

# Wind Power v. Hydropower in the Pacific Northwest: Improving Electricity “Open Access” Policies for the Bonneville Power Administration

By Stacey Steep\*

“One would think that an overabundance of low variable cost, carbon-free electricity would be an easy problem to solve.”<sup>1</sup>

—*The Bonneville Power Administration*

## I. Introduction

The Bonneville Power Administration (“BPA”) is a federal power marketing administration (“PMA”) in the Pacific Northwest United States with abundant, low-cost, carbon-free power.<sup>2</sup> BPA is federally owned, markets power from thirty-one federal hydroelectric dams, and operates 75% of the transmission grid in Oregon, Washington, Idaho, and western Montana.<sup>3</sup> BPA is required to market its electricity and transmission at cost,<sup>4</sup> resulting in some of the lowest cost, carbon-free electricity in the nation.<sup>5</sup>

The area surrounding BPA also has abundant wind power. Wind producers were drawn to the area by state renewable electricity standards,<sup>6</sup> the federal renewable energy produc-

tion tax credit (“PTC”),<sup>7</sup> and federal policies designed to drive competition in the wholesale electricity market.<sup>8</sup> Hydropower also drew wind producers to the region. The combination of wind and water energy is an ideal carbon-free generation portfolio.<sup>9</sup> Hydroelectric power, which generators can draw on quickly, can balance variable wind power to ensure overall grid reliability.<sup>10</sup> With its hydroelectric resources and statutory mandate to encourage renewable energy development,<sup>11</sup> BPA was well suited to support a growing wind industry. Rarely do such technological opportunities align with political support for development.

The pairing of wind and hydropower resources is more complicated in practice. The problem, according to BPA, is that the wind power influx has overwhelmed the Federal Columbia River Power System (“System”).<sup>12</sup> In 2007, BPA expected that approximately 3,000 MW of wind would enter its system over the course of twenty years.<sup>13</sup> BPA underestimated the wind influx by about fifteen years. Since 2007, BPA’s wind power generation capacity has increased from

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1. Bonneville Power Admin., Answer to Protests and Comments at 3 (Apr. 23, 2012), Iberdrola Renewables, Inc., 137 FERC ¶ 61,185 (2011), *reh’g denied*, 141 FERC ¶ 61,233 (2012) (No. EL11-44) [hereinafter BPA Answer II].
2. *About Us*, BONNEVILLE POWER ADMIN., <http://www.bpa.gov/news/AboutUs/Pages/default.aspx> (last visited Mar. 14, 2014).
3. *Id.*
4. 16 U.S.C. § 832f (2012).
5. See ENERGY INFO. ADMIN., U.S. DEP’T OF ENERGY, RESIDENTIAL AVERAGE MONTHLY BILL BY CENSUS DIVISION, AND STATE 2011 (Nov. 2012). For example, the average U.S. residential electricity price in 2011 was 11.72 cents per kilowatt-hour. *Id.* Idaho had the lowest priced residential electricity at 7.87 cents per kilowatt-hour, followed by Washington at 8.28 cents per kilowatt-hour, and Oregon is the thirteenth lowest price state electricity state, with 9.54 cents per kilowatt-hour. *Id.* On the other end of the spectrum, New York and Connecticut had the highest residential electricity prices in the continental United States at 18.26 cents per kilowatt-hour and 18.11 cents per kilowatt-hour, respectively. *Id.*
6. See *infra* notes 170–74.

7. 26 U.S.C. § 45 (2012).
8. See FERC Order No. 888, Promoting Wholesale Competition Through Open Access, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. §§ 35, 37) [hereinafter Order No. 888]. *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).
9. BRI-MATHIAS HODGE ET AL., NAT’L RENEWABLE ENERGY LAB., U.S. DEPT. OF ENERGY, THE IMPACT OF HIGH WIND PENETRATIONS ON HYDROELECTRIC UNIT OPERATIONS IN THE WWSIS 2 (July 2011).
10. *Id.*
11. Bonneville Power Admin., Answer to Complaint at 24 (July 19, 2011), Iberdrola Renewables, Inc., 137 FERC ¶ 61,185 (2011) (No. EL11-44) [hereinafter BPA Answer I].
12. See *id.*
13. *Id.*

500 MW<sup>14</sup> to 4,515 MW in 2013,<sup>15</sup> and BPA expects that number to rise to 7,200 MW over the next four years.<sup>16</sup> With a peak balancing authority of 10,500 MW, wind power has grown to approximately 30% of BPA's total generation used to balance supply and demand.<sup>17</sup>

Some warn an influx of variable renewables will cause reliability concerns, but wind can provide 30% of the total generation so long as the hydropower system can respond flexibly.<sup>18</sup> In reality, hydroelectric systems are constrained by non-power needs.<sup>19</sup> This is especially true for dams on the System,<sup>20</sup> as demonstrated by recent overgeneration events.<sup>21</sup> Regional snowmelt and precipitation increase river flows on the Columbia River in the early spring,<sup>22</sup> but climate change temperature increases have exacerbated these impacts.<sup>23</sup> As the river's flow levels increase and fill up the reservoirs behind federal dams, dam operators have two options. They can either spill excess water over the dams or run the water through the dams to generate electricity.<sup>24</sup> Spilling excess water is not always an option because the spill can cause gas bubble disease<sup>25</sup> in endangered fish species.<sup>26</sup> Thus, too much spill can quickly run afoul of the Clean Water Act,<sup>27</sup> Endangered Species Act ("ESA"),<sup>28</sup> and Indian treaties.<sup>29</sup> When river flow levels required BPA to either spill or run dam turbines, BPA claimed that dam operators had no choice but to run turbines and generate electricity.<sup>30</sup>

Disposing of excess water by generating electricity led to another problem: BPA had too much electricity and not enough demand.<sup>31</sup> To protect fish species, BPA claimed it had no other option but to prevent other generators, including wind producers, from accessing the transmission

system during these overgeneration events.<sup>32</sup> In 2011, BPA instituted an Interim Environmental Redispatch and Negative Pricing Policy ("Environmental Redispatch Policy") to address periods when BPA must transmit federal hydroelectricity during overgeneration events.<sup>33</sup> The Environmental Redispatch Policy prohibited thermal and wind producers from transmitting electricity and instead replaced their scheduled power with free hydropower.<sup>34</sup> Although BPA did not disrupt customers' transmission rights, wind producers could not transmit their own electricity onto the grid and thereby failed to recoup PTCs and state renewable energy credits ("RECs").<sup>35</sup>

In response to the Environmental Redispatch Policy, regional wind producers petitioned the Federal Energy Regulatory Commission ("FERC") to force BPA to revise its curtailment practices, alleging that the Environmental Redispatch Policy violated federal open access standards as provided for under section 211a of the Federal Power Act ("FPA").<sup>36</sup> Section 211a<sup>37</sup> gives FERC the authority to order a transmission operator to provide third-party generators with transmission services on terms and conditions comparable to the transmission services that it provides itself and that are not discriminatory or preferential,<sup>38</sup> unless the operator meets other criteria the Commission determines to be in the public interest.<sup>39</sup> BPA defended its policy as nondiscriminatory and further justified its position on environmental and reliability grounds.<sup>40</sup> FERC was not persuaded.<sup>41</sup> In *Iberdrola Renewables, Inc.*, FERC sided with regional wind producers and for the first time relied on section 211a to halt BPA's Environmental Redispatch Policy.<sup>42</sup> FERC ruled that BPA must take steps to compensate wind producers for lost credits and ordered BPA to file a revised Open Access Transmission Tariff ("OATT").<sup>43</sup> Despite appeals from BPA and its public power customers,<sup>44</sup> FERC upheld its decision on Decem-

14. See BPA Answer I, *supra* note 11, at 24.

15. *Wind Generation Plant List*, BONNEVILLE POWER ADMIN., <http://transmission.bpa.gov/Business/Operations/Wind/default.aspx> (last visited June 28, 2014).

16. BPA Answer I, *supra* note 11, at 24.

17. BPA Answer II, *supra* note 1, at 24.

18. HODGE ET AL., *supra* note 9, at 8.

19. *Id.*

20. The System is a collaboration among BPA, the U.S. Army Corps of Engineers, and the Bureau of Reclamation to generate power, control floods, and enable irrigation from the Columbia River. BONNEVILLE POWER ADMIN., BPA BROCHURE: FEDERAL COLUMBIA RIVER POWER SYSTEM 1 (Aug. 2003), available at [http://www.bpa.gov/power/pg/fcrps\\_brochure\\_17x11.pdf](http://www.bpa.gov/power/pg/fcrps_brochure_17x11.pdf).

21. See ROBERT J. MICHAELS, BONNEVILLE POWER ADMIN., BPA'S INTERIM ENVIRONMENTAL REDISPATCH AND NEGATIVE PRICING POLICY 9-10 (May 2011), available at <http://www.bpa.gov/news/pubs/RecordsofDecision/rod-20110513-Interim-Environmental-Redispatch-and-Negative-Pricing-Policies.pdf>.

22. See *id.* at 10.

23. See generally Xin Jin & Venkataramana Sridhar, *Impacts of Climate Change on Hydrology and Water Resources in the Boise and Spokane River Basins*, 48.2 J. AM. WATER RESOURCES ASS'N 197 (2012).

24. See MICHAELS, *supra* note 21, at 9.

25. Gas bubble disease is very similar to the bends or decompression sickness in divers. For fish, gas bubble disease occurs when water is supersaturated with dissolved gas. Super-saturation occurs when "water plunges at high velocity from the [dammed] reservoir into the downstream river, it becomes mixed with air." Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 164 (D.C. Cir. 1982).

26. BPA Answer I, *supra* note 11, at 29.

27. HODGE ET AL., *supra* note 9, at 2; see Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2012).

28. MICHAELS, *supra* note 21, at 9-10; see Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2012).

29. BPA Answer I, *supra* note 11, at 28.

30. See MICHAELS, *supra* note 21, at 9-10.

31. See *id.* at 10.

32. See *id.* at 14.

33. See *id.* at 1.

34. The hydropower was free to utilities, not consumers, during overgeneration events. See *id.* at 14-15.

35. *Iberdrola Renewables, Inc.*, 137 FERC ¶ 61,185, at P 63 (Dec. 7, 2011).

36. *Id.* at P 1.

37. 16 U.S.C. § 824j-1 (2012).

38. *Id.* § 824j-1(b).

39. *Id.* § 824j-1(c)(3).

40. See BPA Answer II, *supra* note 1, at 3.

41. *Iberdrola Renewables, Inc.*, 137 FERC ¶ 61,185 at P 62.

42. *Id.*

43. *Id.* at PP 63-65.

