NO. 25-4278

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NW ENERGY COALITION, IDAHO CONSERVATION LEAGUE, MONTANA ENVIRONMENTAL INFORMATION CENTER, OREGON CITIZENS' UTILITY BOARD, and SIERRA CLUB,

Petitioners,

v.

THE BONNEVILLE POWER ADMINISTRATION,

Respondent.

PETITIONERS' OPENING BRIEF

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LIST OF ACRONYMS

APA	Administrative Power Act
BPA	Bonneville Power Administration
CAISO	California Independent System Operator
CEQ	Council on Environmental Quality
CRITFC	Columbia River Inter-Tribal Fish Commission
CTUIR	Confederated Tribes of the Umatilla Indian Reservation
DAM	Day-Ahead Market
EA	Environmental Assessment
EDAM	Extended Day Ahead Market
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
GHG	Greenhouse gas
NEPA	National Environmental Policy Act
ROD	Record of Decision
SPP	Southwest Power Pool
TWh	Terawatt hour
WEIM	Western Energy Imbalance Market

INTRODUCTION

This petition seeks review of the Day-Ahead Market Policy ("DAM Policy") and Record of Decision ("ROD") by the Bonneville Power Administration ("BPA" or "Bonneville"), issued on May 9, 2025. In its DAM Policy and ROD, Bonneville made a final decision to join a "day-ahead electricity market" called Markets+. Day-ahead electricity markets allow producers and consumers of electricity within a defined region to purchase energy on a 24-hour advance basis. Because Bonneville controls the majority of the transmission grid in the Pacific Northwest, and produces much of the region's power, its decision to join Markets+ will have significant implications for how power in the Western United States is generated, how it moves, and how much it costs.

Petitioners raise two claims. First, in adopting its DAM Policy and ROD, Bonneville violated the Pacific Northwest Power Planning and Conservation Act ("Power Act"). The Act requires Bonneville, when entering into energy markets like this one, to ensure that its actions are consistent with the Northwest Power Plan, a regional energy plan crafted pursuant to the Act. That plan, in turn, requires that Bonneville prioritize the most "cost-effective" resource and give "due consideration" to the environmental consequences of its proposal. But Bonneville made no effort to ensure that its decision was consistent with the plan, nor is it. To the contrary, choosing Markets+ will increase Bonneville's costs and power costs

for the region by cumulatively billions of dollars compared to other choices available to the agency, and will have adverse environmental effects that were not considered. As such, Bonneville's decision is unlawful under the Power Act, and arbitrary and capricious in violation of the Administrative Procedure Act ("APA").

Second, Bonneville violated the National Environmental Policy Act ("NEPA") when it concluded that it did not need to consider the environmental impacts of this decision. NEPA requires agencies to "look before they leap" by considering and disclosing the environmental impacts of their actions. Extensive record evidence reveals that Bonneville's choice of Markets+ would have significant environmental effects, such as causing harm to endangered salmon, increasing the amount of coal-power generated in the West, and undermining the transition to renewable power. These significant effects required review pursuant to NEPA. But Bonneville disclaimed any responsibility for complying with the statute, cursorily concluding that its decision would have no environmental effects. This violated NEPA and was arbitrary and capricious in violation of the APA.

In announcing its decision to join Markets+, Bonneville characterized the decision as "momentous." On this much, Petitioners agree. But such a "momentous" decision requires careful and rational consideration in light of the requirements of the Power Act, and compliance with environmental disclosure standards under NEPA considering the evidentiary record. Bonneville's DAM

Policy and ROD fail to meet these basic standards. The Court should find the DAM Policy and ROD arbitrary, capricious and contrary to law, vacate them, and remand them to Bonneville for legally adequate consideration.

JURISDICTIONAL STATEMENT

Bonneville's DAM Policy and ROD constitute final agency action as defined by the APA and the Power Act, respectively. 5 U.S.C. § 704, 16 U.S.C. § 839f(e). This Court has jurisdiction under 16 U.S.C. § 839f(e)(5), which provides "the United States court of appeals" with exclusive jurisdiction over "[s]uits to challenge…any…final actions and decisions taken pursuant to this chapter by [Bonneville]." "We have interpreted § 839f(e)(5)'s judicial review provision with a broad view of this Court's jurisdiction." *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 678 (9th Cir. 2007) (internal quotation omitted). Venue is properly vested in this Court as the actions giving rise to the claims occurred in this Circuit. 16 U.S.C. § 839f(e)(5).

QUESTIONS PRESENTED

1. Did Bonneville's decision to join Markets+, embodied in its DAM Policy and ROD, violate the Power Act?
2. Did Bonneville's decision to join Markets+, embodied in its DAM Policy and ROD, violate NEPA?

3. Should this Court vacate the DAM Policy and ROD, and order Bonneville to prepare an environmental impact statement?

STANDARD OF REVIEW

This court's review of Bonneville's actions is governed by the APA. 5 U.S.C. § 706. *See* 16 U.S.C. § 839f(e)(2) (incorporating scope of review provisions of the APA); *Portland Gen. Elec. Co. v. Bonneville Power Admin*., 501 F.3d 1009, 1025 (9th Cir. 2007). Under the APA, this Court determines whether the agency's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a); *Pub. Power Council, Inc. v. Bonneville Power Admin.*, 442 F.3d 1204, 1209 (9th Cir. 2006). To apply this standard, this Court does not "substitute [its] judgment" for the agency's but nonetheless performs a "searching and careful" review. *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin*., 126 F.3d 1158, 1180 (9th Cir. 1997). This "arbitrary and capricious" standard also applies to Petitioners' NEPA challenge. *Nw. Env't Def. Ctr. v. Bonneville Power Admin.,* 117 F.3d 1520, 1536 (9th Cir. 1997). However, "[w]here an agency's decision not to prepare an EIS turns on a threshold legal question regarding NEPA applicability, rather than a predominantly factual or technical decision, we review under a standard of 'reasonableness.'" *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1084 (9th Cir. 2020).

As for Petitioners' claims that Bonneville's actions were contrary to law, this court "review[s] the construction of a statute *de novo* as a question of law…." *Nw. Env't Def. Ctr*., 117 F.3d at 1530. Bonneville's interpretation of the statute is not entitled to deference. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 387 (2024) ("the interpretation of the meaning of statutes, as applied to justiciable controversies" is "exclusively a judicial function.").

STATEMENT OF THE CASE

Bonneville is a federal energy marketing agency within the U.S. Department of Energy. It markets about one-third of the power generated in the Pacific Northwest, from a series of federally-owned hydroelectric dams in the Columbia Basin and a nuclear power plant in Southeast Washington. 12-ER-3399. Bonneville also owns, operates and maintains more 15,000 circuit miles of the Northwest's high voltage transmission grid. 1-ER-4-98. It sells the bulk of this power at low cost to public power utilities in the region, which are Bonneville's "preference customers." 12-ER-3399; *see* 16 U.S.C. 832c(a). It also sells power at discounted rates to investor-owned utilities like PacifiCorp and Portland General Electric, and to some industrial customers. 12-ER-3399; *see* 16 U.S.C. § 839c(b)(1). In addition, Bonneville engages in bilateral trading within and outside its service area as needed to balance its load and meet demand. 1-ER-11.

As a balancing authority and transmission operator, Bonneville is tasked with "operating the electric grid in a reliable manner[,]" which may include balancing load through real-time and day-ahead power trading, including with utilities outside its service territory. 1-ER-11. If Bonneville generates power that exceeds the needs of its power customers, it sells this surplus power. It also purchases power from out-of-region producers to meet demand as needed. Bonneville's power purchases and sales of surplus power defray its overall operating costs, thereby enabling it to provide cheaper power to the region. 16-ER-4611.

I. AN OVERVIEW OF REGIONAL DAY-AHEAD ELECTRICITY MARKETS IN THE WEST.

Regional energy markets provide an organized way to facilitate buying and selling electricity across a wider region. 1-ER-10-11. They can help lower costs for consumers, provide more access to renewable energy sources, and enable participants to ensure a stable and reliable energy supply without having to construct new generating resources. 1-ER-10-12.

Historically, entities within the Western Interconnection have managed and balanced electricity supply and demand through bilateral transactions of varying duration.[1] 1-ER-8. Bonneville has long participated in bilateral energy trading

[1] The Western Interconnection is the largest region of the U.S. Bulk Electric

within and outside its service area. *Id.* However, bilateral trading can be less efficient than trading through an organized market. *See* 1-ER-8-13.

More recently, Bonneville has participated in real-time trading through the Western Energy Imbalance Market ("WEIM"), operated by the California Independent System Operator ("CAISO").[2] *See* 1-ER-8-10. The WEIM enables real-time balancing of supply and demand across a broad footprint of participants on an hourly basis. 1-ER-8-9. Since it joined the WEIM in 2022, Bonneville has seen "over $98.11 million in gross benefits to its customers." 5-ER-1216. By decreasing power costs, these savings ultimately get passed down to individual electricity consumers. *See* 16-ER-4611; *see also generally* Decl. of Bob Jenks at ¶¶ 12-22 (explaining how power costs are integrated into utility rates).

A. Two Day-Ahead Markets Develop in the West.

Building upon the success of the WEIM, western entities are developing "day-ahead" trading market options. The purpose of day-ahead markets is to encourage and facilitate the trade of electric power within the market on both a day-ahead and a real-time basis, with the goal of dispatching the most economic generation resources to serve load. *See* 1-ER-8.

System. 1-ER-8. It encompasses 38 Balancing Authority Areas that are individually responsible for ensuring the reliable operation of the electric grid. *Id.*

[2] CAISO is a regional transmission organization that manages the high-voltage transmission system for most of California and a small part of Nevada.

In recent years, two day-ahead markets have developed in the West: (1) the Extended Day Ahead Market ("EDAM"), operated by CAISO; and (2) Markets+, developed by the Southwest Power Pool ("SPP"), a private entity headquartered in Arkansas. The Federal Energy Regulatory Commission ("FERC") has approved the formation of both markets. 1-ER-47.

