

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Iberdrola Renewables, Inc.;)	
)	
PacifiCorp;)	
)	
NextEra Energy Resources, LLC;)	
)	
Invenergy Wind North America LLC;)	
)	
Horizon Wind Energy LLC,)	Docket No. EL11-44-002
)	
Complainants,)	
)	
Bonneville Power Administration,)	
)	
Respondent)	
)	

**BONNEVILLE POWER ADMINISTRATION’S
REQUEST FOR REHEARING
AND
REQUEST FOR STAY AND EXPEDITED CONSIDERATION**

Pursuant to Rule 713¹ of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), the Bonneville Power Administration (“Bonneville”) requests rehearing of the Commission’s December 20, 2012 Order Conditionally Accepting Compliance Filing (“Order”).² In the Order, the Commission accepted Bonneville’s proposed Oversupply Management Protocol (“OMP”) tariff revision and Attachment P as complying with the Commission’s December 7, 2011 order in this proceeding³ but required Bonneville to

¹ 18 C.F.R. § 385.713 (2012).

² 141 FERC ¶ 61,234 (2012).

³ *Iberdrola, Inc. v. Bonneville Power Admin.*, 137 FERC ¶ 61,185 (2011), *order denying reh’g*, 141 FERC ¶ 61,233 (2012).

submit, within 90 days of the date of the Order, a different methodology to allocate OMP costs than the methodology Bonneville has proposed in its separate, statutory rate-setting proceeding (OS-14) under the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act). Bonneville requests rehearing of the Commission's ruling on the cost allocation methodology.

Bonneville believes the Commission acted on a misunderstanding of Bonneville's Compliance Filing and that the Commission erred by directing Bonneville to alter a rate proposal prior to the completion of its Northwest Power Act rate setting proceeding and the filing of the Administrator's final decision with the Commission for review and approval. The Commission may have misperceived Bonneville's Compliance Filing as requesting Commission approval of a specific cost allocation methodology. Bonneville may have inadvertently caused this misperception by briefly describing the cost allocation proposal the Bonneville staff intended to present as its initial proposal in an upcoming Bonneville rate case.

However, Bonneville did not intend to submit a cost allocation methodology for Commission review and approval, nor did it submit a record for the Commission's consideration. Bonneville is legally prohibited from submitting a rate (or a component of a rate) to the Commission for review and approval until it completes a formal rate case under section 7(i) of the Northwest Power Act (this proceeding is described further below). Even assuming the Commission's authority to rule on a Bonneville rate proposal prior to the completion of a Northwest Power Act rate setting proceeding, the Commission did not have a sufficient record on which to make a ruling and it failed to adequately explain the rationale for its rejection of Bonneville's methodology.

For the same reasons Bonneville also requests rehearing of the requirement to make a compliance filing within 90 days. Bonneville believes the Commission can accept Bonneville's OMP tariff provision and Attachment P without the requirement to file a modified cost allocation methodology at this time. As required by the Northwest Power Act, at the conclusion of its rate-setting process Bonneville will file its final rate proposal with the Commission for confirmation and approval. Because Bonneville cannot apply any oversupply rate until it receives Commission approval, there is no risk that customers will pay inappropriate charges. Bonneville's OMP rate proceeding can proceed without adversely affecting the interests of Bonneville's customers or the Commission's authority to review Bonneville's cost allocation methodology prior to implementation. To ensure that the Commission retains full authority over Bonneville's allocation of OMP costs under section 211A of the Federal Power Act, Bonneville will also file its final cost allocation methodology and rate with the Commission in this subdocket for approval under section 211A, as directed by the Commission.

Bonneville also requests a stay of the compliance filing requirement until Bonneville files its final OMP rate decision with the Commission under section 7(i) of the Northwest Power Act and section 211A of the Federal Power Act (if the Commission acts favorably on this Petition for Rehearing before the compliance filing is due, a stay will not be necessary). Bonneville and the rate case parties will be holding discussions in an effort to resolve this case. If they cannot, the formal rate case process will resume. Bonneville is concerned that filing a proposal with the Commission before the case has finished may disrupt the proceedings.

Bonneville requests expedited Commission review of its request for a stay.

