

## GTH UPDATE Energy

### FERC ISSUES ORDER STRIKING DOWN BPA'S "ENVIRONMENTAL REDISPATCH" POLICY

DECEMBER 2011



On December 7, 2011, the 70th anniversary of the attack on Pearl Harbor, the Federal Energy Regulatory Commission ("FERC") issued an order striking down the Bonneville Power Administration's ("BPA") "Environmental Redispatch" policy, in which BPA required wind generators to curtail production during periods of high flows on the Columbia River.

Like the attack on Pearl Harbor, the order may mark the beginning of a long struggle, in this case to resolve difficulties arising from integration of variable renewable resources, like wind, into the Pacific Northwest's electric system.

BPA issued the Environmental Redispatch policy to prevent harm to fisheries from excessive dissolved gases caused by running water over dam spillways rather than through turbines. During periods of high river flows, Federal dams in the Columbia Basin produce huge amounts of power, often in excess of available demand, and obligations to protect fisheries from dissolved gases limit the extent to which BPA can direct water over spillways rather than through generators. In such circumstances, other generators are required to back down to maintain the balance between generation supply and load demand necessary for system reliability. Under the Environmental Redispatch policy, BPA required Northwest wind generators to curtail significant production from May to early July this year, producing significant losses to those generators from foregone power sales and foregone tax credits. In response, a group of wind generators filed a complaint at FERC in July, asserting that BPA's Environmental Redispatch policy improperly discriminated against wind generators in violation of Sections 210, 211A, and 212 of the Federal Power Act.

FERC's December 7<sup>th</sup> order concluded that the Environmental Redispatch policy violates the non-discrimination provisions of FPA Section 211A, often referred to as the "FERC Lite" provisions, which were added to the FPA in 2005. FERC did not address many of the more contentious issues raised in the wind producers' complaint, such as their proposal for negative pricing. Rather, it left these and other issues to be resolved by BPA and other regional interests, and ordered BPA to file a new tariff within 90 days that addresses FERC's

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The FERC order is notable for several reasons. Perhaps most importantly, it marks the first instance in which FERC has exercised its “FERC Lite” authority under Section 211A, which provides limited authority for FERC to impose transmission rules on BPA, other federal power marketing agencies, and other publicly-owned utilities, which are otherwise generally exempt from FERC jurisdiction. In addition, it invalidates one of BPA’s primary policy initiatives to address problems created by integration of the region’s rapidly-expanding wind generation fleet, sending the agency back to square one. Finally, the order points up difficult (possibly intractable) issues arising from attempts to reconcile the requirements of the FPA with many statutory obligations imposed on BPA arising from, for example, the Northwest Power Act, the Clean Water Act, and the Endangered Species Act.

Petitions for rehearing of the FERC order are due January 6, 2012. FERC must file a tariff complying with the FERC order in March 2012. BPA will likely initiate an administrative process to address the tariff changes required by the FERC order.

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The attorneys at Gordon Thomas Honeywell have extensive experience in all areas of the energy and utility industries, including regulatory matters, project development, renewable energy, power purchase agreements, REC purchase agreements, transmission, taxation, municipal law, cooperative law, public records requests and general operations.

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