Governance of each of these markets operates differently. CAISO has formed an independent governing body to operate EDAM called the Western Energy Markets Governing Body. 1-ER-45. Members of this governing body are nominated by and represent a range of "stakeholder sectors" beyond just the participating utilities. *Id.* The CAISO Board of Governors reviews decisions by this governing body, and in the event of a disagreement, CAISO will prepare two filings that represent their different perspectives and file both with FERC. 1-ER-45. Further, CAISO and western stakeholders are working to revise EDAM's governance model to create an independent nonprofit entity, controlled by WEIM and EDAM stakeholders, that would govern and assume primary authority over EDAM. *See* 1-ER-45, 86-88.

Markets+ is governed by a five-member panel of utility experts, the Markets+ Independent Panel. 15-ER-4320-22. Markets+ participants (including Bonneville) cannot serve on this governing board but do have a role in electing its members. *See id.* "The SPP Board of Directors retains authority for specific

financial oversight of Markets+." 1-ER-45. "The SPP Board of Directors will review and consider [d]ecisions of the [Markets Independent Panel], …that have a material adverse effect on SPP[.]" 15-ER-4305. This means that SPP retains veto authority over financial decisions relating to Markets+ that could affect its interests.

B. Benefits and Drawbacks of Day-Ahead Market Participation.

The larger and more contiguous the geographic "footprint" of a day-ahead market, and the greater the diversity of generating resources within that footprint, the greater the benefit of market participation through lowered energy trading costs and broader energy purchase and sales opportunities. *See* 1-ER-229 ("Bonneville acknowledges that the size and connectivity of a day-ahead market footprint factors into the magnitude of benefits…"). The market footprint constitutes the "load, generation, and transmission" included in the market. 1-ER-21. A larger footprint enables operating flexibility to help manage reliability risks. 15-ER-4522. Conversely, a fragmented footprint can increase reliability risks by making exchanges less efficient, and more expensive by reducing competition. 16-ER-4526, 2-ER-462.

A significant issue when evaluating participation in a day-ahead market is the creation of operational or commercial "seams" between participants who choose different market footprints, either Markets+ or EDAM. *See* 1-ER-65. Day-

ahead markets adopt policies and rules that encourage internal trading, and these rules can make it more expensive and difficult to trade outside the market, i.e. across a seam. While not physical barriers to trade, seams occur at the boundaries of a day-ahead market where electricity must be transmitted across those boundaries to reach its buyer or seller. *See* 1-ER-65-66. Managing these "new operational seams in the Western Interconnection" will require the negotiation of agreements to allow for trade across seams. *Id*.

Minimizing seams reduces cost, encourages competition, and improves reliability. 2-ER-461-64. Creation of market seams in the West through the bifurcation of the western grid into two separate day-ahead markets would adversely affect the reliability of the grid and increase the risk of blackouts during extreme weather events. 16-ER-4536 ("We show that larger footprints for a single ISO/RTO create larger reliability benefits during extreme events.").

II. BONNEVILLE MADE A FINANCIAL COMMITMENT TO MARKETS+ BEFORE ISSUING ITS DRAFT DAY-AHEAD MARKET POLICY.

In February 2025, before issuing its draft day-ahead market policy, Bonneville entered into a binding contract with SPP to help secure financing for implementation and development of Markets+ ("Phase II Agreement"). 2-ER-360-94. In the Phase II Agreement, signatory utilities promise to provide collateral that will enable SPP to obtain a bank loan to pay for market development costs. 2-ER-

362-63. If all goes well, SPP expects to repay this loan with revenue generated by rates charged to utilities that participate in the market after it is in operation. *See id.*

By signing, Bonneville agreed to pay a rate to SPP once Markets+ goes live and until SPP recovers its financing costs. Once Markets+ goes live, "[f]inancing will be paid down through amounts billed and collected from all Markets+ market participants at the applicable rate pursuant to the Markets+ Tariff Schedule 1-B[.]" 2-ER-373-74 (Phase II Agreement § 1(c)). Signatory market participants, including Bonneville, agreed to be charged rates "through Schedule 1-B of the Markets+ Tariff for repayment of the financing." 2-ER-362-63. Schedule 1-B requires that "Market Participants must purchase" market operator services from Markets+ to recover "100% of its costs for the fiscal year in which services are provided…" 15-ER-4297. In other words, Bonneville bound itself to participate in Markets+ even before it completed the decision-making process about whether and which day-ahead market it would participate in.

As consideration for signing the Phase II Agreement, Bonneville provided SPP a letter of assurance which guarantees Bonneville will be financially responsible for up to $40 million in market development costs. 2-ER-392-94 (describing Bonneville's Phase 2 obligation as $40 million); 15-ER-4324 ("Bonneville is responsible for the Phase 2 Obligations attributable to it[.]"). Bonneville guaranteed that "[o]bligations payable by Bonneville under the [Phase

II] Agreement and other operating and maintenance expenses have priority over payments by Bonneville to the U.S. Treasury." 15-ER-4325.

If Bonneville withdraws from Markets+, it becomes liable for up to the full $40 million it committed. If "a Funding Participant wishes to withdraw from the Agreement, the Funding Participant must pay its Phase 2 Obligation to SPP." 2-ER-365-66. In its order approving the Markets+ tariff, FERC found that the Phase II agreement "requires a Funding Participant to pay its Phase 2 Obligations in the event it decides to withdraw from the Funding Agreement[.]" 16-ER-4511.

In its Day-Ahead ROD, Bonneville states that its "decision to fund market development did not obligate Bonneville to actually join or otherwise participate in Markets+." 1-ER-252. While technically accurate in the sense that a party can always breach a contract, if Bonneville does not join Markets+ after it begins to operate, it would forfeit its $40 million Phase II funding commitment.

III. STAKEHOLDERS OBJECTED TO BONNEVILLE'S PROPOSAL TO JOIN MARKETS+ BECAUSE OF COSTS AND ENVIRONMENTAL IMPACTS.

Starting in 2023, Bonneville convened a series of workshops to consider the benefits and drawbacks of day-ahead market participation versus remaining in the WEIM, and the specific design and structure of Markets+ and EDAM. 1-ER-13-15. On March 6, 2025, Bonneville posted a draft policy proposing to move ahead with participation in Markets+, rather than join EDAM or remain in the WEIM. 1-

ER-6. Bonneville's draft proposal to join Markets+ triggered a chorus of concerns and objections from a broad array of stakeholders.

A. Bonneville's Choice of Markets+ Will Have Significant Cost Implications.

The first set of concerns focused on the high costs of joining Markets+ compared to either EDAM or remaining in the WEIM. State agencies from Washington and Oregon voiced grave concerns regarding the potential costs to the region, finding that joining Markets+ and foregoing EDAM resulted in a cumulative loss of $4.4 billion to the region. 16-ER-4688. Additionally, Bonneville's decision would increase costs and pose "potential unprecedented reliability challenges for the region" due to the creation of market seams, which inhibit power trading and make it more expensive. 16-ER-4691. Four U.S. Senators from Oregon and Washington, more than once, urged Bonneville to delay its final decision to allow day-ahead markets to fully develop in the West given that "BPA's participation in a day-ahead market will have significant, complex, and long-term consequences for electricity affordability and reliability in the Pacific Northwest." 4-ER-1176, 6-ER-1691-93.

The two largest investor-owned utilities in Oregon—PacifiCorp and Portland General Electric—raised concern that Bonneville's "expressed preference for Markets+ governance and market design" did not outweigh "the significantly reduced economic advantages when compared to EDAM participation." 5-ER-

1218. Bonneville's second largest power customer, and eighth largest transmission customer, Seattle City Light, urged Bonneville to delay participation in a day-ahead market until Bonneville could show that market participation "will result in positive benefits to its customers[.]" 5-ER-1262. Power producers urged Bonneville to wait until legislative efforts to amend EDAM's governance structure were resolved, given the potential impacts to transmission customers. 4-ER-1114-31, 5-ER-1238-61.

B. Bonneville's Choice of a Day-Ahead Market Will Have Significant Environmental Impacts.

Commenters also highlighted the significant environmental impacts that would arise from the choice of day-ahead markets. Choosing Markets+ over EDAM would mean an increase in fossil-fuel generated power, with its attendant air, water, and other forms of pollution. 2-ER-347-48, 14-ER-4094 (predicting "reduced fossil fuel generation" under EDAM as compared to Markets+). Petitioners submitted an expert report prepared by the Brattle Group that modeled anticipated greenhouse gas ("GHG") emissions based on the different power purchases and sales that would occur in the Western Interconnection under different day-ahead market scenarios. The study found that Bonneville's proposed decision to join Markets+ would *increase* annual GHG emissions from the Western grid by 4 million metric tons annually because of "gas-to-coal switching" in

predicted Markets+ trading. 2-ER-501. That's roughly equivalent to the GHG emissions of an average U.S. coal-fired power plant. 2-ER-349.

Likewise, Washington and Oregon's regulatory agencies and utility commissions offered in-depth analysis explaining how market choice could change the distribution of power among states that price GHG emissions, and thereby increase high-emitting power generation in other places, frustrating state policies and increasing GHG emissions overall. 5-ER-1207, 4-ER-1139 ("BPA's decision…will cause reasonably foreseeable differences in GHG emissions and related pollutants for the entire western region"). Senators from Washington and Oregon similarly highlighted the "profound and lasting impacts" that Bonneville's decision would have on GHG emissions and the state's clean energy policies. 4-ER-1177. So did the states' governors. 4-ER-1174 ("[O]ur administrations have a strong commitment to achieving a clean energy transition and meeting our individual state climate goals.").

Increased coal-fired generation, of course, means increased air and water pollution, the subject of additional extensive discussion in the record. *See, e.g.*, 2-ER-349 ("[i]ncreased generation of electric power from coal-fired power plants will cause additional significant adverse environmental impacts"); 4-ER-1139 ("the level of GHG emissions is directly tied to the levels of other air pollutants regulated under the Clean Air Act, Clean Water Act, and other statutes."). For

example, the record provides extensive detail on how increased coal-fired power means increased hazardous air emissions, 3-ER-695-737, death and disease from air pollution, 3-ER-672-73, increased reliance on hazardous coal ash waste dumps which contaminate groundwater, 3-ER-743-89, and hazardous waste cleanups, 3-ER-812-92, 4-ER-894-98.

