates aggregate treatment of market benefits, which may vary based on products and services. Bonneville anticipates aggregate treatment of market benefits. In a section 7(i) rate proceeding, Bonneville would assess how to reflect the costs and benefits of market participation in rates, considering the interaction of any new mechanisms with existing policies. Participation in a day-ahead market would not change the Administrator’s obligation to set rates to recover total system costs.

In addition to rate updates, the agency would need to make changes to the terms and conditions of transmission service it provides to customers to enable participation in a day-ahead market. Bonneville’s governing statutes grant the Administrator broad discretion to set the terms and conditions of transmission service, which would include any terms and conditions necessary to

⁴¹ Native Village of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548, 554 (9th Cir. 1992) (citing Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184–85 (1988)).

⁴² 16 U.S.C. § 839e(i).

⁴³ 16 U.S.C. § 839e(a)(1).

⁴⁴ 16 U.S.C. § 839e(a)(2).

join a day-ahead market. Several statutory provisions provide the basis for Bonneville's authority to determine the terms and conditions of transmission service.⁴⁵ In general, these statutory provisions grant Bonneville the discretion to act in a business-like manner when selling transmission at cost-based rates and to make decisions to effectuate that goal. While the details of such changes would depend on the market design, Bonneville would continue to sell and provide transmission service under its OATT as it does today. Bonneville is actively monitoring the development of market rules associated with transmission, including potential changes in transmission revenue due to market impacts and congestion rent design, to assess potential transmission customer impacts. Bonneville would conduct a Terms and Conditions proceeding to update its tariff with any changes necessary to enable day-ahead market participation. Section 9 of Bonneville's OATT describes the process for changing terms and conditions. Such a proceeding would be in accordance with Section 212(i)(2)(A) of the Federal Power Act.⁴⁶

9. Bonneville will continue to meet its environmental obligations, including those under the Northwest Power Act, Endangered Species Act, and National Environmental Policy Act.

Another important set of Bonneville responsibilities involves the operation of the hydro system in coordination with the U.S. Army Corps of Engineers and the Bureau of Reclamation. The agencies manage the Federal Columbia Power System for multiple project purposes including flood control, navigation, irrigation, fish and wildlife, power production, and recreation. Bonneville's participation in a day-ahead market cannot conflict with meeting non-power objectives, and Bonneville must continue to meet its environmental statutory obligations. As discussed in the Staff Recommendation, the day-ahead market designs include special considerations for hydro bid curves to recognize obligations and operational flexibilities of hydropower projects. The current day-ahead market designs do not appear to present a conflict with meeting these objectives, but as more details are developed it is essential that Bonneville maintain the flexibility and discretion necessary to meet non-power objectives. Bonneville will continue to ensure that Federal Columbia River Power System projects are managed for all project purposes and recognize system-wide operating constraints.

In a day-ahead market context, Bonneville would maintain operations to support Endangered Species Act listed fish species. Bonneville would also continue to meet Northwest Power Act requirements. Bonneville's power marketing services and activities, and its actual power operations to meet load obligations, would continue to be conducted consistent with applicable Biological Opinions and within existing operating constraints and normal operating limits of the projects. If Bonneville were to pursue participation in a day-ahead market, it would also assess the potential environmental effects that could result from implementing the decision consistent with the National Environmental Policy Act.

⁴⁵ 16 U.S.C. §§ 832a(b), 832a(f); 16 U.S.C. § 837e; 16 U.S.C. §§ 838b, 838d.

⁴⁶ 16 U.S.C. § 824k(i)(2)(A).

10. Conclusion

As discussed above, Bonneville believes it is reasonable for the agency to continue its consideration of whether to participate in a day-ahead market. Bonneville's decision to join any market must comport with its legal obligations including to provide preference and priority in the sale of power, make firm power sales under section 5(b) of the Northwest Power Act, provide transmission service and operate the transmission system, set rates sufficient to repay the federal investment, and fulfill environment, fish and wildlife obligations.