44. The Public Power Council (PPC), American Public Power Association (APPA), the National Rural Electric Co-Operative Association (NRECA), and the Large Public Power Council (LPPC) formally intervened to protest the wind producer's petition against BPA and FERC's ultimate ruling. See Petition of NRECA, FERC Docket No. EL11-44-000 (July 5, 2012); Protest and Comments of the American Public Power Association, FERC Docket No. EL11-44-000 (July 19, 2011); Comments of the Large Public Power Council, EL11-44-000 (July 19, 2011). Their public power customers receive preference cost-based rates from BPA. In the short term, customers are concerned FERC would force BPA to compensate wind producers for lost tax and RECs and subsequently pass those costs to its customers through future rate proceedings. Going forward, customers are concerned that any FERC ruling could bring BPA under greater FERC control and result in greater market reforms. See Petition of NRECA, FERC Docket No. EL11-44-000 (July 5, 2012).

ber 20, 2012,<sup>45</sup> and BPA and its customers have challenged FERC's decision in federal court.<sup>46</sup>

In *Iberdrola Renewables*, FERC made clear that open access is a national transmission performance standard.<sup>47</sup> On one hand, the ruling signaled that independent power producers must have comparable transmission access no matter where in the country they generate electricity.<sup>48</sup> On the other hand, this uniform standard does not apply to a uniform grid. Instead, the United States is made up of many grids, each of which is subject to different operational and regulatory requirements.<sup>49</sup> Twenty-two states with roughly two-thirds of the national population participate in seven independent, organized wholesale markets<sup>50</sup> and have been subject to open access requirements since the mid-1990s.<sup>51</sup> The rest of the country is a mix of transmission grids owned by vertically-integrated utilities<sup>52</sup> and federal power marketers.<sup>53</sup>

Even amidst this diverse landscape, BPA is unique. Every other region of the country relies heavily on fossil fuels for electricity generation, but the Pacific Northwest produces the most hydropower in the nation.<sup>54</sup> Federally marketed hydroelectricity supplies approximately 30% of total regional consumption.<sup>55</sup> More importantly, unlike generation sources in the rest of the country, federal dams in this region must, at least in the short-term, produce much needed carbon-free electricity to comply with environmental laws.<sup>56</sup> Without a safety valve for operational constraints, open access orders ignore potential environmental impacts and require Pacific

Northwest consumers to bear the costs of other states' RECs and federal PTCs.<sup>57</sup>

Given FERC's reluctance to read the FPA's public interest requirement with BPA organic acts, such as the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act"), Congress should amend section 211a of the FPA. This change would accommodate the unique operational constraints in the Pacific Northwest.<sup>58</sup> Specifically, an amended section 211a would require that FERC consider the section 211a public interest with BPA organic acts,<sup>59</sup> thereby adding fish and regional consumer impacts as relevant public interest factors.<sup>60</sup> Given the impact climate change is having in the Pacific Northwest, Congress should also amend the Northwest Power Act to use the System to reduce greenhouse gas ("GHG") emissions.<sup>61</sup> These changes would direct FERC to consider the BPA's public interests of regional consumer protection, fish protection, and climate change mitigation when ordering open access.

Following this introduction, part II of this Article presents background on what led to *Iberdrola Renewables*, including the Pacific Northwest's changing climate, BPA operational difficulties, and the passage of section 211a in the Energy Policy Act of 2005.<sup>62</sup> Part III discusses FERC's ruling in *Iberdrola Renewables*, the ruling's impact, the existing public interest standard for private power in sections 205 and 206 of the FPA, and why a BPA-specific public interest standard is the best option when ordering open access against BPA. Part IV proposes that Congress adopt a BPA public interest standard by amending sections 211a and 212 of the FPA.<sup>63</sup> In addition, to support BPA's ability to reduce national GHG emissions from the power sector, Congress should add a national GHG reduction goal to the Northwest Power Act. With this addition, FERC would only be authorized to order an open access order under section 211a so long as the order would not result in GHG emissions increases. These reforms would ensure that FERC consider the BPA public interest based on consumer interests, fish protection, and climate change when acting under section 211a.

## II. The History Behind the Federal Government's Authority to Regulate Electric Utilities

Public and private powers' histories help put the current debate over open access into context. For the purposes of this Article, public utilities and public power are used to refer to government-owned or cooperatively-owned utilities exempt from most of the FPA.<sup>64</sup> Most private or shareholder-

45. Order Conditionally Accepting Compliance Filing, 141 FERC ¶ 61,234 (Dec. 20, 2012).

46. BPA, Public Utility District No. 1 of Snohomish County, National Rural Electric Cooperatives, American Public Power Association, Pacific Northwest Generating Cooperative, Northwest Requirements Utilities, Public Power Council, and the City of Seattle filed petitions for review of the FERC Iberdrola orders. All petitions were filed in February 2013 and have been consolidated in the U.S. Court of Appeals for the Ninth Circuit. See *Northwest Requirements Utilities et al. v. FERC*, Case No. 13-70391 (9th Cir. 2013).

47. See *Iberdrola Renewables, Inc.*, 137 FERC ¶ 61,185 at PP 62-65.

48. *Id.*

49. See MASS. INST. OF TECH., *THE FUTURE OF THE ELECTRIC GRID* 4 (2011).

50. *Id.*

51. See *Am. Elec. Power Serv. Corp.*, 67 FERC ¶ 61,168 (May 11, 1994) (ruling that an "open access" standard requires that access and use of the transmission system must be the same or comparable for transmission operators and third-parties).

52. A vertically integrated utility owns its own generation plant, transmission, and distribution system "to provide all aspects of electric service." *Glossary*, ENERGY INFORMATION ADMIN., <http://www.eia.gov/tools/glossary/index.cfm?id=V> (last visited June 28, 2014). Most existing vertically integrated utilities are located in the Southeast region of the United States. See *Why the Southeast*, SOUTHEASTERN COASTAL WIND COALITION, <http://www.secoastalwind.org/why-the-southeast> (last visited July 10, 2014).

53. REGULATORY ASSISTANCE PROJECT, *ELECTRICITY REGULATION IN THE U.S.: A GUIDE* 12 (Mar. 2011).

54. In Washington during 2011, 73% of electricity produced was from hydropower, accounting for 29% of all U.S. electricity generation. *State Profile and Energy Estimates: Washington*, ENERGY INFORMATION ADMIN., <http://www.eia.gov/state/?sid=wa> (last updated July 2012). After Washington, Oregon was the second largest hydropower-producing state in 2011, with hydropower accounting for 80% of power production. *State Profile and Energy Estimates: Oregon*, ENERGY INFORMATION ADMIN., <http://www.eia.gov/state/?sid=or> (last updated July 2012).

55. *History*, BONNEVILLE POWER ADMIN., <http://www.bpa.gov/news/AboutUs/Pages/History.aspx> (last visited Mar. 10, 2013).

56. *Fact Sheet: Measuring the Carbon Content of BPA's Power Supply*, BPA, <http://www.bpa.gov/news/pubs/FactSheets/fs-201303-Measuring-the-carbon-content.pdf> (last visited Mar. 13, 2014).

57. See *infra* Part III.A-B.

58. See *infra* Part IV.

59. *Id.*

60. *Id.*

61. See *infra* Part II.

62. See *infra* Part III.

63. Section 212 is used to enforce section 211 but not section 211a. See 16 U.S.C. § 824k (2012).

64. The Power Marketing Administrations, electric cooperatives, and small utilities are exempt from the "public utilities" definition in the FPA. See 16 U.S.C. § 824(f) (2012).

owned utilities are dubbed public utilities in the FPA,<sup>65</sup> but this Article will refer to them as private utilities and private power to avoid confusion with PMAs, which promote public power. Public and private powers' development helps explain why Congress and FERC required open access in private power markets in the early and mid-1990s<sup>66</sup> but only later extended this standard to public utilities. Open access was not a requirement for BPA until 2005<sup>67</sup> and was not enforced until FERC issued the *Iberdrola Renewables* decision in 2011.<sup>68</sup> How these industries developed helps explain this gap of nearly twenty years.

### A. Public Power and the Bonneville Power Administration

After the Civil War, farmers, granges,<sup>69</sup> and progressives advocated for public power in the Pacific Northwest. These groups sought rivers' public benefits<sup>70</sup> but wanted to avoid the monopolies that grew out of railroad development.<sup>71</sup> Public power took the form of municipal utilities, cooperatives, and public utility districts, while private investors developed and purchased their own utilities.<sup>72</sup> At first, public and private utilities were generally similar. Both encouraged consumption and focused on creating electricity demand. Both types of utilities increased sales by providing electricity to previously self-powered industries and selling home electric appliances.<sup>73</sup>

As electricity use grew, the division between public and private power began to grow. Private holding companies began purchasing small local utilities and consolidating operations into large corporations.<sup>74</sup> This growth had a downside. Holding companies' control over electric utilities allowed them to manipulate other shareholders<sup>75</sup> and

impose excessive electricity rates on consumers.<sup>76</sup> States, which had traditionally regulated utilities, failed to address these questionable business practices, in part, due to the lack of political will. In other cases, federal preemption over interstate commerce barred states from regulating utilities that spanned multiple states.<sup>77</sup>

Congress addressed these abuses during the Great Depression. Congress dramatically altered the private utility market when it passed the Public Utility Holding Company Act of 1935 ("PUHCA").<sup>78</sup> The Act prohibited non-utility corporations, including holding companies, from investing in utilities and limited utility debt.<sup>79</sup> PUHCA also gave the Securities and Exchange Commission the authority to break up interstate holding companies until they were limited to a geographic area regulated by one state Public Utility Commission ("PUC").<sup>80</sup> The law was a death knell to holding companies but also facilitated the rise of public power in the Pacific Northwest.<sup>81</sup> As a result, a mix of public and private utilities supplied power throughout the Pacific Northwest.<sup>82</sup>

The federal government also encouraged public power by building hydroelectric dams.<sup>83</sup> During the New Deal, the federal government authorized and built the Bonneville and Grand Coulee dam projects in Oregon and Washington.<sup>84</sup> The question of how to market this power led Congress to create BPA as the federal hydropower marketer in the Bonneville Power Act.<sup>85</sup> To guarantee that federal hydropower be operated "for the benefit of the general public," and "domestic and rural consumers" in particular, the Bonneville Power Act established a preference power clause.<sup>86</sup> This clause directed BPA to "give preference to public bodies and cooperatives,"<sup>87</sup> rather than investor-owned utilities.<sup>88</sup> The power generated and transmitted on the System was, and still is, sold at cost<sup>89</sup> to utility systems in Washington, Oregon, Idaho, and western Montana.<sup>90</sup>

65. Public utilities are any person who owns or operates facilities subject to specific provisions of the FPA. *See id.* § 824(e).

66. Congress first passed an open access requirement in the Energy Policy Act of 1992, and FERC later expanded its open access authority by relying on sections 205 and 206 in the FPA in *Am. Elec. Power Serv. Corp.*, 67 FERC ¶ 61,168 (May 11, 1994) and through FERC Order No. 888 in 1996, FERC Order No. 888, 61 Fed. Reg. 21,540, 21,540 (May 10, 1996). *See infra* Part II.B.

67. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1231, 119 Stat. 594, 955 (2005) (codified at 16 U.S.C. § 824j-1 (2012)).

68. *Iberdrola Renewables, Inc.*, 137 FERC ¶ 61,185, at PP 62–65 (Dec. 7, 2011).

69. Granges are community organizations that advocate for rural and agricultural interests. *See, e.g., About Us, NAT'L GRANGE OF THE ORDER OF PATRONS OF HUSBANDRY*, <http://www.nationalgrange.org/about-us/> (last visited Apr. 7, 2013).

70. GENE TOLLEFSON, *BPA AND THE STRUGGLE FOR POWER AT COST* 59 (1987).

71. *Id.* at 89.

72. *Id.* at 49.

73. *Id.* at 47, 68.

74. United Corporation, a holding company owned by JP Morgan, Jr., eventually came to control most utilities in the region. *Id.* at 89.

75. The top level of the holding company would control utilities by stock ownership, and thus control the management of the operating companies. Boards and utility managers routinely acted on behalf of the holding company, rather than utilities, and created a system vulnerable to manipulation. Holding company abuses included investor fraud, fraudulent accounting practices, and excessive debt. These abuses led, in part, to the Wall Street Crash of 1929. *See* Crystal J. Lloyd, *The Public Utility Holding Company Act of 1935*, 7 B.C. L. REV. 716, 716–17 (1966); Nidhi Thakar, *The Urge to Merge: A Look at the Repeal of the Public Utility Holding Company Act of 1935*, 12:3 LEWIS & CLARK L. REV. 903, 907–09 (2008).

76. ENERGY INFO. ADMIN., *PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: 1935–1992*, Sections 3, 4 (Jan. 1993) (discussing excessive fees charged to utilities for construction services, management, or financial services rendered by the holding company. These fees were ultimately passed onto utility consumers).

77. Because holding companies engaged in interstate commerce, it was difficult, if not impossible, for states to regulate their behavior. *See* *Pennsylvania Gas Co. v. Pub. Serv. Comm'n*, Second Dist., of State of New York, 252 U.S. 23 (1920); *see also* *Pub. Utilities Comm'n for State of Kansas v. Landon*, 249 U.S. 236 (1919).

78. Pub. L. No. 74-333 (codified as amended at 16 U.S.C. §§ 79 et seq. (2012)) repealed by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1263.

79. *Id.*

80. *Id.*

81. Michael C. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Northwest Electric Power Planning and Conservation Act*, 58 WASH. L. REV. 175, 192-93 (1983).

82. *See id.* at 193.

83. *See History, BONNEVILLE POWER ADMIN.*, <http://www.bpa.gov/news/AboutUs/Pages/History.aspx> (last visited Mar. 17, 2014).

84. *Id.*

85. Bonneville Power Act of 1937, Pub. L. No. 113-120, 50 Stat. 732 (1937) (codified as amended at 16 U.S.C. § 832 (2012)).

86. 16 U.S.C. § 832c (2012)).

87. *Id.*

88. Bonneville Power Act of 1937, Pub. L. No. 113-120, 50 Stat. 732 (1937) (codified as amended at 16 U.S.C. § 832 (2012)).

89. 16 U.S.C. §§ 839c, 832d (2012).

90. BPA's main service territory includes Idaho, Oregon, Washington, and western Montana, as well as small parts of eastern Montana, California, Nevada, Utah

As private power grew in other areas of the country, Congress continued to support the region's unique power supply with policies tailored to the System. For example, the Northwest Power Act<sup>91</sup> was one of the first federal statutes that directed a transmission utility to consider environmental impacts. Although the Bonneville Power Act has not prevented the destruction of salmon habitat, it requires that BPA conduct its responsibilities "in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated."<sup>92</sup> The Bonneville Power Act also directs entities to encourage renewable energy development and energy conservation.<sup>93</sup>

Congress had historically tailored its electricity policies in the Pacific Northwest to the region, but in 2005, Congress imported a requirement from the rest of the country.<sup>94</sup> BPA was already providing open access to its excess transmission capacity,<sup>95</sup> but Congress expanded that access in the Energy Policy Act of 2005 ("EPACT '05").<sup>96</sup> The Act granted FERC new authority in section 211a to enforce open access to BPA's transmission capacity.<sup>97</sup> Section 211a requires all previously unregulated utilities, including BPA, to provide transmission services in the same manner that it provides transmission services to itself.<sup>98</sup>

### B. Section 211a of the Federal Power Act and Its Private Power Antecedents

Section 211a may be a relatively new requirement for BPA, but FERC had long promoted open access in private utility markets. As section 211a is a by-product of previous policy measures to regulate the private utility market, it is important to examine how FERC's open access policies developed. Although Congress did not create FERC open access requirements until the mid-1990s, the seeds for the policy were planted with the very first private utilities.

Historically, utilities owned electricity generation, transmission, and distribution capabilities and sold these services as a bundled package.<sup>99</sup> State PUCs had authority to regulate retail rates and wholesale power within their own state, while the federal government had authority to regulate interstate wholesale power markets.<sup>100</sup> Federal regulation of utilities was minimal,<sup>101</sup> however, because most power

generators served only customers in a limited area (usually within one state)<sup>102</sup> due to their inability to transmit electricity long distances.

These state-based models had resulted in regional price differences throughout the country,<sup>103</sup> but technological changes threatened to disrupt this model by the 1970s. Technological advances allowed utilities to generate substantially more electricity and permitted high voltage and long distance transmission.<sup>104</sup> With electricity no longer strictly constrained by geography, independent power producers and entities that generated excess power entered the wholesale power market where a generator could sell and transmit its electricity to utilities serving retail customers.<sup>105</sup>

Vertically integrated utilities, which had built their own generation and transmission facilities, opposed these independent power producers' participation in the wholesale market.<sup>106</sup> Transmission owners had no obligation to serve these new entrants, let alone offer transmission on equal terms,<sup>107</sup> and frequently denied other power producers fair transmission access.<sup>108</sup> In 1978, Congress sought to remedy this problem by passing the Public Utilities Regulatory Policy Act,<sup>109</sup> which authorized FERC to compel vertically integrated utilities to buy or sell electricity from co-generators<sup>110</sup> and small power producers, including renewable energy generators.<sup>111</sup>

By the 1990s, barriers to open access remained.<sup>112</sup> Utilities that already owned transmission facilities continued to deny transmission outright or to only offer services at comparatively unfavorable rates.<sup>113</sup> In response, Congress passed the Energy Policy Act of 1992 ("EPACT '92"),<sup>114</sup> which began a federal effort to restructure private utilities and to encourage competitive markets, rather than administrative decisions, to shape wholesale electricity prices.<sup>115</sup> In particular, EPACT '92 expanded FERC's wheeling authority under section 211 of the FPA.<sup>116</sup> Until that point, FERC could only order a utility to wheel, or transfer a third party's electricity over its trans-

and Wyoming, *About Us*, BONNEVILLE POWER ADMIN., <http://www.bpa.gov/news/AboutUs/Pages/default.aspx> (last visited Feb. 16, 2014).

91. 16 U.S.C. §§ 839 et seq. (2012).

92. 16 U.S.C. § 839b(h)(11)(A)(i) (2012). This requirement also applies to the other federal agencies responsible for managing, operating, or regulating hydroelectric projects in the region. *Id.*

93. 16 U.S.C. § 839.

94. *See infra* Part II.B.

95. 16 U.S.C. § 838d (2012).

96. *See infra* Part II.B.

97. *Id.*

98. *Id.*

99. FRED BOSSELMAN ET AL., *ENERGY, ECONOMICS, AND THE ENVIRONMENT* 609 (Foundation Press et al., 3d ed. 2010).

100. The wholesale market includes electricity sales and purchases between utilities. BARRY W. KENNEDY, *POWER QUALITY PRIMER* 276, (McGraw Hill, 2000).

101. *Id.*

102. Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 681 (D.C. Cir. 2000).

103. KENNEDY, *supra* note 100, at 275.

104. Technological advances allowed utilities to generate more 500 MW. *Transmission Access Policy Study Group*, 225 F.3d at 681.

105. *See generally* Jeffery D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992: A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447, 451-56 (discussing alternative power generation suppliers, such as co-generators, small power producers, and independent power producers).

106. FED. ENERGY REGULATORY COMM'N, *ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS* 73 (2012).

107. *Id.*

108. *Id.*

109. Pub. L. No. 95-617 (codified as amended in 16 U.S.C. §§ 796(17), 796(18), 2601-2645 (2012)).

110. These independent power producers are known as "qualifying facilities" ("QFs") under PURPA. A co-generator produces electricity and heat simultaneously, and then recycles its thermal output to enhance efficiency. FERC could compel utilities to purchase power from QFs at a rate that represented each utility's "full avoided cost" of generating electricity. *See Otter Creek Solar LLC*, 146 FERC ¶ 61,192, at P 7 (Mar. 20, 2014).

111. 16 U.S.C. § 796(17).

112. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 682 (D.C. Cir. 2000).

113. *Id.* at 683-84.

114. Pub. L. No. 102-486.

115. 4 West's Fed. Admin. Prac. § 4582 (3d ed.).

116. KENNEDY, *supra* note 100, at 277.

mission system, if it would improve conservation, efficiency, or maintain the competitive positions of the parties.<sup>117</sup> The amended section 211 gave FERC authority to order a transmission utility to transmit a third party generator's power on an involuntary basis, so long as the transaction was in the public interest and met certain requirements under section 212.<sup>118</sup> Under section 212, FERC could only mandate wholesale wheeling when it would not result in "reasonably ascertainable uncompensated economic loss," "an undue burden," an unreasonable impairment to the reliability of any electric utility, or an impairment to adequate customer service.<sup>119</sup>

FERC welcomed its new authority; however, the law severely limited its ability to act. Section 211 only allowed FERC to issue an order when a utility complained to the agency; it did not grant FERC authority to issue a broad open access ruling.<sup>120</sup>

Recognizing that open access continued to hamper competitiveness, FERC looked to other sections of the FPA to enact broad change. Instead of section 211, FERC pursued open access using its separate section 205 duty to provide just and reasonable rates and prevent any undue preference, prejudice, disadvantage, or unreasonable difference in rates and other conditions.<sup>121</sup> In 1996, FERC adopted the landmark Order No. 888,<sup>122</sup> which forced utilities to provide access to their transmission lines to anyone purchasing or selling electricity in the interstate market on the same terms and conditions as the utilities use their own lines.<sup>123</sup> The order required, among other things, that all regulated transmission owners file an OATT<sup>124</sup> with FERC.<sup>125</sup> BPA is not required to file an OATT under Order No. 888,<sup>126</sup> although FERC may review BPA's transmission access and pricing policies under certain limited circumstances.<sup>127</sup>

Order No. 888 paved the way for additional transmission market reforms. FERC continued to promote electricity markets through Order No. 889, creating an electronic system to support real-time transmission market activity.<sup>128</sup> Later, through Order No. 2000, FERC established a voluntary system of regional transmission markets, known as Regional Transmission Organizations ("RTO"), to manage transmission pricing<sup>129</sup> that is just, reasonable and ultimately nondis-

criminatory.<sup>130</sup> Similar to the stock market, RTOs manage various markets, including energy markets where buyers bid on offered electricity in real-time or in day-ahead markets.<sup>131</sup>

These market reforms largely excluded BPA and other PMAs.<sup>132</sup> As states established RTOs on a voluntary basis, none formed in the Pacific Northwest. Although BPA submitted an OATT under Order No. 888, it eventually lapsed,<sup>133</sup> and FERC had no authority to order transmission access on BPA's system.