Further, the choice of day-ahead market would also significantly impact the deployment of renewable energy throughout the West. 14-ER-4035. Specifically, participating in EDAM would allow better deployment of "surplus renewable energy from areas of over-supply," reducing curtailment of clean and renewable energy by "almost 2.5 TWh, almost all from solar resources in California, which allows less reliance on fossil generation with associated cost savings and emissions reduction." *Id.*; *see also* 14-ER-4059 ("EDAM drives a reduction in gas generation," mostly driven by "an increase in solar and wind production").[3] Other commenters discussed how the choice of day-ahead markets would impact the stability of the regional grid, which could have dramatic environmental and social impacts of its own. 16-ER-4515-42, 2-ER-351.

Lastly, Native American Tribes in the Columbia Basin highlighted how Bonneville's choice of a day-ahead market would have "lasting implications" for

[3] A terawatt hour ("TWh") is an amount of energy equivalent to one million megawatt hours.

salmon and steelhead impacted by the federal Columbia River hydrosystem. The Columbia River Inter-Tribal Fish Commission ("CRITFC"), representing the basin's Treaty Tribes, was blunt:

> BPA must thoroughly evaluate potential implications of its decision to tribal and treaty resources. This includes the effects that market participation may have on management of federal power system, its operations, their consistency with currently negotiated fish operations, and the ability to improve those operations as needed for fish. Without adequate fish operation protections, *market commitments could make salmon survival worse*.

2-ER-315 (emphasis added). CRITFC supported its concerns with a detailed analysis of how hydrosystem operations impact salmon survival, and documented concerns with Bonneville's process for choosing a day-ahead market. 2-ER-322-33. Conversely, regional energy markets "if used correctly, they can help take some pressure off the hydro system." 2-ER-315.

The Yakama Nation expressed concern about Bonneville's "rush to judgment" its lack of consultation with the Tribe. 5-ER-1399-1400. They pointed to modeling showing that the changes to dam operation resulting from market participation "would have implications for water temperature increases, delayed salmon migrations, treaty fisheries and spill operations[.]" 5-ER-1403-4.

The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") echoed this theme in an "urgent request," expressing "significant concerns" that the choice of "[m]arket participation poses potential risks to the protection of our

natural and cultural resources." 2-ER-319-20 ("the Market's operational framework may alter dam operations, including spill rates critical to fish passage"); 2-ER-326 (discussing modeling showing that river flows could drop to zero). CTUIR expressed concern that "[a]ny reduction in spill or change in water management could directly impact salmon populations-species that are central to CTUIR's culture, economy, and identity" 1-ER-320, 1-ER-218; *see also* 4-ER-1138 (market choice "could lead BPA to alter hydropower operations with consequent impacts on fish, wildlife, and tribal obligations").

IV. BONNEVILLE CHOOSES TO PARTICIPATE IN MARKETS+ IN ITS DAM POLICY & ROD.

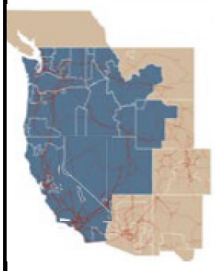
On May 9, 2025, Bonneville issued its DAM Policy and ROD, adopting the policy position it proposed in its draft—participation in Markets+. 1-ER-6. Even though production cost modeling showed that joining EDAM or remaining in the WEIM provided the greatest financial benefit to Bonneville's system, Bonneville dismissed the benefits of that analysis. Instead, Bonneville favored Markets+ because of its "superior" governance structure. *Id*.

In its final decision, Bonneville discussed three alternatives: staying in the WEIM and not committing to a day-ahead market, participating in Markets+, and participating in EDAM. 1-ER-19. Bonneville "analyze[d] economic costs and benefits" of each of these alternatives, *id*., based on the costs to generate power,

costs and revenues from operating its transmission system, costs to serve load, and revenue from power sales, *see* 1-ER-23-39.

Bonneville's production cost modeling considered six possible market footprints but focused on two that best represented Markets+ (referred to as Alt Split 4A) and EDAM (referred to as Alt Split 2NV), based on expressed commitments to market participation by other regional entities.[4] 1-ER-28-29. Table 3 below, 1-ER-29, is a geographic representation of these alternatives, with blue representing EDAM and tan representing Markets+.

Table 3 | Updated footprints for additional E3 studies

Alternative Split 2NV	Alternative Split 4A
 **EDAM:** California, PacifiCorp, NV Energy & all Pacific Northwest BAAs **Markets+:** BAAs located in the Desert Southwest and Rockies	 **EDAM**: California, PacifiCorp, NV Energy, Idaho Power, Portland General Electric, Seattle City Light **Markets+:** Rest of US WECC and British Columbia ***Reflects current day-ahead market declarations & leanings***

Bonneville also considered a third scenario—Bonneville does not join a day-ahead market but instead remains in the WEIM, and two day-ahead markets develop in the West, consistent with the footprints of the Alt Split 4A scenario. 1-

[4] Production cost modeling is a detailed financial analysis of future market operations that evaluates and optimizes loads, resources and transmission, to determine anticipated costs and dispatch of power. 1-ER-21. "Production cost modeling (PCM) is a best practice utilized throughout the electric industry to inform important investment and resource decisions[.]" 5-ER-1287.

ER-28-30. This scenario was important for comparing the value of joining Markets+, versus remaining in the WEIM while other entities join day-ahead markets.

Based on this modeling, Bonneville concluded that "footprint is a primary driver of results." 1-ER-33. In the scenario where Bonneville joins Markets+ (Alt Split 4A), "[g]eographically, Markets+ is divided into two regional areas[,]" the Pacific Northwest and the Desert Southwest. 1-ER-34. Power transfers between these regions will be difficult because of the limited transmission that connects the two. *See* 1-ER-92-93 (noting that real-time transfers between these regions will be limited). In contrast, if Bonneville joints EDAM (Alt Split 2NV), "each market maintains contiguous transmission connectivity." 1-ER-34. Overall, the results of Bonneville's production cost modeling showed that "[p]articipation in the EDAM market produces the highest net cost benefit in the cases studied." 1-ER-19.

Nevertheless, ultimately Bonneville decided to join Markets+ because of its "superior governance and stakeholder process and [] superior design[.]" 1-ER-61. Notwithstanding the consistent findings of its own economic analysis, and that of the many stakeholders, Bonneville asserted that it "believes [Markets+] has the potential to offer financial benefits that are greater than business as usual." *Id.* With regard to its third alternative, WEIM-only participation, Bonneville discounted this option, stating that it "sees participation in a day-ahead market as

an important step in maintaining access to trading partners to continue meeting obligations and marketing surplus to maintain low rates for customers." *Id.*

V. BONNEVILLE'S DAM POLICY AND ROD REQUIRE AMENDING ITS FINANCIAL AGREEMENTS AND CHANGING HOW RESOURCES DISPATCH WITHIN THE FOOTPRINT OF ITS BALANCING AUTHORITY.

Bonneville characterized its decision as a "[p]olicy direction to join Markets+[.]" 1-ER-61. This decision requires Bonneville to revise its contracts, rates and tariffs with its customers and business partners. 1-ER-251. For example, Bonneville will amend its "Provider of Choice Contracts" with its customers to include contractual provisions that align with Bonneville's choice of Markets+ and provide for recovery of the Markets+ tariff. 1-ER-68-69.

Every resource above a certain size in Bonneville's balancing authority area will be subject to the Markets+ tariff and rules. 1-ER-61. As Bonneville explained, its "policy direction to join Markets+ impacts all generation and load in the Bonneville [balancing authority area] to some degree." 1-ER-61.

Bonneville's participation in Markets+ would also change how transmission rights are allocated. In Markets+, "Participants' transmission right are considered 'all in' for market use unless specifically opted out." 6-ER-1757. Parties holding firm transmission rights still have control over how those rights are used, but must specifically choose to opt-out of the day-ahead market if the anticipated use of those rights will not meet their needs with attendant transmission and financial

consequences. *See* 1-ER-69-71. Bonneville's decision to move ahead with participation in Markets+ would also change the availability of the short-term transmission products it offers. *See* 1-ER-70-71. Bonneville may restrict the availability of these products to utilities in its balancing authority that participate in a different day-ahead market than Bonneville. *Id*.

SUMMARY OF ARGUMENT

Under the Power Act, a decision to participate in an interregional exchange of power must be consistent with the Northwest Power Plan, which requires Bonneville to prioritize the most cost-effective resource, and give "due consideration" to environmental quality, particularly impacts to fish and wildlife, and compatibility with the regional power system. *See* 16 U.S.C. § 839d(l)(3), § 839b(e). Here, however, Bonneville chose to join Markets+ without ensuring its decision is consistent with the Plan. Bonneville failed to prioritize the most cost-effective alternative, EDAM. Instead, it chose to join Markets+ even though doing so would cause Bonneville substantial losses and would increase power costs for the entire Pacific Northwest. This arbitrary decision violated the Power Act's mandate to keep power affordable.

Nor did Bonneville consider how its decision could affect the environment, as required by both the Power Act and NEPA. As the administrative record makes clear, Bonneville's DAM Policy & ROD will change how power is generated and

moved across West. It will increase coal-generation across the Western Interconnection and undercut reliance on clean energy. Further, it will change how and when its hydroelectric dams generate power, harming endangered salmon. By failing to consider and disclose environmental impacts, such as these, before reaching its decision, Bonneville violated NEPA and the Power Act. This Court should find Bonneville's actions unlawful and vacate them.

ARGUMENT

I. BONNEVILLE'S DAY-AHEAD MARKET POLICY IS A FINAL AGENCY ACTION.

An agency's action is final and subject to review when it represents the culmination of agency decision making, and either determines rights, sets obligations or has legal consequences. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). In applying this test, the Court looks to whether "the action amounts to a definitive statement of the agency's position, whether it has a direct and immediate effect on the day-to-day operations of the subject party, and if immediate compliance is expected." *Prutehi Litekyan: Save Ritidian v. U.S. Dep't of Airforce*, 128 F.4th 1089, 1108 (9th Cir. 2025) (internal quotation omitted). This "finality" element should be flexibly and pragmatically interpreted. *Id.*

An agency policy document constitutes final agency action when it binds agency staff and requires them to undertake certain actions, for example, by forbidding them to continue implementing a program or directing them to

implement a new one. *See Biden v. Texas*, 597 U.S. 785, 808-09 (2022). Further, "a federal agency's assessment, plan, or decision qualifies as final agency action even if the ultimate impact of that action rests on some other occurrence[.]" *Prutehi Litekyan,* 128 F.4th at 1110. An agency action can be final "even if its legal or practical effects are contingent on a future event." *Id.* (internal quotation omitted).