I. STATEMENT OF ISSUES⁴

- A. The Commission erred when it reviewed a Bonneville rate proposal prior to the completion of Bonneville's rate-setting proceeding under the Northwest Power Act, 16 U.S.C. § 839e(i).**
- B. The Commission failed to provide an adequate explanation of its rejection of Bonneville's proposed cost allocation method.** *TNA Merch. Projects, Inc. v. FERC*, 616 F.3d 588, 593 (D.C. Cir. 2010); *City of Vernon v. FERC*, 845 F.2d 1042, 1046 (D.C. Cir. 1988); *Gibson v. Heckler*, 779 F.2d 619, 622 (11th Cir. 1986).

II. REQUEST FOR REHEARING

- A. The Commission erred when it reviewed a Bonneville rate proposal prior to the completion of Bonneville's rate setting proceeding under the Northwest Power Act.**
- 1. Section 7(i) of the Northwest Power Act requires Bonneville to establish rates pursuant to a formal rate case process and based on the rate case record.**

The Northwest Power Act requires that Bonneville's rates be established based on the procedures and record of a formal hearing described in section 7(i) of that Act,⁵ which provides:

In establishing rates under this section, the Administrator shall use the following procedures:

(1) Notice of the proposed rates shall be published in the Federal Register . . . Such notice shall include a date for a hearing in accordance with paragraph (2) of this subsection.

(2) One or more hearings shall be conducted as expeditiously as practicable by a hearing officer to develop a full and complete record and to receive public comment in the form of written and oral presentation of views, data, questions, and argument related to such proposed rates. In any such hearing—

(A) any person shall be provided an adequate opportunity by the hearing officer to offer refutation or rebuttal of any material submitted by any other person or the Administrator, and

(B) the hearing officer, in his discretion, shall allow a reasonable opportunity for cross examination⁶

⁴ Bonneville is not relying on Commission or court precedent for those issues for which no representative precedent is listed.

⁵ 16 U.S.C. § 839e(i) (2012).

At the conclusion of the hearing, the Administrator

shall make a final decision establishing a rate or rates based on the record which shall include the hearing transcript, together with exhibits, and such other materials and information as may have been submitted to, or developed by, the Administrator. The decision shall include a full and complete justification of the final rates pursuant to this section.⁷

Finally, “[t]he final decision of the Administrator shall become effective on confirmation and approval of such rates by the Federal Energy Regulatory Commission pursuant to subsection (a)(2) of this section.”⁸ Cost allocation, rate design, and other rate issues are all subject to this process.

Bonneville’s rate cases start with a proposal by the Bonneville staff supported by testimony and, if necessary, by studies. The parties then file testimony supporting or opposing the staff proposal and making their own rate proposals if they wish. All parties and Bonneville staff then file rebuttal testimony. After each round of testimony, the parties conduct discovery. The final steps are cross-examination, oral argument before the Administrator, and briefing.

The Administrator makes a decision establishing rates only after the conclusion of the rate case, based on the rate case record. Even if, before the rate case, there is widespread agreement in the region regarding the appropriate rate, Bonneville can at most commit only that it will propose that rate in the section 7(i) process. All parties must have an opportunity to contest the rate before the Administrator makes a decision. Otherwise, Bonneville would be subject to claims of pre-decisional bias. The United States Court of Appeals for the Ninth Circuit has held that once Bonneville has made a proposal, Bonneville’s ratemaking is subject to the

⁶ *Id.* § 839e(i)(1)-(2).

⁷ *Id.* § 839e(i)(5).

⁸ *Id.* § 839e(i)(6).

Administrative Procedures Act's prohibition on *ex parte* communications.⁹ That prohibition ensures that the Administrator's decision is based on the rate case record and is not tainted by off-the-record communications.

When Bonneville informed the Commission in its Oversupply Management Protocol Compliance Filing that it was going to propose a 50/50 cost allocation in its section 7(i) proceeding, it was not saying that it had made a decision to allocate costs in this manner or that it was seeking Commission review of the proposal. Instead, Bonneville was simply informing the Commission of the *starting point* of the rate case.¹⁰ Had Bonneville submitted the cost allocation proposal for Commission review and approval, Bonneville would have violated section 7(i) of the Northwest Power Act.

Bonneville described the methodology only to provide the Commission with a full picture of Bonneville's approach to the generation oversupply situation. Bonneville stated in its Compliance Filing that it "will convene a rate case to establish a rate for the recovery of costs incurred under the Oversupply Management Protocol" and "will propose" a 50/50 cost allocation approach as an initial proposal.¹¹ Bonneville also stated that it could not "commit in this filing to any particular cost allocation or rate design" because it is "legally barred from establishing rates outside of a formal rate case."¹² Bonneville then explained that "[a]ny party that disagrees [with Bonneville's rate case proposal] will have full opportunity to challenge Bonneville's

⁹ *Cent. Lincoln Peoples' Util. Dist. v. Johnson*, 735 F.2d 1101, 1119 (9th Cir. 1984).