In light of these restrictions, some called for greater access to BPA's grid. In 1997, Congress held hearings to explore what role, if any, public power should play in the competitive market.<sup>134</sup> There was no consensus at the hearing, but members from the Oregon delegation cautioned that Congress should tailor any new requirements to BPA's unique hydroelectric system.<sup>135</sup> Others wanted open access extended to BPA. By 1999, the now defunct energy trading company Enron wrote to Congress asking for FERC open access authority over BPA transmission.<sup>136</sup> Dubbed "FERC lite,"<sup>137</sup> what eventually became section 211a appeared in proposed legislation in 1999,<sup>138</sup> and Enron lobbied heavily for its passage.<sup>139</sup>

130. *Id.* at 12,090.

131. JOHN CHANDLY & WILLIAM HOGAN, *ELECTRICITY MARKET REFORM: APPA'S JOURNEY DOWN THE WRONG PATH* 1 (2009).

132. BPA is excluded from much of the FPA because it does not fall under the definition of a public utility. *See* 16 U.S.C. §§ 824(e), 824(f) (2012).

133. Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996).

134. *Electricity: Public Power, TVA, BPA, and Competition, Hearing Before the H. Comm. on Commerce and Subcomm. on Energy and Commerce*, 105th Cong. 37 (1997).

135. *Id.* at 10–11 (statement by Rep. Furse, D-Or.).

136. Letter from Dan R. Brouillette, Dept of Energy, to Rep. Henry A. Waxman (Oct. 9, 2001).

137. Compl. and Pet. for Order Under Federal Power Act Section 211A Against Bonneville Power Admin. Requesting Fast Track Processing, Fed. Energy Regulatory Comm'n, Docket No. EL11-44-000 at n.43 (June 13, 2011) [hereinafter Compl. and Pet.].

138. Electricity Competition and Reliability Act, H.R. 2944, 106th Cong. §§ 622, 633, (1999).

139. Enron lobbied both Congress and Vice President Cheney's National Energy Policy Development Group (NEPDG) for "FERC lite." Kenneth Lay, then-Chairman of Enron, lobbied Vice President Cheney in April 2001 for greater transmission access to transmission lines maintained by PMAs, including BPA. In a memo to the Vice President, Lay's first policy priority stated, "FERC jurisdiction must actively exercise jurisdiction over all aspects of electricity transmission in interstate commerce and place all uses of the grid under the same rates, terms, and conditions. Moreover, FERC jurisdiction must extend to the terms of access applicable to transmission systems owned and operated by non-FERC jurisdictional entities including *Federal Power Marketing Associations (PMAs)*, states and municipalities." *Examining Enron: Electricity Market Manipulation and the Effect on the Western States, Hearing Before the Subcomm. on Commerce, Sci., and Transp., Subcomm. on Consumer Affairs, Foreign Commerce and Tourism*, 107th Cong. 23–24 (2002) (quoting eight point policy recommendation memo submitted from Kenneth Lay to Vice President Cheney). The White House Energy Plan subsequently recommended greater access to PMA transmission lines in its May 2001 report. NAT'L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY 5-12 (May 2001). The Department of Energy also advocated for the policy as Congress considered granting this authority to FERC. *See* MINORITY STAFF ON THE COMM. OF GOV'T REFORM, 107TH CONG., FACT SHEET: THE WHITE HOUSE ENERGY PLAN REFLECTS SEVEN OF EIGHT RECOMMENDATIONS IN ENRON MEMO 3 (Comm. Print Jan. 31, 2002) ("Grant FERC jurisdiction over the BPA transmission system to the same extent as public utilities."). Section 211a was first introduced as part of a broader bipartisan amendment to an energy science bill, S. 517, by Senators Daschle (D-S.D.) and Bingaman (D-N.M.). 148 CONG. REC. S. 909 (2002). Section 211a was subsequently included in H.R. 4, the Energy Policy Act of 2002 (Rep. Tauzin, R-La.-3), H.R. 4, 107th Cong. (2002), the Energy Policy Act of 2003 (Sen. Domenici, R-N.M.), S. 2095, 108th Cong. (2003), and (Sen. Craig Thomas, R-Wyo.), S. 475, 108th Cong. (2003).

117. Ari Peskoe, *A Challenge for Federalism: Achieving National Goals in the Electricity Industry*, 18 MO. ENVTL. L. & POL'Y REV. 209, 234 (2011).

118. 16 U.S.C. § 824j (2012).

119. New York State Elec. & Gas Corp. v. Fed. Energy Regulatory Comm'n, 638 F.2d 388, 401–02 (2d Cir. 1980).

120. *Id.* at 402 (ruling that section 211 did not authorize FERC to order wheeling solely on the basis of the public interest or to advance competition).

121. 16 U.S.C. §§ 824d, 824c (2012).

122. Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996).

123. *Id.*

124. A transmission tariff, despite its name, is not a rate or tax, but is a published volume of rate schedules and general terms and conditions under which a product or service will be supplied. *Glossary*, ENERGY INFORMATION ADMIN., <http://www.eia.gov/tools/glossary/index.cfm?id=T> (last visited Feb. 2, 2013) (defining tariff).

125. Order No. 888, 61 Fed. Reg. 21,540.

126. *Id.*

127. *Id.*

128. Order 889, Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct Issued, 61 Fed. Reg. 21,737-01 (May 10, 1996) (codified at 18 C.F.R. § 37 (2013)).

129. *See* Order No. 2000, Regional Transmission Organizations, 65 Fed. Reg. 12,088 (2000) (codified at 18 C.F.R. part 35).

Congress eventually passed section 211a into law as part of EPACT '05.<sup>140</sup>

After section 211a became law, FERC did not issue implementing regulations or guidelines. FERC considered requiring all non-regulated entities, including BPA, to file an OATT with FERC when it proposed Order No. 890 but backed down due to widespread opposition.<sup>141</sup> Instead, FERC announced that it would apply the provisions of section 211a on a case-by-case basis.<sup>142</sup> FERC indicated that transmission customers could file an application with the Commission seeking an order to compel an unregulated transmitting utility to meet section 211a standards.<sup>143</sup>

### III. *Iberdrola Renewables Inc.* and FERC's Public Interest Standard

#### A. Application of Section 211a in *Iberdrola Renewables*

In *Iberdrola Renewables*, FERC ruled that BPA could not institute its 2011 Environmental Redispatch Policy.<sup>144</sup> FERC ruled that the policy "interrupts non-Federal customer's firm point-to-point transmission service," without causing similar interruptions to federal resources.<sup>145</sup> BPA's complex operational environment, hydroelectric resources, and area wind generators led to this ruling.

Hydroelectric power was expected to be an ideal complement to wind power. Hydropower units can balance variations in wind power output because they "are quick-starting with high ramping rates."<sup>146</sup> In practice, however, non-power constraints on hydroelectric generation have limited this theoretical potential. BPA foreshadowed these constraints in 1997 when it reminded Congress that it marketed power from a very unique river system with "complex energy and ecological impacts," including salmon management.<sup>147</sup>

The System has endangered Columbia River Basin salmon and steelhead trout, which are in "a state of perilous decline."<sup>148</sup> The Columbia River had supported one of the largest salmon runs in the world, with an estimated high of 16,000,000 fish before European settlement.<sup>149</sup> These populations have dropped to an estimated 1,000,000 fish, most of which are hatchery produced,<sup>150</sup> and thirteen stocks of

Columbia River salmon and steelhead occupy the ESA list of threatened and endangered species.<sup>151</sup> The dams' destruction of fish habitat has been the subject of nearly thirty years of litigation under the ESA,<sup>152</sup> and it has denied Native American Tribes and First Nations their treaty rights.<sup>153</sup>

Although the National Marine Fisheries Service<sup>154</sup> is under a court order to develop long-term mitigation measures for endangered salmon,<sup>155</sup> one mitigation measure known as "spill" is currently in place and is at the heart of the open access conflict in *Iberdrola Renewables*.<sup>156</sup> The System is under a court order<sup>157</sup> to spill both fish and water over the dams rather than passing them through turbines.<sup>158</sup> Too much spill, however, can endanger the fish by creating a condition known as gas bubble disease.<sup>159</sup> During a spill, operators spill excess water over the dam, trapping air and increasing total dissolved gas.<sup>160</sup> High total dissolved gas levels can cause gas bubble disease—similar to the bends in divers—with symptoms ranging from minor injuries to death.<sup>161</sup> Consequently, spill levels must remain within state CWA total dissolved gas level limits,<sup>162</sup> which forces BPA to run its turbines—and thereby generate electricity—during high water events.

Climate change exacerbates this already precarious situation by increasing the frequency of high water events that require spills. Historically, the Columbia Basin Mountains captured 100 to 200 inches of snow per year, providing a natural water storage system.<sup>163</sup> The warming climate has resulted in declining snowpack and earlier spring runoff for regional rivers and streams.<sup>164</sup> This earlier spring runoff is expected to continue, as scientists predict that more precipitation will fall as rain than snow and the snow that does fall will melt earlier in the season to produce high early spring river flows and low, warmer summer flows.<sup>165</sup> Scientists expect these changes to have major impacts on aquatic ecosystems, especially for salmon in the summer.<sup>166</sup> Not only will BPA need to respond to spring runoff events, but it may also need to manage the

140. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 955 (2005) (codified at 16 U.S.C. § 824j-1 (2012)).

141. See FERC Order No. 890, 118 FERC ¶ 61,119 (2007).

142. *Id.* at P 191.

143. *Id.* at P 192.

144. *Iberdrola Renewables, Inc.*, 137 FERC ¶ 61,185, at P 62 (Dec. 7, 2011).

145. *Id.*

146. HODGE ET AL., *supra* note 9, at 2.

147. *Hearing, supra* note 134, at 138 (statement of John Robertson, Deputy Administrator, BPA).

148. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d 1196, 1201 (D. Or. 2003).

149. NAT'L RESEARCH COUNCIL, MANAGING THE COLUMBIA RIVER: INSTREAM FLOWS, WATER WITHDRAWALS, AND SALMON SURVIVAL 99 (2004), available at [http://www.nap.edu/openbook.php?record\\_id=10962&page=17](http://www.nap.edu/openbook.php?record_id=10962&page=17); Fisheries Timeline, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, <http://www.critfc.org/about-us/fisheries-timeline/> (last visited June 5, 2014).

150. *Id.*

151. *Id.*

152. Michael C. Blumm, *Governor John Kitzhaber's Call for a New Salmon Plan Makes Sense*, THE OREGONIAN (Oct. 9, 2012), [http://www.oregonlive.com/opinion/index.ssf/2012/10/governor\\_john\\_kitzhabers\\_call.html](http://www.oregonlive.com/opinion/index.ssf/2012/10/governor_john_kitzhabers_call.html).

153. *Hearing, supra* note 134, at 133.

154. See Fisheries, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <http://www.noaa.gov/fisheries.html> (last visited Mar. 17, 2014).

155. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 839 F. Supp. 2d 1117, 1121 (D. Or. 2011).

156. *Iberdrola Renewables, Inc.*, 137 FERC ¶ 61,185 (Dec. 7, 2011).

157. BONNEVILLE POWER ADMIN., COLUMBIA RIVER HIGH-WATER OPERATIONS 5 (June 1–14, 2010), available at <http://www.bpa.gov/Projects/Initiatives/Oversupply/OversupplyDocuments/final-report-columbia-river-high-water-operations.pdf>.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. To protect against such impacts, state water quality standards under the CWA limit allowable levels of total dissolved gas to 110% saturation. *Id.*

163. Rachael Paschal Osborn, *Climate Change and the Columbia River Treaty*, 2 WASH. J. ENVTL. L. & POL'Y 75, 85 (2012).

164. Jin & Sridhar, *supra* note 23, at 197.

165. WASH. STATE DEP'T OF ECOLOGY, FACTS ABOUT WASHINGTON'S RETREATING GLACIERS AND DECLINING SNOW PACK 1 (Apr. 2007).

166. *Id.*

hydroelectric system to ameliorate climate change impacts on salmon in warmer summer streams.<sup>167</sup>

Meanwhile, the demand for wind power has increased due to a combination of state and federal incentives. The now expired federal PTC still provides wind energy generation built before 2014 with a ten-year tax credit of 2.2 cents per kWh.<sup>168</sup> Renewable portfolio standards in Washington, Oregon, and California also promote wind construction in or near BPA's service territory.<sup>169</sup> Utilities distributing energy to consumers must purchase a certain percentage of renewable electricity, with levels ranging from 15% by 2020 in Washington,<sup>170</sup> 25% by 2025 in Oregon,<sup>171</sup> and 33% by 2025 in California.<sup>172</sup> In an effort to promote new renewable energy resources, these states' legislatures allowed utilities to meet the standards with wind energy but excluded energy produced by existing dams.<sup>173</sup>

Wind power has taken advantage of these incentives in BPA's service territory. In 2007, the average level of wind generation in BPA's control region was 249 MW, with a maximum of 1,176 MW.<sup>174</sup> In 2012, BPA experienced the greatest influx of new wind sources in the nation, with up to 4,039 MW of wind energy online during the middle the year.<sup>175</sup> By the end of 2012, the average wind output was 1,175 MW, and the maximum wind power produced was 4,365 MW.<sup>176</sup> By early 2013, wind capacity had grown to 4,515 MW in BPA's balancing area,<sup>177</sup> and to over 7,000 MW in the entire Pacific Northwest.<sup>178</sup>

Wind energy's intermittent supply further complicates matters. Wind generation occurs when the wind blows, not

in response to demand. To balance the varying wind influxes on the transmission grid, BPA manages its hydrogeneration to complement wind output.<sup>179</sup> Under BPA's Dispatch Standing Order 216, BPA decreases hydropower to in response to wind over-generation and increases hydropower to balance declining wind.<sup>180</sup> For example, in 2010 when BPA managed the region's then 3,000 MW of wind generation, BPA produced 1,050 MW more than the necessary minimum of hydrogeneration in order to balance wind resources.<sup>181</sup> If wind picks up, BPA then drops hydrogeneration.<sup>182</sup> BPA also runs dams below maximum generation in case hydro output must increase once wind dies down.<sup>183</sup> Once BPA has exhausted its ability to manipulate its hydroelectric reserves, it may then curtail wind power without compensation.<sup>184</sup>

Balancing fish management, high stream flow, and reliability have become a challenge for BPA, in part due to its own open access policies. BPA claims it had historically provided open access transmission in an effort to encourage competition and keep consumer prices low.<sup>185</sup> BPA then dealt with excess electricity by placing as much hydroelectric power on the grid as possible, often by replacing scheduled power with hydropower for free.<sup>186</sup> Although consumers continued to pay for power, this allowed coal, oil, and natural gas fired power plants ("thermal generators") to reduce output but continue to collect payment. Thermal generators thus did not object to BPA's over-generation events because they saved fuel costs by reducing output, but still collected rates from consumers.

Although BPA had Dispatch Standing Order 216, it needed another tool to address instances where it had to balance the grid against high seasonal runoff, fish protection restraints, and high dam electricity outputs. In 2011, BPA issued its Environmental Redispatch Policy.<sup>187</sup> As part of this policy, BPA informed wind operators that during high water events, BPA would reduce balancing reserves and allow BPA to temporarily substitute federal hydropower for the then 3,000 MW of wind generation during overgeneration events.<sup>188</sup> During those events, wind generators had to stop, or curtail, transmission.<sup>189</sup> Although wind generators met their scheduled orders with free hydropower, BPA did not physically transmit any wind power.<sup>190</sup>

Unlike thermal generators, wind producers continue to have an incentive to generate electricity. Those familiar with wind overgeneration in other areas of the country recognize that markets may pay negative prices. That is, the market

167. See BONNEVILLE POWER ADMIN., BPA STRATEGIC OBJECTIVES 6 (Feb. 2012) ("To meet national and regional policy goals and to serve customers' electricity needs, BPA will be proactive in understanding and responding to resource choices and regulatory impacts of climate change. BPA also will examine how climate change may alter hydrology and federal hydro generation capability in the Northwest.").

168. U.S. DEP'T OF ENERGY, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY, WIND AND WATER PROGRAM (2012). The now expired federal PTC provided new wind energy generators with a ten-year 1.5 cents (in 1993 dollars) per kWh tax credit. 16 U.S.C. § 45 (2012).

169. See WASH. ADMIN. CODE §§ 194-37-010, 480-109-001 (2013); OR. REV. STAT. ANN. § 469A (2013); CAL. PUB. RES. CODE § 25740 (2013).

170. In Washington, certain electric utilities must obtain 15% of their electricity from new renewable resources by 2020 and undertake all cost-effective energy conservation. WASH. ADMIN. CODE §§ 194-37-010, 480-109-001 (2013).

171. In Oregon, large utilities were required to meet a 5% renewable portfolio standard in 2011. This rate increases to 15% in 2015, 20% in 2020, and 25% in 2025. Smaller electric utilities in Oregon have standards of 5% or 10% by 2025. OR. REV. STAT. ANN. § 469A (2013).

172. In California, utilities must use 20% of eligible renewables by 2014, 25% by 2016, and 33% by 2020. CAL. PUB. RES. CODE § 25740 (2013).

173. See *id.* See also WASH. ADMIN. CODE §§ 194-37-010, 480-109-001; OR. REV. STAT. ANN. § 469A.

174. *Data for BPA Balancing Authority Total Load, Wind Gen, Wind Forecast, Hydro, Thermal, and Net Interchange: 2007*, BONNEVILLE POWER ADMIN., <http://transmission.bpa.gov/Business/Operations/Wind/default.aspx> (last visited Mar. 17, 2014) [hereinafter *Data for BPA Balancing Authority*].

175. Press Release, Bonneville Power Admin., Wind Power on BPA System Sets Another New Record (Mar. 22, 2012, 12:00 AM), available at <http://www.bpa.gov/news/newsroom/Pages/Wind-power-on-BPA-system-sets-another-new-record.aspx>.

176. *Data for BPA Balancing Authority*, *supra* note 174.

177. *Wind Generation Plant List*, *supra* note 15.

178. NW. POWER AND CONSERVATION COUNCIL, SIXTH POWER PLAN: MID-TERM ASSESSMENT PLAN 17 (Mar. 13, 2013), available at <http://www.nwcouncil.org/energy/powerplan/6/2013-01/2013-05/>.

179. BONNEVILLE POWER ADMIN., *supra* note 157, at 8.

180. LORI BIRD ET AL., NAT'L ENERGY RENEWABLE LAB., U.S. DEP'T OF ENERGY, WIND AND SOLAR ENERGY CURTAILMENT: EXPERIENCE AND PRACTICES IN THE UNITED STATES, 5 (2014).

181. BONNEVILLE POWER ADMIN., *supra* note 157, at 8.

182. *Id.* at 9.

183. *Id.* at 9.

184. BIRD ET AL., *supra* note 180, at 6.

185. *Hearing*, *supra* note 134, at 137 (statement of John Robertson, Deputy Administrator, BPA).

186. Blumm, *supra* note 152, at 6.

187. See MICHAELS, *supra* note 21.

188. *Id.* at 8.