Bonneville's DAM Policy and ROD easily meets this standard. This decision is the culmination of Bonneville's decision making regarding whether to join a day-ahead market, and what day-ahead market Bonneville will participate in. Bonneville states that it is adopting its policy "[a]fter careful consideration of public input on Bonneville's evaluation principles and key considerations[.]" 1-ER-06. Bonneville explains that "[t]his Policy…memorializes Bonneville's *final* direction and provides initial guidance on next steps." *Id.* (emphasis added). Specifically, in its DAM Policy, Bonneville decided to "adopt the recommendations in the draft policy and pursue participation in a day-ahead market and specifically pursue participation in Markets+." *Id.* Consequently, it "will now shift focus to joining Markets+ by initiating a formal process to implement Markets+." *Id.*

While Bonneville has said it could change its mind later and ultimately not join Markets+, this possibility does not change the finality of its DAM Policy and

ROD. "[T]he mere possibility that the agency might reconsider does not suffice to make an otherwise final agency action nonfinal." *S.F. Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 579 (9th Cir. 2019) (internal quotation omitted). As this Court explained in *Prutehi Litekyan*, an agency's action is still final even if it rests on some other occurrence or is contingent on a future event. 128 F.4th 1089, 1110. Further, as a practical matter, Bonneville effectively locked in its decision, as it would forfeit up to $40 million if it abandoned its plan. *See supra* at 10-12 (describing Markets+ funding agreement).[5]

II. BONNEVILLE'S DAY-AHEAD MARKET POLICY VIOLATES THE POWER ACT.

A. Bonneville's DAM Policy Must Comply With the Standards for Participating in an Interregional Exchange of Power.

"The Power Act was designed to resolve the conflict between the Columbia River Basin's two great natural resources: hydropower and salmon." *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1011 (9th Cir. 2013). The Power Act "'marked an important shift in federal policy' by creating a new obligation…to protect, mitigate, and enhance fish and wildlife' while not jeopardizing 'an adequate, efficient, economical, and reliable power supply.'" *Id.*

[5] Petitioners have standing to seek review of Bonneville's DAM Policy and ROD. *See* Declarations of Bill Arthur, Jim Norton, and Bob Jenks filed concurrently herewith, and the Declarations of Mitchell Cutter and Benjamin J. Otto filed with the Petition for Review.

at 1012 (quoting *Nw. Res. Info. Ctr. v. Nw. Power Planning Council*, 35 F.3d 1371, 1377-8 (9th Cir. 1994). The Act also sought to encourage energy conservation and renewable energy development in the Pacific Northwest. 16 U.S.C. § 839. The Power Act governs Bonneville's power marketing activities including its power sales, resource acquisitions, and rate setting. 16 U.S.C. §§ 839c, 839d, 839e (respectively). The Act seeks to reduce the need for power through "conservation and efficiency in the use of electric power," and by encouraging "the development of renewable resources within the Pacific Northwest[.]" 16 U.S.C. 839(1).

The Act established a new governing structure that places responsibility for regional power planning in the hands of a four-state commission—the Northwest Electric Power and Conservation Planning Council (hereinafter "Council").[6] *See generally*, 16 U.S.C. § 839b. The Council is responsible for developing a "a regional conservation and electric power plan" (hereinafter "Northwest Power Plan"). 16 U.S.C. § 839b(d)(1). The Act requires that actions Bonneville takes pursuant to § 839d, which describes Bonneville's authority to acquire new resources, "*shall be consistent* with the plan[.]" 16 U.S.C. § 839b(d)(2) (emphasis added).

[6] The Council is composed of two representatives from each state in the Pacific Northwest region, including Washington, Oregon, Idaho, and Montana. 16 U.S.C. § 839b(a)(2).

Section 839d directs Bonneville to investigate "mutually beneficial interregional exchanges of electric power that reduce the need for additional generation or generating capacity in the Pacific Northwest…" 16 U.S.C. § 839d(l)(2). "[R]esource" is defined as both "actual or planned electric power capability," and "actual or planned load reduction" resulting from a "conservation measure" that increases "the efficiency of energy use, production, or distribution[.]" 16 U.S.C. § 839a(3), (19). The Act describes these exchanges as a "resource[,]" 16 U.S.C. § 839d(l)(3), and authorizes Bonneville to "*acquire resources* consistent with such investigations" provided that its decision is "consistent with the plan or, if no plan is in effect, with the priorities of Section 839b(e)(1) and the considerations of Section 839b(e)(2)[.]" (emphasis added).

Bonneville agrees that its authority to join a day-ahead market is pursuant to its authority to enter into interregional exchanges of power. *See* 1-ER-81. Bonneville stated that its "participation in the interregional Markets+ day-ahead market falls within the scope" of a "mutually beneficial interregional exchange" of power provided for in Section 839d(l). 1-ER-81-82. As Bonneville explained, "[a] day-ahead market will operate similar to an exchange of power because all market participants must bring sufficient resources to the market to serve their loads[,]" and, in the market, participants will then "exchange" power from existing resources to serve load. 1-ER-82. Since Markets+ is considered an "interregional

exchange[s] of power[,]" it also is a "resource" under the Act and must comply with the requirements of 16 U.S.C. § 839d. 16 U.S.C. § 839d(l)(2).

B. Bonneville's DAM Policy and ROD Are Inconsistent With the 2021 NW Power Plan.

When Bonneville acquires resources—including joining a regional power exchange—the Power Act requires it to ensure its actions are consistent with the Northwest Power Plan. 16 U.S.C. § 839d(l)(3) (authorizing Bonneville to acquire resources under power exchange that are "consistent with the Plan"); *id.* at § 839b(d) ("all actions of the Administrator pursuant to section 839d of this title shall be consistent with the plan"). Despite this clear statutory requirement, Bonneville never considered whether its action was consistent with the Plan, even when pressed to do so in public comments. Bonneville stated that it "is not required to make a determination regarding consistency of this policy direction with the Council's power plan[.]" 1-ER-275. While Bonneville "disagree[d] with the joint commenters' position that its participation in Markets+ would conflict with the Council's power plan[,]" *id.*, it never took steps to evaluate whether that participation in Markets+ *is in fact consistent* with the Plan.

Had it tried, it would have found that the DAM Policy and ROD are not consistent with the 2021 NW Power Plan.[7] The Plan requires Bonneville to

[7] The Council issued its most recent power plan in 2021. 16-ER-4543-681. The

prioritize the "least-cost resource," and integrate environmental considerations into its decision making. The decision to join Markets+ ran afoul of both requirements.

1. EDAM is the most cost-effective day-ahead market based on Bonneville's production cost modeling.

The Power Act requires that the Northwest Power Plan give "priority to resources which the Council determines to be cost-effective." 16 U.S.C. § 839b(e)(1). Adhering to this directive, the 2021 NW Power Plan states that with regard to energy market participation, Bonneville should pursue "[t]he least-cost option to maintain an adequate, cost-effective regional system[.]" 16-ER-4648-49. Further, the Council expected that "new market tools, such as capacity and reserve products," developing in the West, would result in "significant *cost savings* from greater regional collaboration to drive more efficiency into the system operations." 16-ER-4590 (emphasis added).

The 2021 NW Power Plan does not recommend participating in a particular day-ahead market. *See* 16-ER-4639-49. However, the Plan provides that "leveraging off regional collaborations…may be advantageous[,]" and this includes participating in the WEIM, and "coordinating throughout the West for the day-ahead market via the [EDAM]." 16-ER-4648 n.97.

Council is required to revise its power plan at least every five years. 16 U.S.C. 839b(d)(1).

A resource is "cost-effective" if it has "incremental system cost *no greater than* that of the *least-cost* similarly reliable and available alternative measure or resource[.]" 16 U.S.C. § 839a(4) (emphasis added). This is a quantitative analysis that estimates "all direct costs of a measure or resource over its effective life, including, if applicable, the cost of distribution and transmission to the consumer" as well as the "quantifiable environmental costs and benefits[.]" 16 U.S.C. § 839a(4)(B) (defining "incremental system cost").

Bonneville's production cost modeling showed that joining Markets+ would substantially increase Bonneville's system costs as compared with joining EDAM. *See* 1-ER-19 ("Participation in the EDAM market produces the highest net cost benefit in the cases studied.") Bonneville's modeling showed that participating in EDAM (Alt Split 2NV) would lower costs by $196 million annually, comparatively, while joining Markets+ (Alt Split 4A) would only lower costs by $30 million. 1-ER-29. Based Bonneville's cost production modeling, Seattle City Light stated in its comments that "Markets+ is worse for [Bonneville] customers than EDAM by $165-$221 million annually—and these losses persist *indefinitely into the future*." 5-ER-1262 (emphasis added). Further, it estimated that Bonneville's decision to join Markets+ *alone* would increase costs for its customers by up to $21 million every year. 5-ER-1265.

In fact, Bonneville's modeling showed that it would be better off remaining in the WEIM and not joining a day-ahead market at all—compared with Markets+. In its WEIM-only scenario where all regional actors except Bonneville join a day-ahead market, Bonneville found that, "staying only in the EIM brings lower net cost vs. joining [Markets+] in Alt Split 4A[.]" 1-ER-35. Bonneville's analysis shows that staying in the WEIM would result in $130 million annually in avoided costs compared with joining Markets+. *Id.* In comments, PacifiCorp and Portland General Electric raised concern that "[Bonneville] has not demonstrated…how the Agency's decision to leave WEIM and join…Markets+ will be more economically beneficial to its retail customers than joining EDAM or staying in WEIM." 5-ER-1216.

Nor did Bonneville explain how joining Markets+ will affect Northwest ratepayers who will ultimately pay for Bonneville's market decision. Instead, Bonneville arbitrarily declined to consider the financial impact to ratepayers, stating that it could not "forecast the financial impact around rates, products, and the volatility for any option prior to issuing its day-ahead market Policy." *Id.*

Moreover, the record reveals that joining Markets+ would raise costs not just for Bonneville, but the entire Pacific Northwest region. State agencies from Oregon and Washington estimated that if Bonneville joined Markets+, instead of EDAM, regional power costs would substantially increase:

> Comparing the most realistic market footprints, there are annual regional savings of $400 million in the near-term, growing to almost $550 million per year in the long-term when BPA participates in EDAM compared to participation in Markets+…Assuming these benefits accrue annually as estimated in BPA's modeling through 2035, *there is the opportunity to reduce customer costs by $4.4 billion if BPA selects EDAM*[.]