¹⁰ See Compliance Filing 8; Bonneville Answer to Protests and Comments, Attachment A, "BPA's response to comment on 2012 Oversupply Management Protocol" 19 (Apr. 23, 2012).

¹¹ Compliance Filing 21.

¹² *Id.* at 22-23.

proposal . . . and to propose another cost allocation proposal that would also result in an equitable sharing of the costs.”¹³

Bonneville also attached to its subsequent Answer to Protests and Comments¹⁴ its response to public comments on its proposed 2012 Oversupply Management Protocol. In that response, Bonneville explained:

Neither this comment process nor Bonneville’s filing with the Commission is the proper forum to test either the legality or the factual justification of any particular cost allocation methodology . . . The issue of cost causation will be a topic of discussion in pre-rate case workshops and during the rate case . . . Whether the costs should be recovered through power rates or transmission rates will be a topic of discussion in pre-rate case workshops and during the rate case.¹⁵

Asserting Commission authority over a Bonneville proposal during a regional rate setting proceeding under the Northwest Power Act undermines this process. An initial or revised proposal directed by the Commission under section 211A may not represent Bonneville’s view, yet Bonneville must include in its Federal Register notice a “statement of justification and reasons” supporting the proposal.¹⁶ The Commission’s direction denies parties the right to submit evidence and argument challenging the proposal and prevents the Administrator from basing his decision on the rate case record.

2. Bonneville was in the midst of its rate case when the Commission issued its Order requiring a compliance filing.

On November 8, 2012, Bonneville formally initiated its OS-14 rate proceeding on OMP cost recovery by publishing a Federal Register notice of the proceeding, as required by the

¹³ *Id.* at 25.

¹⁴ Accepted by the Commission in its Order at P 25.

¹⁵ Bonneville’s Answer to Protests and Comments, Attachment A, “BPA’s response to comment on 2012 Oversupply Management Protocol” 19.

¹⁶ 16 U.S.C. § 839e(i)(1) (2012).

Northwest Power Act.¹⁷ A pre-hearing conference was held on November 14, the date on which Bonneville made its proposal and accompanying testimony available to the parties. The parties then conducted discovery on Bonneville's proposal. The parties' direct testimony responding to Bonneville's proposal was scheduled to be due on January 28, 2013.

On December 20, 2012, however, the Commission issued the Order, which forced at least a temporary halt in the proceedings as Bonneville and the rate case parties assessed the Order's implications. Although Bonneville believes the Commission should not have ruled on the cost allocation proposal until Bonneville submitted a final rate for Commission review, in light of the Order Bonneville has re-engaged the rate case parties in discussions regarding potential cost allocation mechanisms in hopes that the parties may be able to resolve the case. Bonneville held a technical conference with the parties on January 16, at which it invited the parties to submit proposals for alternative cost allocation methods. The parties will be meeting again during the week of February 4 to discuss the proposals and determine whether to hold additional discussions.

As noted above, even if the parties resolve the case among themselves and Bonneville staff, Bonneville must conduct a section 7(i) process (which would be uncontested if all parties agreed to the resolution) and present the proposed settlement for the Administrator's decision. Under the schedule that was established at the pre-hearing conference, the Administrator expects to issue a Final Record of Decision on July 22, 2013. This date may shift either earlier or later depending on the outcome of the settlement discussions, although Bonneville expects that in no case would the conclusion of the rate case be significantly delayed.

¹⁷ 77 Fed. Reg. 66963 (Nov. 8, 2012). Though Bonneville indicated in its Compliance Filing that it expected to initiate the rate proceeding in the spring of 2012, it was delayed to coincide with the initiation of Bonneville's combined power and transmission rate case. See the Status Report of the Bonneville Power Administration filed in this docket on December 5, 2012.

3. Various interveners understood that the cost allocation issue was not before the Commission at this stage of the proceeding and therefore did not litigate the issue.