189. *Id.*

190. *Id.*

price drops so generators pay consumers to use energy.<sup>191</sup> For example, the California grid operator recently lowered the limit for negative bids from -\$30/MWh to -\$150/MWh and -\$300/MWh.<sup>192</sup> A negative price for electricity may seem counterintuitive, but generators that receive federal PTCs and state RECs have an incentive to offer negative prices so long as they are producing electricity. The federal PTC is valued at \$21 per MWh,<sup>193</sup> and state RECs range from \$8 to \$20 per MWh.<sup>194</sup> If the total value of PTCs and RECs is approximately \$38 per MWh, then a wind farm's operating profit is positive so long as electricity prices do not dip below that value less operating and maintenance costs. Once the price dips below that point, it will discourage generators from bidding into the system.<sup>195</sup>

BPA's Environmental Redispatch Policy offered no compensation to wind producers for these lost credits. As an alternative, wind producers proposed that BPA sell at negative prices during overgeneration events.<sup>196</sup> BPA rejected this approach on the grounds that it could create opportunities for market distortion, unreasonably curtail hydroelectric generation, and unfairly shift costs to BPA's fish and wildlife program.<sup>197</sup> If it paid the negative prices, BPA asked, "[A]t what point does [the negative price] stop? If negative \$50/MWh doesn't garner enough load, does Bonneville go to negative \$100? Negative \$500? The costs are potentially enormous."<sup>198</sup> BPA estimated that if it had to pay negative prices, it could cost up to \$50 million to compensate foregone tax and renewable energy credits.<sup>199</sup>

Wind producers appealed to FERC. Regional wind generators and independent power producers Iberdrola Renewables, PacifiCorp, NextEra Energy Resources, Inverness Wind North American, and Horizon Wind Energy petitioned FERC to force BPA to halt its curtailment practices, alleging that BPA's Environmental Redispatch Policy violated open access principles under section 211a of the FPA.<sup>200</sup> The complainants alleged that Bonneville's policy shifted costs to existing interconnection or transmission service agreement customers, and instead power customers should bear the price associated with the Environmental Redispatch Policy.<sup>201</sup>

In *Iberdrola Renewables*, FERC agreed with regional wind producers. FERC acknowledged the difficulties BPA faces in managing many competing obligations, including those under the ESA and CWA.<sup>202</sup> Notwithstanding those difficulties, FERC found that BPA's policy significantly diminished open access to transmission.<sup>203</sup> FERC ruled that BPA's Environmental Redispatch Policy results in non-comparable

transmission service for non-federal generating resources connected to BPA's transmission system.<sup>204</sup>

FERC ordered BPA to file tariff revisions to its voluntary OATT to provide for comparable, non-preferential transmission service.<sup>205</sup> Since that order, BPA has revised its Oversupply Management Protocols ("OMP") three different times to comply with section 211A. The basic framework is the same for all three protocols. During a qualifying event, BPA can curtail production when it determines that it is probable for the total dissolved gas levels to exceed Oregon and Washington water quality standards under the CWA.<sup>206</sup> During these events, BPA will issue instructions requiring certain generating facilities, particularly wind, to reduce output.<sup>207</sup> BPA will continue to substitute free federal hydropower in place of energy produced by those resources, but BPA will compensate those producers who seek reimbursement for lost revenues.<sup>208</sup>

Disagreements over cost allocation have motivated the revised OMPs. Although the OMP may describe the cost allocation framework, BPA can only recover costs under the Northwest Power Act.<sup>209</sup> On November 20, 2012, BPA began an oversupply rate proceeding, known as OS-14, to establish a long-term section 211A compliance and cost allocation scheme.<sup>210</sup> In the meantime, BPA still had to comply with section 211A. BPA proposed the first protocol ("OMP I")<sup>211</sup> on March 6, 2012, as a short-term OATT revision to expire on March 30, 2013.<sup>212</sup> OMP I divided costs evenly between power customers and wind generators on the theory that both wind and federal hydropower contribute to overgeneration.<sup>213</sup> In December 2012, FERC ruled that the fifty-fifty cost share scheme was discriminatory to wind producers. Rather than striking down the cost allocation methodology, FERC ordered BPA to file a new cost allocation methodology within ninety days, and also suggested that BPA seek a cost allocation scheme that divides costs among all transmission users.<sup>214</sup> BPA's long-term solution under the Northwest Power Act had yet to be finalized, however, and BPA requested an extension for its cost allocation. On February 19, 2013, FERC granted an extension until BPA files its final OMP rate decision with FERC under the Northwest Power Act.<sup>215</sup>

191. BIRD ET AL., *supra* note 180, at 25.

192. *Id.*

193. MICHAELS, *supra* note 21, at 11.

194. *Id.*

195. BIRD ET AL., *supra* note 180, at 25.

196. BPA Answer 1, *supra* note 11.

197. *Id.* at 64.

198. *Id.*

199. *Iberdrola Renewables, Inc.*, 137 FERC ¶ 61,185, at P 63 (Dec. 7, 2011).

200. *Id.* at P 1.

201. Compl. and Pet., *supra* note 137, at 63.

202. *Iberdrola Renewables, Inc.*, 137 FERC ¶ 61,185, at P 33.

203. *Id.*

204. *Id.* at P 62.

205. *Glossary*, ENERGY INFORMATION ADMIN., <http://www.eia.gov/tools/glossary/index.cfm?id=T> (last visited Mar. 31, 2013).

206. *Iberdrola Renewables*, 137 FERC ¶ 61,185, at P 5.

207. Press Release, Bonneville Power Admin., BPA Revises Policy for Managing Seasonal Power Oversupply, (Mar. 5, 2013, 12:00 PM), <http://www.bpa.gov/news/newsroom/Pages/BPA-revises-policy-for-managing-seasonal-power-oversupply.aspx>.

208. *Id.*

209. 16 U.S.C. § 839e(a)(1) (2012).

210. BPA, Notice of Proposed 2014 Oversupply Rates, 77 Fed. Reg. 66,963 (Nov. 8, 2012).

211. OMP I is commonly known as OMP P because BPA included the OMP as Attachment P to its OATT. Press Release, *supra* note 207.

212. *Iberdrola Renewables, Inc.*, 141 FERC ¶ 61,234, at P 8 (2012) (Order Conditionally Accepting Compliance Filing).

213. *Id.* at P 8.

214. *Id.* at P 18.

215. *Iberdrola Renewables, Inc.*, 142 FERC ¶ 61,116 (Feb. 19, 2013) (Order Granting Extension of Time).

Since the extension, FERC proposed an interim protocol (“OMP II”) and its final OMP, OS-14, under the Northwest Power Act (“OMP III”). In March 2013, BPA filed OMP II, which largely mirrored the expired OMP I.<sup>216</sup> OMP II was silent on cost allocation, but it did direct BPA to take twelve actions before ordering wind power offline.<sup>217</sup> However, BPA only needs to take action if it would reduce the need to displace wind.<sup>218</sup> For example, BPA must seek flow reductions upstream,<sup>219</sup> seek access to additional federal reservoir storage,<sup>220</sup> or reduce total dissolved gas levels at one site by spilling at another site if such actions would reduce curtailment need or levels.<sup>221</sup> BPA did not displace any wind under OMP II in 2013 or 2014.<sup>222</sup> Whether this was due to the OMP II measures or low Columbia River water levels is unclear.

BPA submitted OMP III as its long-term solution in May 2014. OMP III allocates costs from 2012 until 2015 to “generators in Bonneville’s balancing authority area based on their transmission schedules during oversupply situations.”<sup>223</sup> Under this scheme, displacement costs are assigned proportionally among scheduled transmission users. For example, BPA incurred \$2.7 million in costs in 2012.<sup>224</sup> With thermal generators excluded, BPA would pay roughly 85% of costs and wind would pay 15%.<sup>225</sup> If thermal generators were included, BPA would be responsible for 72% and thermal generators and wind each pay 14% of costs.<sup>226</sup> Thus, wind producers would not be fully compensated for lost revenues and federal hydroelectric consumers would pay for most of the lost RECs and PTC. FERC has yet to rule on the proposal, but the solution is consistent with FERC’s suggestion that costs be shared equally when FERC rejected BPA’s fifty-fifty cost share in OMP I.<sup>227</sup>

#### IV. Iberdrola Renewables’ Impact on the Regional Grid

FERC’s decision in *Iberdrola Renewables* exacerbates an already changing electric grid in the Pacific Northwest. Hydropower constraints, wind power growth, and retiring coal plants are helping to drive increased demand for natural gas generation.<sup>228</sup> The region is exploring ways to increase energy consumption, especially at night when demand is low and wind increase, but hydropower no longer provides

the balancing services that it once did.<sup>229</sup> For example, to avoid Dispatch Service Order 16 penalties, wind producer Iberdrola purchased power from natural gas plants to balance its own generation.<sup>230</sup> In addition to demand from wind resources, the overall demand for new gas is also going up. Over the past few years, regional utilities have pursued over 3,100 MW of conventional generating resources through requests for proposals<sup>231</sup> and 960 MW of new natural gas capacity will be added by 2016.<sup>232</sup>

Electricity rates will likely rise in the Pacific Northwest.<sup>233</sup> BPA estimated that oversupply would cost \$10 million in 2013<sup>234</sup> and result in rate increases.<sup>235</sup> Public power customers anticipate the yearly overgeneration rate increase will increase rates by 1.5% per year,<sup>236</sup> and an electricity cooperative estimated that these measures would increase consumer electricity bills by approximately 3.75% or \$4.75 per month.<sup>237</sup> In reality, these projections were overblown and BPA did not suffer any direct curtailment costs in 2013.<sup>238</sup> Moreover, these rate increases are modest given the region’s historically low electricity rates. A roughly \$5 per month increase is consistent with, or even lower, than other rate increases across the country.<sup>239</sup>

216. Press Release, *supra* note 207.

217. BPA Open Access Transmission Tariff, Attachment P: Oversupply Management Protocol, section 2 (2012), available at <http://www.bpa.gov/Projects/Initiatives/Oversupply/Pages/default.aspx>.

218. *Id.*

219. *Id.* at section 2(g).

220. *Id.* at section 2(i).

221. *Id.* at section 2(l).

222. See BPA May 23, 2014, Compliance Filing, 4, Docket No. EL11-44-002.

223. *Id.* at 5.

224. *Id.*

225. *Id.* at 6.

226. *Id.*

227. See *Iberdrola Renewables, Inc.*, 141 FERC ¶ 61,234, at P 8 (2012) (Order Conditionally Accepting Compliance Filing).

228. NW. POWER AND CONSERVATION COUNCIL, *supra* note 178, at 9, 17.

229. *Id.* at 15, 33. Nighttime and early morning demand may rise in part because of future electric vehicle charging, and increased flat loads for data centers and industrial loads. *Id.* at 33.

230. BIRD ET AL., *supra* note 180, at 7.

231. *Id.* at 16.

232. Idaho Power Company began operating a 300 MW Langley Gulch plant in 2012, and at least three other natural gas-fired plants, with 660 MW of capacity in Oregon, will be brought online in 2014 and 2016. NW. POWER AND CONSERVATION COUNCIL, COLUMBIA RIVER BASIN FY 2013 REPORT 6 (2013).

233. Steven Johnson, *Electric Power Rates to Rise in Northwest*, ELECTRIC CO-OP TODAY (Nov. 13, 2012), <http://www.ect.coop/industry/business-finance/northwest-to-see-power-rates-increase/50291>.

234. The Oversupply charge would account for fifty percent of the costs incurred under the Oversupply Management Protocol multiplied by the customer’s load, divided by the sum of all power customers’ load. BONNEVILLE POWER ADMIN., POTENTIAL FOR SEASONAL POWER OVERSUPPLY IN 2013 (2013), available at <http://www.bpa.gov/Projects/Initiatives/Oversupply/OversupplyDocuments/2013/20130222-Potential-for-seasonal-power-oversupply-in-2013.pdf>.