16-ER-4688 (emphasis added). Similarly, another study found that *annually* "net system cost in the Pacific Northwest would decrease by $430 million if BPA joins EDAM and increase by $83 million by joining Markets+." 1-ER-117.

These quantitative analyses show that joining EDAM, without doubt, is the "cost-effective" resource, because of the significant savings it would provide to Bonneville and the region. But, Bonneville did not prioritize EDAM. Instead, it chose Markets+, which would increase costs, even compared with remaining in the WEIM and not joining a day-ahead market.

2. Transacting across market seams, even under the most generous assumptions, makes Markets+ the most expensive option.

One of the reasons that Markets+ would be the most expensive option is the creation of market seams. With Bonneville joining Markets+, new market seams will be created along the footprints depicted in Table 3, above. By joining Markets+, Bonneville put itself on the opposite side of a market seam to its key trading partners, including California. This means that Bonneville will have to trade across a market seam with its traditional partners, including energy providers in California and Nevada, making these transfers more costly.

Bonneville evaluated how changing the cost of transacting with regional partners outside of the Markets+ footprint, i.e. the hurdle rate, could influence the financial benefits of Markets+. Even with generous hurdle rates, however, joining EDAM (Alt Split 2NV), would still result in greater financial benefit to Bonneville by at least $14 million as compared to Markets+.[8] 1-ER-31.

Further, this analysis does not account for the need to acquire additional generating resources when Bonneville joins Markets+. *See* 1-ER-93. Bonneville lacks the capacity to make real-time purchases and sales with Markets+ participants in the Desert Southwest. *Id.* To address this loss in reliability,

[8] The benefits are likely higher, because Bonneville did not adjust the hurdle rates for its EDAM alternative (Alt Split 2NV), making it an apples to oranges comparison. 1-ER-31.

Bonneville determined it would have to procure additional resources to hold in reserve if it joins Markets+ to ensure adequate reliability. *Id.*

Bonneville also considered how increasing transmission capacity—something that has proven stubbornly difficult to achieve—to support greater connectivity between the Pacific Northwest and Desert Southwest would change the benefits of participation in Markets+. 1-ER-28-32. Bonneville found that even with a new transmission line or contracted transmission capacity to reach other Markets+ participants, joining EDAM would still provide greater benefits than Markets+. *See* 1-ER-32 (Figure 2).

Bonneville did not analyze its EDAM alternative (Alt Split 4A), for this improved transmission scenario—yet another example of a one-sided and arbitrary analysis. *See Ctr. for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.* (*CBD v. NHTSA*), 538 F.3d 1172, 1198-1201 (9th Cir. 2008) (agency "cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs").

3. Joining Markets+ would increase power costs during extreme weather or low-water years, which reduce the reliability of Bonneville's system.

Ideally, day-ahead markets should *reduce* costs and improve resource adequacy during high stress events by opening up opportunities to trade with other regions not experiencing these events. Such events include demand spikes caused by extreme heat, or low water conditions, which reduce the power generated by the

federal hydrosystem. Evaluating how each market alternative responds during such events is especially important to consider as climate change increases their likelihood.

Climate change will affect the amount of power generated by the hydroelectric dams on the Columbia River. "Water conditions cause hydro generation to vary greatly year to year depending on weather factors such as precipitation, snowpack, and temperature." 12-ER-3417. Indeed, as Bonneville recognizes, "future climate change impacts to retail loads, streamflow, and resources," are a significant source of uncertainty for the federal power system. 12-ER-3419. Climate change is predicted to result in "smaller snowpack…resulting in lower stream flows in June through September." 7-ER-2016. In its Strategic Business Plan for 2024-2028, Bonneville stated that "[c]limate change risks will intensify with expected changes in water supply, and more frequent and severe heat waves and wildfires." 12-ER-3469. In this plan, Bonneville committed to "embed climate resilience into BPA's critical business functions." 12-ER-3484.

Despite these statements in other contexts, Bonneville's DAM Policy and ROD lack any explicit discussion of how extreme weather and low water could alter the financial calculus for market participation, or which market could provide greater resource adequacy during stress events. Bonneville did conduct some

limited modeling of the effects of a low water year on its market participation, but never grappled with the outcomes of this modeling.

In its modeling, Bonneville found power will become *more expensive* for Bonneville's system during drought conditions if it joins Markets+ (Alt Split 4A). 1-ER-30, 32. In contrast, a west-wide day-ahead market could substantially lower financial losses during a low-water year even when coupled with high demand. *Id.* Bonneville never modeled whether its EDAM alternative (Alt Split 2NV) could lower power costs during stress events and a low-water year. *Id.* This prevented a fair comparison of market alternatives. *See CBD v. NHTSA*, 538 F.3d at 1198-1201.

These results show that when Bonneville needs to rely on market participation the most—when demand outstrips supply during a low-water year or high stress events—joining Markets+ will make energy costs even higher and reduce the reliability of the system. Yet, in its decision, Bonneville never considered or discussed how these modeled outcomes informed its decision making. Again, Bonneville's market choice conflicts with the directives of the 2021 NW Power Plan to pursue the lowest-cost reliable resource alternative.

4. *Bonneville arbitrarily elevated its concerns about EDAM governance over the substantial cost-savings that joining EDAM could provide its customers and the region.*

Bonneville prioritized its preferences over market governance, instead of prioritizing the substantial cost savings it could have achieved by choosing EDAM. In this as well, Bonneville acted contrary to the directives of the 2021 NW Power Plan, which require it to prioritize the most cost-effective resource.

In its DAM Policy, Bonneville emphasized the importance of governance stating that it weighed whether market governance would provide "fair representation to all market participants and stakeholders[.]" 1-ER-44. Bonneville sought "unbiased" market governance, that is "free of disproportionate obligation to the policies of a single state, entity or customer type." *Id.*

Bonneville concluded that the governance structure of EDAM "risks undue influence" by the State of California. 1-ER-45. Bonneville found the oversight role for CAISO's Board of Governors unacceptable, because it feared that the Board of Governors would prioritize the needs of California not the wider market. *Id.*

In contrast, while Markets+ provides the SPP Board of Directors with veto authority over rules developed for that market, Bonneville did not articulate any parallel finding of a risk of "undue influence" in Markets+. 1-ER-45-46. Instead, Bonneville simply concluded that "the independence of the Markets+ decision-making body is superior to that of EDAM[.]" *Id.*

Bonneville's findings regarding the "undue influence" of California in EDAM governance conflicts with FERC's approval of this market. FERC is responsible for regulating regional energy markets, including EDAM and Markets+. FERC found that EDAM's governance structure "is consistent with the existing WEIM governance, which the Commission previously concluded is just and reasonable." 14-ER-3906. In a later proceeding, FERC again concluded that the EDAM tariff and market was just and reasonable. 13-ER-3737. Bonneville's continued distrust of EDAM's governance is unjustified and unexplained in light of these findings. Bonneville's failure to address, consider, or explain why it disagrees with not one, but two FERC findings regarding the structure and governance of EDAM, is arbitrary and capricious.

Further, Bonneville did not consider how market governance could affect the costs of market participation. Commenters raised concern that "no analysis explains why market design and governance of Markets+ is worth $160 million per year more." 5-ER-1218. In response, Bonneville discounted this estimate of loss as "one component of a much larger decision framework[.]" 1-ER-39.
It summarily concluded that "[i]t is not possible to quantify a dollar value for the attributes of independent governance[.]" *Id.*

Nevertheless, Bonneville believed "substantial value" could be gained through the "decision process for market design and Bonneville's ability to

influence that design." *Id.* Bonneville stated that it "believes [Markets+] has the potential to offer financial benefits that are greater than business as usual." 1-ER-61. Bonneville also concluded that "the Markets+ design is likely to provide economic benefit that partially offset the financial benefits attributed to EDAM[.]" *Id.* But again, these statements of belief and likelihood were not supported by any "estimate" of the "direct cost" of participation in Markets+ or other analysis or explanation. *See* 16 U.S.C. 839a(4)(B). These vague conclusions, unsupported by any meaningful analysis, cannot rationally justify Bonneville's decision to join a day-ahead market that will increase its costs by over a hundred million dollars annually, and will mean foregoing billions of dollars in savings on power costs for the Pacific Northwest.

Bonneville acted on hope by choosing Markets+, but the APA elevates reason above unexplained faith. Bonneville acted arbitrarily when it relied on the unquantifiable benefits of the Markets+ governance structure as the basis for disregarding the substantial financial benefits that would result from participating in EDAM. The "administrative record does not show that BPA, as required by *State Farm,* considered the relevant facts and used a rational process[.]" *Nw. Env't Def. Ctr.*, 477 F.3d at 688. Bonneville's failure to prioritize the most effective resource as required by the 2021 NW Power Plan is arbitrary, capricious, and

contrary to the requirements of the Power Act. 16 U.S.C. §§ 839b(d)(2), 839d(l)(3).

5. Bonneville arbitrarily failed to consider the environmental consequences of its decision as required by the Power Plan and the Act.

Lastly, the 2021 NW Power Plan, following the mandate of the Power Act, 16 U.S.C. § 839b(e)(2), requires Bonneville to give "due consideration" to the environmental consequences, including impacts to endangered wild salmon, of any decision to acquire new resources. This "is a serious substantive obligation[.]" *Nw. Res. Info. Ctr.* 730 F.3d at 1016. "The Power Act's due-consideration requirement is aimed specifically at new power-resource acquisitions[.]" *Id.* at 1017.

The 2021 NW Power Plan explains that the definition of "cost-effective" includes integrating the quantifiable environmental costs and benefits into any cost-benefit analysis for new resource acquisition. 16-ER-4664-71; *see also* 16-ER-4640 (providing for a methodology for evaluating "cost-effectiveness" to "ensure a reliable power system and achieve decarbonization goals."). Further, under the Plan, Bonneville should ensure its decisions uphold and advance state law state law requirements to decarbonize the power sector. *See* 16-ER-4657 ("The Council designed a resource strategy for a power system consistent with the effects of these [clean energy] laws, policies, and commitments."). Further, the Plan highlights the need to consider how changes in flow from dam operations could

affect "environmental conditions for fish in the river, particularly for juvenile and adult salmon and steelhead migration and for mainstem spawning and rearing habitat." 16-ER-4653.

