

Case Study: Iberdrola Renewables V. Bonneville Power

Law360, New York (December 16, 2011, 2:42 PM ET) -- On Dec. 7, 2011, the Federal Energy Regulatory Commission issued an order exercising its authority under Section 211A of the Federal Power Act against an otherwise nonjurisdictional entity, but one with a broad statutory mandate, in *Iberdrola Renewables Inc., et al. v. Bonneville Power Administration*, 137 FERC ¶ 61,185 (2011). The broad statutory mandate of the Bonneville Power Administration presented unique issues not previously addressed by the commission.

In *Iberdrola*, the commission directs Bonneville to file an Open Access Transmission Tariff that provides transmission service to third parties on terms and conditions that are not unduly discriminatory or preferential compared to the service Bonneville provides itself. The commission leaves it to Bonneville, however, to determine how it will revise its tariff and recommends that Bonneville work with the petitioners and other parties to craft a solution.

Jurisdictional Implications

Iberdrola marks a significant statement by FERC of its jurisdiction under Section 211A. By directing Bonneville to file a revised tariff, the commission found that the other statutes empowering Bonneville do not supersede Bonneville's obligation under Section 211A to provide service on a not unduly discriminatory basis.

The commission also implicitly rejects Bonneville's argument that Bonneville's Environmental Redispatch Policy, the impetus for the complaint, constitutes a final action subject only to review by the Ninth Circuit. By doing so, FERC treats Section 211A as a matter solely subject to its own jurisdiction. The commission also chose to go forward with the proceeding despite a pending case before the Ninth Circuit regarding the Environmental Redispatch Policy, despite calls from some intervenors to wait.

Environmental Redispatch Policy

Beyond the jurisdictional concerns, *Iberdrola* focuses on the impacts of Bonneville's Environmental Redispatch Policy. The Environmental Redispatch Policy is meant to address the periodic problem of excess water supply upstream of hydroelectric facilities that Bonneville, for environmental reasons, must put through the facilities, thereby generating excess energy.

Under the Environmental Redispatch Policy at issue, Bonneville instituted a procedure to use this excess energy by curtailing first thermal generators, then wind generators, delivering power from hydro facilities to customers instead. The petitioners in Iberdrola were wind generators that complained because, while their customers still received power, the generators and customers lost out on potential federal tax credits and risked not meeting renewable portfolio standard requirements due to the change in supply source.

Petitioners claimed that Bonneville's actions constituted a taking of their firm transportation rights in favor of Bonneville's preferred generation, which was unduly discriminatory. The petitioners were supported by the Public Utility Commission of Oregon as well as some members of Congress, an atypical departure from the often uniform regional support of Bonneville.

FERC Directives

FERC's main explicit directive in Iberdrola is to direct Bonneville to file revised tariff provisions that are not unduly discriminatory, but the order has a number of relevant findings and implications.

First, FERC found that wind and other generators were similarly situated to the federal hydropower generators because all of those parties receive firm transmission service from Bonneville. Thus, interrupting nonfederal customers without interrupting federal customers constitutes undue discrimination because Bonneville was not providing service to others comparable to the service it provides itself. A key implication of this holding is that FERC rejected Bonneville's arguments that it had explored all of the alternatives in creating the Environmental Redispatch Policy and that the other measures Bonneville determined to take prior to interrupting service were sufficient to avoid undue discrimination.

The commission declined at this point, however, to direct Bonneville to rectify the problem in any particular way, such as by paying negative prices to thermal and wind generators to curtail their resources. Instead, the commission will let Bonneville have the first opportunity to craft revised tariff provisions.

FERC's order also rejected Bonneville's claim that its Large Generator Interconnection Agreement (LGIA) supported the Environmental Redispatch Policy. FERC found that the LGIA requires Bonneville to comply with its statutory and regulatory obligations, including the obligation under Section 211A to provide comparable transmission service on a not unduly discriminatory or preferential basis.

This holding reinforces the concept that Section 211A stands on equal footing to the other statutes that govern Bonneville's actions and obligations. FERC held that environmental redispatch does not constitute force majeure under the LGIA either, which blocks an alternate patch for Bonneville to keep the current policy in place.

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