235. BPA proposed a 9.6% generation rate increase to account for reduced power sales. Gordon Oliver, *BPA Proposes 9.6 Percent Wholesale Rate Hike*, THE COLUMBIAN (Nov. 8, 2012), <http://www.columbian.com/news/2012/nov/08/bpa-proposes-96-wholesale-rate-hike/>; a 13% transmission rate increase to pay for transmission upgrades, including new transmission lines, Press Release, Bonneville Power Admin., BPA proposes rate increase to bolster federal power and transmission systems (Nov. 9, 2012), available at <http://www.bpa.gov/news/newsroom/Pages/BPA-proposes-rate-increase-to-bolster-federal-power-and-transmission-systems.aspx>; and a seven percent rate increase accounting for wind integration.

236. Narrative Statement of Position of Public Power Council et al., BPA Docket No. OS-14 (Mar. 18, 2013).

237. Lynnette Hintze, *Price of Power Heading Upward*, THE DAILY INTERLAKE (Mar. 23, 2013), [http://www.dailyinterlake.com/news/local\\_montana/article\\_5c0982ca-9371-11e2-a57c-001a4bcf887a.html](http://www.dailyinterlake.com/news/local_montana/article_5c0982ca-9371-11e2-a57c-001a4bcf887a.html).

238. BPA Compliance Filing, *supra* note 222.

239. For example, PEPCO recently requested a \$60.8 million rate increase in Maryland, which would increase consumers monthly energy bill by \$7.13, or about five percent. Victor Zapana, *Pepco Requests \$60.8 Million Rate Hike in Maryland*, WASHINGTON POST (Nov. 30, 2012), [http://articles.washingtonpost.com/2012-11-30/local/35585672\\_1-pepco-rate-request-customers](http://articles.washingtonpost.com/2012-11-30/local/35585672_1-pepco-rate-request-customers). Pacific Gas & Electric Company (“PG&E”) has requested a \$1.28 billion rate hike in 2014 from California, which would add just under \$5 a month for a PG&E residential electrical customer. Dennis Wyatt, *PG&E Seeks \$1.28B Rate Hike: 2014 Request Is 18.77% More Than 2013 Rates Already on the Table*, MANTECA BULLETIN (Nov. 18, 2012), <http://www.mantecabulletin.com/archives/59199/>. Duke Energy asked for a \$220 million increase, which would increase residential rates by 16.3% from \$100 to more than \$118 per month. Bruce Hender-

Although BPA has not incurred any curtailment costs in 2013 or 2014, consumers will pay for natural gas plants in the region. Whether this is the most cost-effective solution is up for debate. The Department of Energy's National Renewable Energy Laboratory suggests that these costs may be unnecessary if BPA reduced curtailment through "dynamic reserves, negative pricing, and improved forecasts."<sup>240</sup>

These costs may be low or sporadic, but the Supreme Court has ruled that FERC may not ignore even "a small dent in the consumer's pocket."<sup>241</sup> With the majority of wind produced in the region exported to California,<sup>242</sup> lost California REC costs will be borne by BPA consumers. FERC did not consider whether these costs were fair nor did it consider the impact of its order on the region's growing natural gas capacity. By taking a hard line on open access, FERC forces BPA to exhaust all options before curtailing wind, but the approach does not transparently weigh the decision's tradeoffs. Under section 211a of the FPA, FERC may require open access unless the otherwise unregulated utility "meets other criteria [FERC] determines to be in the public interest."<sup>243</sup> FERC indicated that it would consider section 211a on a case-by-case basis when a utility had not voluntarily filed a compliant OATT,<sup>244</sup> but it has not indicated what it considers "criteria in the public interest."

## V. The Federal Electricity Regulatory Commission's Duty to Consider the "Public Interest" Under the Federal Power Act

The public interest requirement under section 211a is, at a minimum, governed by the public interest standard applied throughout the FPA.<sup>245</sup> The FPA declares that transmitting and selling electricity for distribution is "affected with a public interest" and grants FERC broad authority to regulate the wholesale transmission sector to protect that public interest.<sup>246</sup> FERC has acted under this authority to curb anti-

competitive behavior through the "economic regulation of entrepreneurs engaged in resource developments."<sup>247</sup>

FERC has broad public interest authority when regulating tariffs and, although its authority is narrower for bilateral contracts, it must still ensure that the public interest requirement is met. For bilateral contracts, FERC must adhere to the *Mobile-Sierra* doctrine, which presumes that the contract's terms are just and reasonable unless the contract "seriously harms the public interest."<sup>248</sup> If FERC finds that the rate seriously harms the public interest—after considering energy needs, investor interests, and consumer interests<sup>249</sup>—then the Commission may replace the contract terms with a compliant rate.<sup>250</sup> FERC rarely acts under the "practically insurmountable"<sup>251</sup> public interest standard unless rates are clearly unfair. When rates automatically captured nuclear power plant costs, the excessive burden on consumers violated the public interest.<sup>252</sup> More recently, FERC made generic public interest findings for both bilateral contracts and tariffs under Order No. 888 to require open access in the regulated market and under Order No. 1000 to eliminate rights of first refusal for transmission facilities.<sup>253</sup>

FERC may consider broader public interest concerns with tariffs, but "only insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest."<sup>254</sup> That is, FERC may only consider a factor in its public interest determination if that factor affects rates and FERC has authority over it.<sup>255</sup> For example, eliminating racial discrimination is in the broader public interest, but the U.S. Supreme Court ruled that FERC's predecessor, the Federal Power Commission ("FPC"), did not have the authority to establish an anti-discrimination program for utilities.<sup>256</sup> FPC had a duty to prevent utilities from charging rates that capture "illegal, duplicative, or unnecessary labor costs." The connection between workplace anti-discrimination and reasonable rates was too tenuous, however, to support a rulemaking prohibiting utilities from engaging in discriminatory employment practices.<sup>257</sup>

As a result, FERC has been reluctant to consider public interest factors beyond encouraging market competitiveness in the transmission sector. When FERC issued Order

son, *Duke Energy Asks for South Carolina Rate Hike*, CHARLOTTE OBSERVER, (Mar. 19, 2013), <http://www.charlotteobserver.com/2013/03/19/3925116/duke-energy-asks-for-south-carolina.html>.

240. BIRD ET AL., *supra* note 180, at 30.

241. *FPC v. Texaco Inc.*, 417 U.S. 380, 399 (1974).

242. MICHAELS, *supra* note 21, at 8, 64.

243. 16 U.S.C. § 824j-1(c)(3) (2012).

244. *Iberdrola Renewables*, 137 FERC ¶ 61,185 (Dec. 7, 2011).

245. *See* 16 U.S.C. § 824(a) (2012).

246. *Id.*; *see also* 16 U.S.C. § 824a(a)-(c) (2012) (authorizing FERC to order interconnection so long as it is in the public interest); 16 U.S.C. § 824a-3(c) (1) (2012) (requiring cogeneration and small power producer rates must be in the public interest); 16 U.S.C. § 824a-4(a) (2012) (granting FERC authority to acquire transmission rights-of-way in North Dakota, South Dakota, and Nebraska, so long as it is in the public interest); 16 U.S.C. § 824c(a) (2012) (authorizing FERC to allow utilities to issue securities and assume liabilities so long as it is in the public interest); 16 U.S.C. § 824(i)(c)(1) (noting that interconnection orders must be in the public interest); 16 U.S.C. §§ 824j(a), 824j(d)(1) (2012) (authorizing FERC wheeling authority in the public interest); 16 U.S.C. § 824o (2012) (noting that Electric Reliability Organization (ERO) rules must be in the public interest); 16 U.S.C. § 824p(b)(3) (2012) (authorizing FERC transmission backstop authority so long as it is in the public interest); 16 U.S.C. § 824t(a)(1) (2012) (noting that FERC must have due regard for the public interest in prescribing electricity market transparency

rules); 16 U.S.C. § 824v(a) (2012) (granting FERC authority to establish electricity market manipulation rules in the public interest).

247. *NAACP v. FPC*, 425 U.S. 662, 664 (1976).

248. *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527 (2008) (citing *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)).

249. *Id.* at 530 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)).

250. 16 U.S.C. § 824e(a) (2012).

251. *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983) (noting that FERC was unaware of any case granting relief under the public interest standard).

252. *Ne. Utilities Serv. Co. v. FERC*, 55 F.3d 686, 692 (1st Cir. 1995) (ruling that FERC properly considered the public interest when finding that rates were based on an automatic rate-of-return-on-equity, as opposed to actual capital market conditions, for a nuclear power plant).

253. *ISO New England Inc.*, 143 FERC ¶ 61,150, at PP 182–83 (2013).

254. *NAACP v. FPC*, 425 U.S. 662, 671 (1976).

255. *Id.* at 664.

256. *Id.*

257. *Id.* at 663, 671.

No. 888, it rejected the Environmental Protection Agency's ("EPA") suggestion that FERC mitigate air pollution under its order by denying open access orders if the order would result in an adverse environmental impact.<sup>258</sup> In rejecting this proposal, FERC cited the technical difficulties in making such a determination,<sup>259</sup> the small benefits when compared to the costs of failing to remedy open access violations,<sup>260</sup> and its lack of authority to conduct such mitigation measures under the FPA.<sup>261</sup> On this last point, FERC claimed that it could not consider environmental impacts under the public interest standard because the FPA's focus on "just and reasonable rates" does not extend to environmental mitigation measures.<sup>262</sup>

The utility industry and its market regulators are reluctant to incorporate environmental impacts into electricity market design. Appropriately priced externalities, such as environmental pollution, should be enough to drive technological and planning changes in the transmission system. According to FERC, Congress has charged EPA with protecting the environment and FERC with regulating economic behavior in the electricity sector.<sup>263</sup> As such, any effort to mitigate environmental impacts would be *ultra vires*.<sup>264</sup>

This approach ignores FERC's authority to structure transmission markets and require practices to encourage environmental protection under supplemental statutes, such as the National Environmental Policy Act ("NEPA").<sup>265</sup> NEPA supplements agencies' existing statutory authority<sup>266</sup> and charges the federal government with the responsibility to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."<sup>267</sup> NEPA requires that agencies conform to this purpose,<sup>268</sup> but does not force agencies to avoid all negative environmental consequences.<sup>269</sup> NEPA instead requires an agency to "take a hard look" at environmental impacts.<sup>270</sup> Under NEPA, agencies must consider and disclose the environmental impacts of their actions before making decisions.<sup>271</sup> Agencies must prepare a "detailed statement," or an Environmental Impact Statement, for "major federal actions significantly affecting the quality of the human environment."<sup>272</sup> The Act directs agencies to examine a range of alternatives when considering such action and report on each alternative's environmental consequences.<sup>273</sup>

To the extent that FERC claims that it may not consider environmental impacts under the FPA public interest standard, this rationale is misguided. Such an interpretation would mean that Congress directed FERC to consider an action's environmental consequences on the one hand, and then forbade it, by implication, from considering that analysis when acting in the public interest. Although NEPA's policy goals are not enforceable by the courts,<sup>274</sup> FERC can act on its "hard look" at environmental consequences.<sup>275</sup> FERC may give some weight to environmental protection when acting in the public interest, and already does so when ensuring that energy projects are in the public interest.<sup>276</sup>

FERC's authority to consider environmental impacts as a factor in the public interest standard is even stronger when ordering open access on BPA's system under section 211a. BPA operates in a "complex statutory landscape."<sup>277</sup> Under the Northwest Power Act, BPA must operate its transmission system in a manner that provides "equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated."<sup>278</sup> Courts have recognized that this provision supplements the FPA to put power and fish protection on an equal footing.<sup>279</sup>

The Northwest Power Act also requires that FERC consider BPA's cost-of-service framework under the public interest standard. The power generated and transmitted on the System must be sold "at the lowest possible rates consistent with sound business principles," while "having regard" for production and transmission cost recovery and debt servicing<sup>280</sup> and giving preference to regional publically or cooperatively owned utilities.<sup>281</sup> Transmission rates for non-federal power must recover the costs associated with the acquisition, conservation, and transmission of electric power, including federal investment costs, in accordance with sound business principles.<sup>282</sup> Any transmission access and service for use out-

258. Order No. 888, 61 Fed. Reg. 21,540, 21,680 (May 10, 1996).

259. *Id.* at 21,681.