The record is replete with analysis in public comments showing how Bonneville's participation in Markets+ would change the energy mix of generating resources used in the West, which in turn would increase reliance on fossil-fueled electric power—including coal—and reduce reliance on renewable power. *See supra* at 14-16. These analyses uniformly conclude that emission increases will be significantly larger if Bonneville joins Markets+ than if it participates in EDAM. *Id.* Yet, while Bonneville considered the financial cost of GHG attributes, i.e., how each market documented GHG accounting for power purchases, it did not consider how market participation could result in increased GHG emissions overall, frustrating state policies. *See* 1-ER-18-19; 1-ER-217. Furthermore, the record contains extensive evidence that Bonneville's choice of a day-ahead market would change how the federal hydroelectric dams in the Columbia Basin are operated to produce power. *See supra* at 16-18. These changes in operations could have adverse impacts on fish already struggling to avoid extinction. *Id.*

Bonneville did not give any rational consideration, let alone "due consideration," to the environmental impacts of its decision to move forward with participation in Markets+. *See* 16 U.S.C. §§ 839d(l)(3), 839b(e). There are "'no

findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion.'" *Nw. Env't Def. Ctr.*, 477 F.3d at 690 (quoting *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 48 (1983))

Instead, Bonneville stated that it is "still in the process of assessing the potential environmental effects that could result from participation in a day-ahead market[,]" and on this basis deferred consideration of any environmental impacts. 1-ER-251-52. Bonneville's refusal to give due consideration to these environmental impacts as required by the Northwest Power Plan is arbitrary and violates the Power Act. 16 U.S.C. § 839d(l)(3); 16 U.S.C. § 839b(d).

C. Bonneville's Acted Arbitrarily When It Failed to Consider Whether Its Decision to Join Markets+ Was Consistent With the Priorities and Purposes of the Power Act.

Bonneville must exercise its responsibilities "consistent with the purposes of the [Power Act] and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife[.]" 16 U.S.C. 839b(h)(11)(A)(i). The purposes of the Act include: (1) "to assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply;" (2) to encourage "the development of renewable resources within the Pacific Northwest;" (3) "to protect, mitigate and enhance the fish and wildlife…of the Columbia River and its tributaries[;]" and to (4) "provid[e] environmental quality[.]" 16 U.S.C. 839.

Pursuant to this obligation, Bonneville should ensure its decision to acquire an interregional exchange of power, is consistent with the statutory priorities of the Act—especially when the Northwest Power Plan does not recommend what resource to acquire. *See* 16 U.S.C. § 839d(l)(3) (authorizing acquisition of interregional exchanges of power "consistent with the plan or, if no plan is in effect, with the priorities of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title."). The Act prioritizes the most "cost-effective" resource and requires giving "due consideration" to "environmental quality," and the "protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat[.]" *See* 16 U.S.C. § 839b(e)(2). For the same reasons that Bonneville's decision is inconsistent with the Northwest Power Plan, it is also inconsistent with the purposes of the Power Act, and the priorities set out in the act for new resource acquisition.

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In sum, the record shows that Bonneville chose the most expensive resource option, Markets+, even compared with remaining the WEIM and not joining a day-ahead market. Indisputably, Bonneville did not prioritize the most cost-effective resource, EDAM. As a result, Bonneville's decision will substantially increase Bonneville's system costs, and power costs for the Pacific Northwest. Lastly, Bonneville refused to consider the environmental impacts of its decision. For these

reasons, Bonneville's DAM Policy conflicts with the 2021 NW Power Plan, the priorities of 16 U.S.C. § 839b(e), and therefore violates the Power Act.

III. BONNEVILLE VIOLATED NEPA BY FAILING TO CONDUCT ANY ENVIRONMENTAL ANALYSIS FOR ITS DAY-AHEAD MARKET POLICY AND ROD.

NEPA requires agencies to consider and disclose the environmental effects of their actions before committing resources to them. 42 U.S.C. §§ 4321-4347. Commenters urged Bonneville to assess the environmental effects of the DAM Policy and ROD because the decision would have significant implications for energy generation, fisheries, air and water pollution, and greenhouse gas emissions, among other things. But Bonneville refused to conduct any NEPA assessment. Compounding this failure, Bonneville made an irreversible financial commitment to Markets+ before it complied with NEPA. Its actions are arbitrary and contrary to NEPA.

A. Overview of Bonneville's NEPA Obligations.

NEPA "declares a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). To ensure that this commitment is "infused into the ongoing programs and actions of the Federal Government," the act establishes "action-forcing procedures." *Id.* Such procedures seek "(1) to ensure the agency will have detailed information on significant environmental impacts when it makes its

decisions; and (2) to guarantee that this information will be available to a larger audience." *Inland Empire Pub. Lands v. U. S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996). In short, NEPA requires all federal agencies "to the fullest extent possible" to carefully analyze and disclose to the public the potential environmental impacts of, and feasible alternatives to, federal agency actions. 42 U.S.C. § 4332(2)(C); *Westlands Water Dist. v. Nat. Res. Def. Council*, 43 F.3d 457, 460 (9th Cir. 1994).

Specifically, NEPA requires that agencies provide a "detailed statement"— known as an environmental impact statement ("EIS")— assessing the impacts "of any proposed major federal action which would significantly affect the quality of the environment." *Forelaws on Bd. v. Johnso*n, 743 F.2d 677, 680-81 (9th Cir. 1984) (finding Bonneville violated NEPA by not preparing an EIS on long-term power contracts). An EIS is required to assess the "reasonably foreseeable environmental effects of" and a "reasonable range of alternatives" to the proposed action, as well as "any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented." 42 U.S.C. § 4332(2)(C)(v).[9] As this Court has held, an EIS "must

[9] The Court's review of petitioners' NEPA claim is governed by Department of Energy regulations in effect at the time of Bonneville's decision. Those regulations, at 10 C.F.R. Pt. 1021, explicitly incorporate rules promulgated by the Council on Environmental Quality ("CEQ") at 40 C.F.R. Pts. 1500-1508.

be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006) (characterizing this as a "low standard"); *Steamboaters v. FERC*, 759 F.2d 1382, 1392 (9th Cir. 1985) ("If the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared.").

Where it is unclear whether the impacts of an agency action are significant enough to require a full EIS, agencies can prepare a shorter "environmental assessment" ("EA") to assess whether the action's effects are potentially significant. 10 C.F.R. § 1021.320. If the EA reveals that impacts are insignificant, thereby avoiding an EIS, an agency must document this in a "finding of no significant impact" that is judicially reviewable. 10 C.F.R. § 1021.322. Agencies can also establish by rule categories of actions known as categorical exclusions that do not ordinarily have significant impacts individually or collectively, and hence do not require an EIS. 40 C.F.R. § 1501.4; 10 C.F.R. § 1021.410. An agency must explain its rationale for invoking a categorical exclusion at the time of its decision. *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002); 10 C.F.R. §

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10 C.F.R. § 1021.103. After Bonneville signed the ROD, the Department of Energy amended those rules. 90 Fed. Reg. 29676 (July 3, 2025). Since the effective date of the amended rules is after the decision under review, this brief cites to the regulations in effect at the time of Bonneville's decision.

1021.410(b) (listing findings agency must make before invoking categorical exclusion). Before relying on a categorical exclusion, an "agency *shall* evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect." 40 C.F.R. § 1501.4(b) (emphasis added).

Finally, separate and apart from the EIS requirement, NEPA imposes a duty to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(H). "This requirement is independent of EIS requirements, and applies to a wider range of federal actions than do the EIS requirements." *Ass'n of Pub. Agency Customers*, 126 F.3d at 1174.

Bonneville is a federal agency subject to NEPA and routinely prepares EISs and EAs on its actions. Courts have been called upon to review Bonneville's NEPA compliance since the statute's inception. *Forelaws on Bd.*, 743 F.2d at 681 (Bonneville violated NEPA by not preparing an EIS on long-term power contracts).

B. Bonneville Did Not Comply With NEPA Prior to Issuing the ROD and Policy.

Many commenters identified the need for Bonneville to comply with NEPA prior to making a commitment to a day-ahead market. *See, e.g.*, 5-ER-1405 ("Failure to comply with NEPA is a serious concern."); 4-ER-1138 ("BPA has not yet conducted the '"hard look"' required by [NEPA] sufficient to assess the

reasonably foreseeable impacts of BPA's proposed choice."); 4-ER-1171. These commenters highlighted the serious environmental impacts that would follow from a decision about participating in a day-ahead market, and the importance of comparing the alternatives like joining EDAM or remaining in the WEIM. *See supra* at 14-18.

Initially, Bonneville claimed that it was "in the process of assessing the potential environmental effects that could result from the proposed participation in a day-ahead market," as required by NEPA. 5-ER-1478. It hinted that it might conclude its decision was categorically excluded from NEPA. *Id.* In its final decision, however, Bonneville pivoted, asserting that its DAM Policy was only "procedural and administrative" and simply "establishes a scope for future implementation decisions" that would "precede a final agency decision to join Markets+." As such, the Final Policy and ROD "would not entail any action by Bonneville that would have a potential effect on the environment." 1-ER-252.

Bonneville suggested that it might comply with NEPA in the future. *Id.* ("Bonneville will conduct and document any appropriate NEPA analysis prior to taking additional steps towards—or making any final agency decisions with respect to—joining and participating in Markets+."). As to its $40 million financial commitment to the development of Markets+, Bonneville claimed that its "decision

to fund market development did not obligate Bonneville to actually join or otherwise participate in Markets+." *Id*.

C. The DAM Policy and ROD Constitute "Major Federal Action" That Triggers NEPA.

A threshold question in NEPA cases is whether the action under review constitutes a "major federal action," thus triggering NEPA's review obligations. NEPA defines major federal action as "an action that the agency…determines is subject to substantial Federal control and responsibility." 42 U.S.C. § 4336e(10). The statute identifies some "exclusion[s]" from this definition, for example, certain non-federal actions with a minimal federal role, certain forms of financial assistance, and enforcement actions. *Id.* at (10)(B). CEQ's regulations provide further examples of major federal actions, including "[a]doption of official policy…[including] formal documents establishing an agency's policies that will result in or substantially alter agency programs," and "[a]doption of formal plans, such as official documents prepared or approved by Federal agencies, which prescribe alternative uses of Federal resources, upon which future agency actions will be based[.]" 40 C.F.R. § 1508.1(w). As this Circuit as repeatedly recognized, "agency action may constitute a 'major Federal action' even though the program does not direct any immediate ground-breaking activity." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1098 (9th Cir. 2011) (Department of

Energy's designation of "national interest electric transmission corridors" was subject to NEPA).