Not expecting the Commission to issue an order on the cost allocation methodology Bonneville would subsequently propose in its section 7(i) rate case, some Bonneville transmission customers did not intervene in this subdocket. In addition, some customers that did intervene did not make any arguments, or else limited their comments, on the cost allocation issue based on their understanding that all aspects of the issue would be fully litigated in Bonneville's regional 7(i) rate proceeding before being submitted to the Commission. For example, the Northwest/Intermountain Power Producers Coalition (NIPPC) stated:

Bonneville's proposed cost allocation and rates are not before the Commission in this proceeding. After Bonneville completes its rate case in accordance with section 7(i) of the Northwest Power Act and submits its adopted cost allocation and rate to the Commission for confirmation and approval, the matter will be ripe for Commission review.¹⁸

Similarly, Joint Intervenors explained:

Until Bonneville has conducted a rate proceeding, developed a complete record, and submitted its proposed rate or rates to the Commission, Bonneville's cost allocation and rate design for the costs incurred under Attachment P are not before the Commission.¹⁹

Other intervenors with a significant stake in the outcome of the cost allocation debate, such as the Western Public Agencies Group, Industrial Customers of Northwest Utilities and PPL Companies, also did not submit substantive comments on how OMP costs should be allocated.

The Commission ruled that “[b]ased on the record in this proceeding, we are not persuaded that a 50/50 sharing of displacement costs results in comparable transmission service for displaced wind generators.”²⁰ However, there was no record for the Commission to review;

¹⁸ NIPPC Protest 29 (internal citations omitted).

¹⁹ Joint Intervenors' Comments 10.

²⁰ Order at P 45 (emphasis added).

or, at best, an inadequate record, which did not have the benefit of many interested parties' comments or the positions established through litigation in the formal rate case.

Just as the Commission held that Bonneville must harmonize the requirements of a section 211A order with its statutory obligations,²¹ the Commission should harmonize its section 211A authority with Bonneville's obligations under section 7(a)(2) and 7(i) of the Northwest Power Act.²² Because of Bonneville's statutory ratemaking requirements, the Commission's section 211A authority with respect to Bonneville's rates should be limited to taking action on (1) Bonneville rates that are in effect or (2) Bonneville rates that the Administrator has established and submitted to the Commission for confirmation and approval. That approach fully comports with the Commission's authority under Section 211A(g) to "remand transmission rates to an unregulated transmitting utility for review and revision if necessary" to require the provision of transmission services at comparable rates.

Even if the Commission determines that its section 211A authority allows it to rule on Bonneville rate proposals during Bonneville's regional rate setting proceedings, the Commission should use its discretion under that section to withhold its use until the statutory proceeding has run its course.²³ This approach would allow all parties full opportunity to make their cases on the record in the rate case and would ensure a considered decision by the Administrator, and review by the Commission, based on the rate case record.

Thus, the Commission should limit its Order to approving Bonneville's tariff revision and Attachment P. Bonneville's statutory requirement to obtain Commission approval of its rates before implementation effectively provides the conditional acceptance of Attachment P desired

²¹ *Iberdrola*, 137 FERC ¶ 61,185 at P 65.

²² 16 U.S.C. §§ 839e(a)(2), 839e(i).

²³ *Cf. Town of Edinburgh, Indiana v. Indiana Mun. Power Agency*, 132 FERC ¶ 61,102 (2010).

by the Commission. Bonneville's OS-14 rate proceeding and initial proposal can proceed without jeopardizing the Commission's authority to review the final cost allocation methodology prior to implementation.

B. The Commission failed to provide an adequate explanation of its rejection of Bonneville's proposed cost allocation methodology.

Assuming the Commission appropriately addressed Bonneville's cost allocation methodology, the Order provides no rationale for the Commission's determination. The only explanation of its decision is as follows:

Bonneville has not demonstrated that all customers taking firm transmission service would bear an appropriate cost burden related to Bonneville's management of the transmission system during oversupply situations

* * * * *

[W]e will direct Bonneville to submit a compliance filing . . . setting forth a methodology to allocate displacement costs in a manner that equitably allocates such costs to all firm transmission customers based on their respective transmission usage during oversupply situations, or setting forth a different method altogether that ensures comparability in the provision of transmission service by Bonneville.²⁴

The Order failed to explain either (1) why allocating OMP costs based on operational causes, such as Bonneville's proposed 50/50 split between wind generation and Federal hydroelectric generation, is unacceptable or (2) why OMP costs should be spread to all firm transmission customers based on transmission use. Although the Commission stated that its decision was "based on the record in this proceeding,"²⁵ it failed to cite anything in the record to support the conclusion that cost allocation should correspond to firm transmission use during oversupply situations.

²⁴ Order at PP 45, 46 (footnotes omitted).

²⁵ *Id.* at P 45.

