127 FERC ¶ 61,270
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Mountain States Transmission Intertie, LLC and NorthWestern Corporation — Docket No. EL09-30-000

DECLARATORY ORDER DENYING NEGOTIATED RATE AUTHORITY

(Issued June 18, 2009)

1. On January 15, 2009, Mountain States Transmission Intertie, LLC (MSTI) and NorthWestern Corporation (NorthWestern) (collectively, Petitioners) filed a petition for declaratory order on the rate treatment for a proposed transmission project (MSTI Project). Petitioners seek a finding that the MSTI Project meets the Commission's criteria for negotiated rate authority. Petitioners also request that the Commission approve their proposal to grant a preference on the MSTI Project to customers currently in NorthWestern's queue.[1] As discussed below, we deny Petitioners' request for negotiated rate authority for the MSTI Project as well their proposal to grant a preference to certain customers.

2. The Commission remains committed to the development of new transmission infrastructure that is essential to access and deliver power from locationally constrained resources and to meet our Nation's future energy requirements. We also recognize

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[1] On January 15, 2009, NorthWestern also filed a separate Petition for Declaratory Order in Docket No. EL09-29-000 seeking approval of an open season process and waivers for its contemplated Collector Project. NorthWestern states that the Collector Project is expected to offer point-to-point service, at incremental rates, from five areas on NorthWestern's system to Townsend, Montana, over five generator lead lines. NorthWestern states that although the Collector Project will provide energy developers with access to the MSTI Project, the MSTI and Collector Projects are not dependent upon one another. The Collector Project is being addressed separately, but concurrently with this order.

Petitioners' desire to insulate native load customers from the costs and risks associated with an export-only project, and to efficiently and effectively facilitate the development of this project. In this regard, we believe that NorthWestern has ample opportunity to accomplish its objectives and construct a project comparable to the MSTI proposal on a cost-of-service basis by requesting appropriate tariff waivers.

I. Background

3. Petitioners describe MSTI as a stand-alone transmission company and a wholly-owned subsidiary of NorthWestern that proposes to develop, own, and operate the MSTI Project. Petitioners describe the MSTI Project as an approximately 433-mile, 500 kV AC transmission line with estimated capacity of 1,500 MW, extending from Townsend, Montana, on NorthWestern's system, to an interconnection point with Idaho Power Company (Idaho Power) at or near the Midpoint or Borah substations in southern Idaho. Petitioners state that the MSTI Project is intended to deliver energy, including renewable wind energy, from Montana to load centers in western states.

4. Petitioners state that NorthWestern is an exporting control area, with existing generation capacity significantly exceeding current load. Petitioners state that due to the limited need for new generation on NorthWestern's system, the MSTI Project is designed to export energy from NorthWestern and is not needed for system reliability. Petitioners state that NorthWestern initially anticipated developing the MSTI Project as part of the NorthWestern system and conducted a preliminary open season to solicit interest in 2004. The preliminary open season resulted in 17 transmission service requests for service into southern Idaho; however, no service requests were binding and the numbers of customers and requested capacity have since varied. Petitioners state that there are currently three customers in NorthWestern's existing transmission queue with non-binding requests for 539 MW of export service.

5. Petitioners explain that MSTI proposes to develop the MSTI Project as a stand-alone transmission system, rather than an expansion of the NorthWestern system as previously anticipated, so that NorthWestern's existing transmission customers will not be required to subsidize the cost of a new transmission facility to serve off-system markets. Petitioners state that, as a stand-alone transmission company, MSTI will insulate existing NorthWestern customers from possible adverse rate impacts from the MSTI Project.

II. Details of Initial Filing

6. Petitioners seek authority to charge negotiated rates on the MSTI Project and contend that the MSTI Project meets all the relevant criteria that the Commission has identified for evaluating proposals to charge negotiated prices for transmission rights

over new merchant transmission facilities.[2] Petitioners explain that the MSTI Project will offer point-to-point service from one end of the project to the other and will not offer service beyond those points. Petitioners state that MSTI has no captive customers and will assume full market and financial risk for the MSTI Project. The MSTI Project would not be located within or adjacent to a Regional Transmission Organization (RTO) or an Independent System Operator (ISO); however, MSTI commits to participating, along with NorthWestern, in the Western Electricity Coordinating Council and the Northern Tier Transmission Group regional transmission planning processes. Petitioners state that MSTI will provide transmission service under its own Open Access Transmission Tariff (OATT) that will be consistent with, or superior to, the Commission's *pro forma* OATT. MSTI commits to filing its OATT with the Commission at or about the time it files its open season report.