This Circuit has found that Bonneville undertakes "major federal action" in a number of contexts. In *Forelaws on Board*, for example, the Ninth Circuit found that Bonneville's execution of long-term power contracts were major federal actions that required an EIS. 743 F.2d at 682. It rejected the various arguments Bonneville offered for failing to comply with NEPA, such that it lacked discretion to consider environmental impacts in its contracting; that the contracts would not have environmental impacts; and that the time constraints of the Power Act impliedly exempted the contracts from NEPA compliance. *Id.* at 682-84 ("the contracts significantly affect the environment because they involve important policy choices affecting energy conservation"). In other cases, this Circuit has examined Bonneville's NEPA compliance for major federal actions like joining an "interregional exchange" of power, *Nw. Env't Def. Ctr.,* 117 F.3d at 1535-37 (upholding EA for "interregional exchange" of power) or executing contracts. *See, e.g.*, *Alcoa v. Bonneville Power Admin.*, 698 F.3d 774, 795 (9th Cir. 2012).

Here, Bonneville's decision in its day-ahead policy and ROD to participate in Markets+ constitutes "major federal action." It is unquestionably subject to "substantial Federal control and responsibility." *See* 42 U.S.C. § 4336e(10). Even Bonneville agrees that the decision to participate in a day-ahead market, and which

one to choose, is discretionary. 1-ER-222 ("Bonneville would retain the appropriate discretion" to manage participation in day-ahead markets to comply with statutes). Moreover, the decision is similar to many of the examples included in regulations. Specifically, it involves adoption of a final "policy," "program," or "plan" that could impact agency actions or drive implementation decisions. 40 C.F.R. § 1508.1(w). NEPA's threshold is met here.

D. Bonneville's Failure to Assess Environmental Impacts Violated NEPA.

Despite a chorus of requests asking it to consider and disclose the environmental impacts of joining a day-ahead market, Bonneville refused to do so. It did not prepare an environmental assessment that concluded its decision would not have significant environmental impacts, nor even invoke a categorical exclusion. Its refusal to comply with NEPA is arbitrary and contrary to NEPA for at least three reasons.

1. Bonneville cannot summarily conclude that there are no environmental impacts without at least an EA.

Bonneville cannot discharge its obligations under NEPA by simply declaring that a "major federal action" like this one has no environmental impacts. 42 U.S.C. § 4336(b)(2) ("An agency *shall* prepare an environmental assessment with respect to a proposed agency action that does not have a reasonably foreseeable significant effect on the quality of the human environment . . ."") (emphasis added). Instead, it

must document its conclusion of no-effects in an EA or, where appropriate, through explanation of why the action fits a categorical exclusion. *Id.* The Ninth Circuit has confirmed that "an agency cannot merely assert that its decision will have an insignificant effect on the environment." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011); *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999) ("An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment."). Instead, the only paths to comply with NEPA for federal actions are providing an EIS, EA, or invocation of a categorical exclusion. *Solar Energy Indus. Ass'n v. FERC*, 80 F.4th 956, 993-94 (9th Cir. 2023); *Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 562 ("[I]f the proposed action does not categorically require the preparation of an EIS, the agency must prepare an EA to determine whether the action will have a significant effect on the environment.").

California Wilderness Coalition is instructive. There, the Department of Energy issued an order designating national electric transmission corridors, which had no immediate on-the-ground impacts, but made available a "fast-track approval process" for specific transmission projects. *Cal. Wilderness Coal.*, 631 F.3d at 1080. The agency declined to prepare any NEPA document—not even an EA or categorical exclusion—instead summarily concluding that the designation of

the corridors had no environmental impacts. The Court rejected this "conclusory statement," finding that the agency needed to supply a "convincing statement of reasons" so the Court could determine whether it took a "hard look" at the potential environmental impacts. *Id.* at 1097-98. Rejecting the agency's various justifications for failing to prepare any NEPA documentation, the Court concluded that even a broad programmatic plan could "encourage" the siting of transmission projects in a way that "has effects" that must at least be scrutinized in an EA. *Id.* at 1103. The agency's failure to "present the documentation necessary" to uphold its conclusion violated NEPA and was fatal. *Id.* at 1105-06 (vacating decision until agency prepared "at least an EA" to assess environmental impacts).

Bonneville's conclusory determination that there will be no environmental impacts cannot withstand review. The record is replete with discussion of the likely adverse environmental consequences of choosing Markets+ over other options. *See supra* at 14-18. NEPA analyses from other Bonneville decisions highlighting the relationship between reduced hydropower generation and increased fossil fuel use support those concerns. 7-ER-1886; 7-ER-1881; *see also Nw. Env't Def. Ctr.,* 117 F.3d at 1535-37 (Bonneville prepared EA for "interregional exchange" of power); *Solar Energy Indus.*, 80 F.4th at 996 (agencies "model[] the potential environmental effects" of major decisions "affecting electricity markets"). While some of these impacts—such as increased pressure on hydrosystem operations that

harm salmon, or increased reliance on fossil-fuel generation—can be difficult to predict, that only highlights the importance of a careful analysis consistent with NEPA's statutory standards. 42 U.S.C. § 4332(D)-(E) (statutory obligation to ensure "professional" and "scientific integrity" of NEPA documents, and use "reliable data"). Bonneville does not grapple with these well-documented effects at all, instead characterizing its Policy and ROD as merely setting a direction. Bonneville cannot rationally rely on this characterization of its action to avoid complying with NEPA, while simultaneously directing its staff to renegotiate regional power contracts and rates consistent with the DAM Policy and ROD, *see supra* at 23-26.

Neither can Bonneville's suggestion that its policy decision is "likely" to be "categorically excluded from further review" justify its inaction. 1-ER-251. Bonneville never invoked a categorical exclusion, nor went through the steps needed to do so. 10 C.F.R. § 1021.410(b); *California*, 311 F.3d at 1177 (agency cannot rely on categorical exclusion it never expressly invoked); *compare* 12-ER-3590 (invoking categorical exclusion when Bonneville decided to join the WEIM). Nor could it invoke such an exclusion on this record, which includes substantial evidence showing that the Department of Energy's categorical exclusions do not apply. 2-ER-336 ("Bonneville cannot rationally rely on a categorical exclusion

from NEPA to avoid evaluating these and other significant effects of its choice…").

2. Bonneville cannot defer environmental review to a later date.

Bonneville cannot avoid NEPA by promising to comply in the future. The Final Policy and ROD make the key decision—whether or not to move ahead with participation in a day-ahead market, and if so, which one—now. Agencies must take a "hard look" at environmental impacts "*before* taking…action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 97 (1983) (emphasis added); *Robertson*, 490 U.S. at 349 ("NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."); *California*, 311 F.3d at 1175 ("the agency is required to prepare an EIS or an EA before committing resources to an action.").

NEPA's implementing regulations state that agencies "should integrate the NEPA process with other planning and authorization processes *at the earliest reasonable time* to ensure that agencies consider environmental effects in their planning and decisions, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2(a) (emphasis added); *see also id.* at § 1502.5 (agency "should commence preparation of an [EIS] as close as practicable to the time the agency is developing or receives a proposal so that preparation can be completed in time for the final statement to be included in any recommendation

or report on the proposal."). The same requirement appears in the Department of Energy regulations governing Bonneville. 10 C.F.R. § 1021.210(b) (agency "shall completed its NEPA review for each DOE proposal before making a decision on the proposal"). For actions like this one, NEPA analysis should take place at the stage of "feasibility analysis," recognizing that it can be supplemented later. 40 C.F.R. § 1502.5(a). The decision Bonneville makes in its day-ahead Policy and ROD is the critical fork in the road where it chooses which market with which to move ahead—a choice it will not return to later.

Again, *California Wilderness Coalition* illuminates the path. 631 F.3d at 1098-99. There, as here, the agency asserted that the designation of energy planning corridors did not have any environmental effects, which would only come to light once specific transmission projects were proposed. *Id.* The Ninth Circuit rejected this characterization, finding that the corridors "influence" areas in which transmission could be proposed, which "could have great historic and regional consequences" on the environment. *Id.* It further cited an extensive line of Ninth Circuit precedent that broad agency programs are subject to NEPA even without directing "any immediate ground-disturbing activity." *Id.* While the Court was open to the possibility that the environmental impacts of designating corridors could prove "difficult to measure" or "too imprecise to influence" the agency's decision, this determination could only be made through properly complying with

NEPA. *Id.* at 1103. Many other cases reach the same conclusion: agencies cannot defer NEPA compliance for major federal actions on a promise that it will take place at a later time. *Solar Energy Indus.*, 80 F.4th at 994 ("it was eminently foreseeable that a regulatory change of this magnitude could produce significant environmental effects" such as changes to renewable energy development and greenhouse gas emissions); *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000) (agency violated NEPA by entering into an agreement to advocate to an international council that an Indian Tribe be allowed to resume whaling prior to environmental review under NEPA).

Here, the record is clear that compliance with NEPA cannot be deferred. *Compare Solar Energy Indus.*, 80 F.4th at 995 (public raised "substantial questions" about incentives for renewable energy in FERC policy that should have been assessed under NEPA). While Bonneville claims that it has not made a "final decision" to join Markets+, 1-ER-252, Bonneville's own documents confirm that it is making the decision now to "to facilitate its entrance into Markets+, rather than EDAM[,]" 1-ER-222. Indeed, Bonneville describes the decision as "momentous" and the product of "two years of extensive analysis" and public engagement. *Id.*; *see also* 7-ER-1820-22 ("Bonneville's decision regarding day-ahead markets will play a critical rule in the energy and capacity market landscape for the region" and represents a "paradigm shift" for the region).