The courts have rejected Commission orders in the past when the Commission has failed to explain its decisions:

[A]lthough we will defer to a reasonable definition by the Commission, we cannot defer to one that is unexplained.²⁶

The basis of agency action must be set forth with such clarity as to be understandable.²⁷

Failure to . . . provide the reviewing court with a sufficient basis on which to determine that the correct legal principles have been followed . . . mandates a reversal.²⁸

The Commission's rejection of Bonneville's suggested cost allocation approach and its explicit approval of an approach based on firm transmission usage lacks the rationale required to uphold an administrative decision and is based on a deficient record.

III. REQUEST FOR STAY AND EXPEDITED CONSIDERATION

Bonneville also requests a stay of the requirement to file an alternative cost allocation methodology in this subdocket within 90 days of the Order. Bonneville cannot complete its 7(i) rate proceeding within 90 days and therefore could submit only another initial proposal rather than the Administrator's decision. The parties to the rate case would not yet have had the opportunity to submit their own testimony or to engage in discovery and cross-examination regarding the Bonneville staff proposal. Therefore, another filing by Bonneville would simply replicate the existing situation: Bonneville would be filing a proposal that had not yet been subject to the customers' due process rights, that was not based on a complete record, and that the Administrator had not yet adopted. Even if the Commission approved the submission, the

²⁶ *TNA Merch. Projects*, 616 F.3d at 593.

²⁷ *City of Vernon*, 845 F.2d at 1046 (internal quotation omitted).

²⁸ *Gibson*, 779 F.2d at 622.

Administrator might adopt a different cost allocation after reviewing the rate case record, requiring the Commission to act again at the conclusion of the rate case.

As noted above, Bonneville has re-engaged customers in discussions in the hope that the parties can resolve their differences without conducting a contested proceeding. If the parties can do so, Bonneville staff will submit the agreed proposal into the record of the case and present it to the Administrator for decision. If the parties cannot resolve their differences, the formal, contested rate case process will proceed, in which all parties can make their proposals and contest other parties' proposals, and a complete record will be established for the Administrator's decision. In either case, the requirement of a compliance filing threatens to interrupt the process and potentially delay resolution of this difficult issue.

Therefore, Bonneville asks the Commission to stay its Order that Bonneville make a compliance filing unless the Commission takes favorable action on this Petition for Rehearing, in which case the compliance filing would not be required, or until Bonneville files its final OS-14 rate proposal with the Commission under section 7(i) of the Northwest Power Act and section 211A of the Federal Power Act. Because of the imminence of the 90-day deadline and the disruption it may cause to the schedule of the OS-14 rate proceeding, Bonneville requests expedited Commission review of its request for a stay.

IV. CONCLUSION

Bonneville appreciates the Commission's approval of its tariff revisions incorporating the OMP. This approval ensures Bonneville's ability to address its unique generation oversupply condition and comply with its environmental obligations when alternatives to generation displacement have been exhausted. Bonneville has initiated discussions with its customers on the issues the Commission identified in the Order.

However, the Commission may have misunderstood Bonneville's Compliance Filing as requesting Commission approval of Bonneville's initial cost allocation proposal in its OS-14 regional rate proceeding. Bonneville requests rehearing of the Commission's intervention in an ongoing Northwest Power Act rate proceeding and its rejection of Bonneville's initial proposal in that proceeding as well as its requirement that Bonneville file a different proposal in this proceeding. Bonneville asks the Commission to approve its OMP tariff revision and Attachment P without a requirement to make a cost allocation compliance filing prior to the conclusion of the OS-14 rate proceeding. Bonneville commits to filing its final OMP cost allocation decision, along with a full and complete record, at the completion of its 7(i) rate proceeding for Commission review and approval both under section 7(a) (2) of the Northwest Power Act and in this subdocket under section 211A of the Federal Power Act, as directed by the Commission.

Bonneville also requests a stay of the 90-day compliance filing requirement unless the Commission takes favorable action on this Petition for Rehearing or until Bonneville files its final OS-14 rate proposal with the Commission under section 7(i) of the Northwest Power Act and section 211A of the Federal Power Act, whichever is earlier. Bonneville requests expedited Commission review of its request for a stay.

DATED this 22nd day of January, 2013.

Respectfully submitted,

/s/ Randy Roach

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Request for Rehearing and Request for Stay and Expedited Consideration upon each person designated on the official service list compiled by the Secretary in Docket No. EL11-44 by electronic mail or by United States Postal Service where requested.

Dated this 22nd day of January, 2013.

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