260. *Id.* at 21,682.

261. *Id.*

262. *Id.*

263. *Id.* at 21,689.

264. *Id.*

265. 42 U.S.C. § 4321 (2012).

266. 42 U.S.C. § 4335 (2012).

267. 42 U.S.C. § 4331 (2012).

268. 42 U.S.C. § 4333 (2012).

269. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

270. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2004).

271. 42 U.S.C. § 4332(2)(C) (2012).

272. *Id.*

273. 40 C.F.R. § 1508.9(b) (2013).

274. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

275. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2004).

276. FERC's website states that "[t]he Commission's public interest balancing gives appropriate weight to environmental protection measures, as reflected in conditions included in licenses and certificates." *Student's Corner: FERC and the Environment*, FED. ENERGY REGULATORY COMM'N, <http://www.ferc.gov/students/environment.asp> (last visited June 28, 2014). The FPA explicitly gives FERC this balancing authority when licensing hydroelectric projects. 16 U.S.C. § 797(e) (2012) (directing FERC to "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality") On the other hand, the Natural Gas Act, similar to section 211a, directs FERC to ensure new natural gas pipelines serve the public interest, which FERC has interpreted to include some "environmental considerations." See 15 U.S.C. § 717(a) (2012); *Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement)* 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,094 (2000), *order on clarification*, 92 FERC ¶ 61,094 (2000).

277. *Pac. Nw. Generating Co-op. v. Dep't of Energy*, 580 F.3d 792, 799 (9th Cir. 2009).

278. 16 U.S.C. § 839b(11)(A)(i) (2012).

279. See generally *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 473 (9th Cir. 1984); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1532 (9th Cir. 1997).

280. 16 U.S.C. § 838g (2012).

281. 16 U.S.C. § 825s (2012).

282. 16 U.S.C. § 839e(a)(1) (2012).

side the Pacific Northwest by non-federal generators are subject to existing legal obligations and any available capacity in the system.<sup>283</sup>

The public interest criteria in section 211a should be read *in pari materia*<sup>284</sup> with the Northwest Power Act's transmission cost and environmental impact considerations. As discussed, low-priced services and fish protection may be public interest criteria, but FERC does not consider these factors.<sup>285</sup> Under FERC's approach, BPA compliance with section 211a open access is not just another requirement but trumps any of BPA's other competing statutory requirements.

## VI. Proposed Solutions

FERC is unlikely to change its approach, but it has the authority to consider environmental impacts for an open access rulemaking or subsequent orders under section 211a. In the absence of FERC action, Congress could proceed with legislation to make clear that BPA public interest factors should be considered under section 211a.

Congress should also consider amending the Northwest Power Act. As discussed, the System's hydropower operations have played an important role in producing low-carbon electricity in the Pacific Northwest, but due to its size, the System can impact how electricity is produced across the United States.<sup>286</sup> As discussed, as hydropower output drops, regional natural gas use is expected to increase.<sup>287</sup> To remedy this potential environmental impact, Congress should also amend the Northwest Power Act to make national GHG reductions one of the System's main goals. Both of these legislative proposals are discussed below.

### A. Incorporating the BPA "Public Interest" Into Federal Power Act Section 211a

Congress could incorporate the BPA public interest into section 211a of the FPA in one of two ways. The first option changes the exemption definition. The exemption states that FERC "shall exempt from any rule or order under this section any unregulated transmitting utility that . . . (3) meets other criteria the Commission determines to be in the public interest."<sup>288</sup> Congress could amend the statute to direct FERC to consider whether open access is in the interest of the BPA system and consumers.<sup>289</sup> Congress may also want to amend section 211a enforcement authority. Section 211a now allows FERC to change rates using the same procedures under sec-

tions 205 and 206.<sup>290</sup> Once FERC finds an open access violation under section 205 procedures, the form and substance of the remedy under section 206 is left to FERC's discretion.<sup>291</sup> For example, FERC may adopt new rates or order utilities to file generally applicable transmission tariffs.<sup>292</sup>

Instead of relying on sections 205 and 206, Congress could direct FERC to use section 212, which authorizes orders requiring interconnection or wheeling.<sup>293</sup> This section already contains special provisions applicable to the System.<sup>294</sup> The section states that the "provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system."<sup>295</sup> The statute also states that rates be governed by applicable organic acts and the "just and reasonable" standard.<sup>296</sup> Congress could make several technical corrections to section 211a and section 212 to make clear that these provisions apply to section 211a.<sup>297</sup>

### B. Incorporating National Greenhouse Gas Reductions Into the BPA "Public Interest"

Amending section 211a would address consumer interests and fish protection, but it does not address the System's contribution to reducing GHG emissions. Congress has used the System's unique properties to promote national environmental and energy development goals in the past.<sup>298</sup> In 1980, Congress recognized that the System provided an opportunity to encourage renewable energy development and energy conservation within the Pacific Northwest and gave priority status to these energy sources in the Northwest Power Act.<sup>299</sup> Similar to the conservation and renewables development goals added decades ago, Congress should add an additional broad emission goal to reduce GHG emissions. Section 2 of the Northwest Power Act states that that the bill seeks "(1) to encourage, through the unique opportunity provided by the Federal Columbia River Power System—(A) conser-

290. 16 U.S.C. § 824j-1(f).

291. Order No. 888, 61 Fed. Reg. 21,540, 21,563 (May 10, 1996).

292. *Id.* at 21,563.

293. 16 U.S.C. § 824k (2012).

294. *Id.* § 824k(i).

295. *Id.* § 824k(i)(1)(i).

296. *Id.* § 824k(i)(1)(ii).

297. To make these changes, Congress should amend FPA section 211a, 16 U.S.C. § 824j-1, by changing subsection (f) "Application to unregulated transmitting utilities" to read, "FERC may order rate changes or order wheeling under section 824k of this title." Under FPA section 212, 16 U.S.C. § 824k, Congress should add section 211a to the list of provisions to be excluded in BPA ratemaking considerations. Section 212(i)(1)(ii) should be amended to read (changes in brackets), "[T]he rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not any provision of section 824i of this title, section 824j of this title, [section 824j-1 of this title], this section, or section 824l of this title, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission."

298. 16 U.S.C. § 839(1) (2012).

299. Pub. L. 96-501, § 2, 94 Stat. 2697 (1980) (codified as amended at 16 U.S.C. § 839(1)); *see also* stillummary on the Library on Congress website supports the sentence above the line. *le* as a summarye a modification to ly in th 96 CONG. REC. S14690-99 (1980) (statement of Sen. Jackson (D-WA)) (noting that the bill's "regional financing and priority status for conservation and renewable resources will enable the region to pursue the most aggressive and comprehensive conservation/renewable resource program in the Nation").

283. 16 U.S.C. §§ 839f(c)–(d) (2012).

284. A canon of statutory construction defined as "[l]oosely, in conjunction with." BLACK'S LAW DICTIONARY (9th ed. 2009).

285. *See Iberdrola Renewables, Inc.*, 137 FERC ¶ 61,185 (Dec. 7, 2011).

286. *Supra* Part III.

287. *Id.*

288. 16 U.S.C. § 824j-1(c) (2012).

289. For example, Congress could amend section 211a to add a fourth exemption that would read, "The Commission shall exempt from any rule or order under this section any unregulated transmitting utility that . . . (4) in the case of the Bonneville Power Administration, meets other criteria in the public interest as required by applicable Federal laws, including the Northwest Power Act."

vation and efficiency in the use of electric power, and (B) the development of renewable resources within the Pacific Northwest.”<sup>300</sup> Congress should add a third goal “(C) the reduction in national and global greenhouse gas and other air pollutant emissions.”

After establishing climate change reductions as a BPA goal, Congress should provide BPA and FERC with new authority to make operational changes based on GHG reductions. Congress should add a new section to the Northwest Power Act that provides BPA and FERC with authority to adopt rates or conditions that will result in national GHG reductions, even if such actions conflict with section 211a. This second change would tie climate change mitigation to the BPA public interest requirement and force BPA and FERC to consider, to the extent relevant, the impact open access orders could have on GHG emissions.

## VII. Conclusion

*Iberdrola Renewables* was the first time FERC used its section 211a open access authority. FERC ruled that BPA’s decision to block wind producers’ grid access was a clear section

211a violation.<sup>301</sup> Without considering BPA’s complicated operational constraints, FERC ruled that Bonneville had to give wind producers comparable transmission access or compensation for lost federal PTCs and state RECs.<sup>302</sup> Since the ruling, BPA has indicated that it cannot provide actual transmission access and will pay wind producers during over-generation events. This compensation scheme requires BPA consumers to pay a portion of lost federal PTCs and RECs from other states.<sup>303</sup>

Section 211a is not well suited to the Pacific Northwest. Section 211a grew out of efforts to encourage competition in private power markets,<sup>304</sup> not grid managers who must put power and fish protection on equal footing. Meanwhile, the System will continue to face complicated climate change, fish protection, and operational constraints.<sup>305</sup> Although FERC has the authority to consider environmental impacts under section 211a, Congress should amend section 211a. Under an amended section 211a, FERC would be required to consider fish and consumers, and, with additional changes to the Northwest Power Act, national GHG emissions.<sup>306</sup> This solution is narrow, but it protects BPA consumers from unfair prices and, potentially, future climate change impacts.

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300. 16 U.S.C. § 839(1).

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301. *See supra* Part I.

302. *Id.*

303. *Id.*

304. *See supra* Part II.

305. *Supra* Part III.A.

306. *Supra* Part IV.