The choice embodied in this decision—to pursue implementation of Markets+, rather than EDAM or not joining a day-ahead market at all—is *the key decision* where impacts and alternatives should have been considered and disclosed. 5-ER-1260 ("Bonneville's decision will have 'generational impacts' that will profoundly alter energy policy throughout" the West); 5-ER-1211 ("EDAM and Markets+ represent two different electricity market designs and footprints that hold different potentials for reducing carbon emissions."); 4-ER-1115 (Bonneville made "no effort to compare the implications" of different DAMs). As in *Metcalf*, Bonneville's decision was the "point of commitment" on pursuing Markets+. 214 F.3d at 1143. Crucially, even if there is NEPA analysis in the future on the technical details of implementing Markets+, it could not meaningfully consider other alternatives, i.e., other day-ahead markets like EDAM—because Bonneville already rejected them. Consideration of such alternatives is at the "heart" of NEPA and a key purpose of the statute, even where an EIS is not required. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992); 42 U.S.C. § 4332(H).

3. Bonneville unlawfully made a financial commitment to Markets+ before it complied with NEPA.

Bonneville violated NEPA in yet another way, by making an irreversible financial commitment to Markets+ even before it issued its final Policy and ROD. Bonneville "shall" not take any action concerning a proposal that would "[l]imit

the choice of reasonable alternatives" prior to completion of the NEPA process. 40 C.F.R. §1506.1. Another regulation drives the point home: agencies "shall not commit resources prejudicing the selection of alternatives before making a decision." *Id.* 1502.2(f); *see also* § 1502.5 (NEPA documents "shall be prepared early enough so that it can serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made"). "These regulations mean that agencies may not take actions prior to beginning the NEPA process that commit them to a course of action." Daniel R. Mandelker et al., NEPA LAW AND LITIG. § 8:18 (2025).

This sensible standard seeks to ensure that agencies comply with NEPA before making "any irreversible and irretrievable commitment of resources." *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988); *see also Metcalf*, 214 F.3d at 1143 (agency violated NEPA by committing to advocate for Tribal whaling prior to NEPA compliance); *N. Alaska Env't Ctr.*, 983 F.3d at 1086 (EIS required when "the agency proposes to make an 'irreversible and irretrievable commitment of the availability of resources' to a project"). Accordingly, even if Bonneville could delay NEPA compliance until a later stage of process—which it cannot for the reasons discussed above—it was plainly prohibited from making a binding financial commitment to Markets+ before it complied with NEPA.

Here, Bonneville has not initiated, let alone completed, the NEPA process. It barely addressed the issue at all, vaguely stating that NEPA documentation might be prepared at some future date. 1-ER-252. As documented above, that alone is a violation of NEPA. But the commitment of up to $40 million to secure a bank loan for the development of Markets+ compounds the violation.

It is "highly likely" that this financial commitment will "slant" Bonneville's final decision, as declining to join Markets+ would now impose a multi-million dollar penalty. *Metcalf*, 214 F.3d at 1144. Many commenters expressed exactly this concern. *See, e.g.*, 5-ER-1400 (Yakama Nation) (Bonneville's commitment of up to $40 million precedes "public workshops, government-to-government consultation, Policy Letter, and Record of Decision."); 4-ER-1150 ("BPA appears to have moved forward with a significant funding decision without a transparent stakeholder process and without assurances of accountability."). This is precisely the kind of premature commitment of resources that NEPA seeks to prevent, and another basis on which to find Bonneville violated the law.

* * *

In sum, Bonneville did not produce a "single sentence of environmental analysis" or make even the most rudimentary attempt to "predict the environmental consequences" before adopting a day-ahead Policy and ROD with sweeping potential impacts on the energy makeup and the environment of the western states.

Solar Energy Indus., 80 F.4th at 996-97. It compounded this error when it made a binding financial commitment to Markets+ prior to any NEPA analysis. In doing so, it violated NEPA and its decision is arbitrary and capricious.

IV. THIS COURT SHOULD VACATE THE POLICY AND ROD AND ORDER BONNEVILLE TO INITIATE AN EIS PROCESS.

A. Vacatur Is the "Default Remedy" for APA Violations and Should Be Applied Here.

The APA directs a district court to "hold unlawful *and set aside* agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added). Where a court holds an agency action unlawful under NEPA, "vacatur and remand is the default remedy under the APA." *Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 50 (9th Cir. 2025). This Court routinely vacates actions undertaken in violation of NEPA as the "presumptive remedy." *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt*., 36 F.4th 850, 882 (9th Cir. 2022). The same standard applies to Bonneville's violation of the Power Act. *See*, *e.g.*, *Cal. Wilderness Coal*., 631 F.3d at 1095 ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action.").

Courts retain equitable discretion in "limited circumstances" to remand an unlawful decision without vacatur. *Mont. Wildlife Fed'n*, 127 F.4th at 50. Courts

scrutinize two factors to make this determination: (1) "how serious the agency's errors are," and (2) "the disruptive consequences of an interim change that may itself be changed." *Id. citing Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). "Because vacatur is the presumed remedy, the burden is on the agency to establish equity demands a more tailored remedy." *See Ctr. for Biological Diversity v. U. S. Bureau of Land Mgmt*., 675 F. Supp. 3d 1112, 1118 (D. Idaho 2023), *citing Env't Def. Ctr*., 36 F.4th at 882.

Bonneville's failure to comply with the Power Act's requirement to ensure its policy decision would keep power costs low in the Pacific Northwest low while protecting environmental quality, and Bonneville's decision to ignore its obligations under NEPA, violated clear mandates from Congress. Vacatur is the appropriate remedy here.

The seriousness of Bonneville's error weighs in favor of vacatur. The first prong addresses the seriousness of the error. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (courts ask whether "on remand, a different result may be reached"). Bonneville sidestepped the requirement in the 2021 NW Power Plan to procure the most cost-effective resource, and decided to join Markets+ even though doing so would increase regional power costs. Record evidence shows that if Bonneville prioritized the most cost-effective resource, as required by the Act, it should have chosen to participate in EDAM, or at the very

least chosen not to participate in any day-ahead market. In other words, if Bonneville had complied with its statutory obligations, it should have reached a different outcome.

The same is true with respect to Bonneville's NEPA violations. Under NEPA, this inquiry focuses not on the underlying substantive decision (i.e., the choice of day-ahead market), but the decision not to comply with NEPA at all. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021). Here, the agency's failure to prepare a NEPA document—not even preparing an EA—is not something that can be sustained with additional explanation. Instead, the failure to comply with NEPA is an archetypically "serious" error warranting vacatur and remand. *Solar Energy Indus.*, F.4th at 997 ("the failure to produce an EA is a serious omission"); *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F3d 520, 536 (D.C. Cir. 2018) (violation of NEPA is "serious" "because the point of NEPA is to require an adequate EIS before a project goes forward").

The second prong gives a court discretion to consider "the disruptive effect of vacatur." *Mont. Wildlife Fed'n*, 127 F.4th at 51. But only in narrow circumstances does this result in a choice not to vacate. For example, courts hesitate to vacate a faulty rule where it would risk causing environmental harm. *See, e.g.*, *Idaho Farm Bureau Fed'n v. Babbit*, 58 F.3d 1392, 1405-06 (9th Cir.

1995); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980). Similarly, severe economic disruption can weigh against vacatur under certain circumstances. *See, e.g.*, *Cal. Cmtys. Against Toxics*, 688 F.3d at 993-94 (vacatur would be "economically disastrous"). But the simple fact that vacatur would be disruptive, for agencies or stakeholders, is not grounds to avoid this remedy. *Mont. Wildlife Fed'n*, 127 F.4th at 51 (vacating leases sales even though it would require canceling 158 leases and returning $36 million in lease revenues to purchasers).

Here, the potential for disruptive effects does not weigh against vacatur. As Bonneville itself emphasizes, it has not yet actually joined Markets+. 1-ER-252. Vacatur would restore the status quo that existed before Bonneville's decision, and allow the agency to complete a legally adequate decision under the Power Act and a proper NEPA analysis. In contrast, leaving the decision in place while an EIS is completed would merely ensure momentum towards affirming the original, unlawful decision. *See Standing Rock Sioux Tribe*, 985 F.3d at 1052.

B. This Court Should Order an EIS to Study the Environmental Impacts of Day-Ahead Market Alternatives.

As this Circuit has found, where "the evidence in a complete administrative record demonstrates that the project or regulation may have a significant impact, then it is appropriate to remand with instructions to prepare an EIS." *CBD v. NHTSA* , 538 F.3d at 1179 (9th Cir. 2008); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) ("An EIS must be prepared if

substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor.") (cleaned up). As this Court held in *Forelaws on Bd.*, "[o]nly a full [EIS] will inform BPA, its customers, the public and the Regional Council of all the environmental consequences of the contacts…BPA must, therefore, perform an EIS on the contracts." 743 F.2d at 686.

Courts in this Circuit and others order agencies to perform EISs regularly. *See, e.g.*, *Env't Def. Ctr.*, 36 F.4th at 882; *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108 (9th Cir. 2004), *opinion amended*, 402 F.3d 846 (9th Cir. 2005) (ordering preparation of an EIS for dock serving oil refinery) ("the permit necessitated an EIS because [plaintiffs] raised a *substantial question* as to whether the dock extension *may* cause *significant* degradation of the environment.") (emphasis added); *Cascadia Wildlands v. Adcock*, 779 F. Supp. 3d 1213, 1234 (D. Or. 2025) (same); *see also Standing Rock Sioux Tribe*, 985 F.3d at 1050 (ordering Corps to perform EIS after rejecting environmental assessment as inadequate).

Applying these precedents here, this Court should direct Bonneville to prepare an EIS. This outcome is appropriate because the record is clear that the impacts of this decision on wide range of environmental values that easily rise to the level of "significance" triggering an EIS. *See supra* 14-18, 44-61. The record is replete with evidence that Bonneville's decision would have major implications for everything, from coal-fired power to endangered salmon. An EIS would also assist

Bonneville in complying with its Power Act obligations to consider environmental values and fisheries. *See supra* 40-42.

CONCLUSION

For the foregoing reasons, this Court should declare that Bonneville violated both the Power Act and NEPA in adopting the DAM Policy and ROD, vacate them pursuant to its authority under the APA, and order Bonneville to prepare an EIS prior to issuing any final decision to join a day-ahead market.

Respectfully submitted this 3 day of November, 2025.

s/ Jaimini Parekh
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 25-4278

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2025, I electronically filed the foregoing Petitioners' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated: November 3, 2025.

s/ Jaimini Parekh
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