7. Petitioners explain that MSTI proposes to hold another open season to determine interest in the MSTI Project and that MSTI may refine the project to meet market demand based on customer response in the open season.[3] If the open season demand exceeds the capacity of the project configuration, MSTI proposes to allocate that capacity by first awarding the full amount of requested capacity to customers in NorthWestern's existing transmission queue, and then pro-rate the remaining requests for capacity among other open season participants. Petitioners submit that it would be fair and not unduly discriminatory to give customers in NorthWestern's current transmission queue such a preference for service on MSTI in recognition of the length of time they have spent in NorthWestern's queue. Petitioners initially proposed to terminate requests from customers in NorthWestern's current transmission queue to the extent that those customers choose not to participate in the MSTI open season, do not qualify, or are not awarded capacity. As explained below, Petitioners ultimately decided to allow customers

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[2] NorthWestern, January 15, 2009 Filing, at 7-8 (citing *Northeast Utilities Service Co.*, 97 FERC ¶ 61,026, at 61,075 (2001); *TransEnergie Ltd.*, 98 FERC ¶ 61,144 (2002); *TransEnergie U.S. Ltd.*, 91 FERC ¶ 61,230 (2000); *Sea Breeze Pacific Juan de Fuca Cable, LP*, 112 FERC ¶ 61,295, at P 21 (2005); *Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 27 (2006)). We note that since Petitioners, initial filing, the Commission has refined its analysis for granting merchant transmission owners negotiated rate authority, as Petitioners addressed in their later filings in this docket, and as discussed further below.

[3] In addition to the proposed 500 kV line from Townsend, Montana to Midpoint, Idaho, MSTI states that it will also explore interest in a 430 MW, 230 kV line from Mill Creek, Montana to Borah, Idaho, and an 800 MW, 345 kV line from Townsend, Montana to Borah, Idaho.

in NorthWestern's queue to remain in that queue regardless of whether they participate in the MSTI open season.

8. Petitioners state that none of MSTI's affiliates will participate in the open season and that any future requests for transmission service will be made in compliance with the terms and conditions of MSTI's OATT. Petitioners state that MSTI will keep separate books from those of any affiliates and file financial statements and reports in compliance with the Commission's regulations.[4] Thus, Petitioners assert that MSTI's costs will be fully segregated from NorthWestern's costs and will prevent cross-subsidization of MSTI by NorthWestern's customers.

9. Furthermore, Petitioners assert that NorthWestern would provide an equal opportunity to any non-affiliate who wishes to compete with the MSTI Project for a new transmission interconnection with NorthWestern. Petitioners claim that, although NorthWestern initially proposed to develop the MSTI Project as part of the NorthWestern system, it did not procure necessary rights-of-way specifically for the project. Therefore, Petitioners state that competitors could obtain rights-of-way at the same costs as MSTI, such that the MSTI Project will not impede market entry by non-affiliates.

III. Notices and Interventions

10. Notice of Petitioners' filing was published in the *Federal Register*, 74 Fed. Reg. 5,155 (2009), with interventions and protests due on or before February 17, 2009. NaturEner USA, LLC (NaturEner USA), PacifiCorp, the Renewable Northwest Project (Northwest Renewables) and American Wind Energy Association (AWEA), Western Area Power Administration (Western), and Bonneville Power Administration (Bonneville) filed motions to intervene. PPL EnergyPlus, LLC and PPL Montana, LLC (collectively, PPL) filed a motion to intervene, consolidate, and protest. The Montana Public Service Commission filed a motion to intervene out-of-time. Petitioners and NaturEner USA filed answers to protests. PPL filed an answer to Petitioners' answer.

11. PPL moves to consolidate the Collector and MSTI dockets, because it contends that the issues raised by the petitions will similarly affect many of the parties participating in both dockets. PPL states that resolving the issues in both dockets simultaneously will lead to greater procedural and practical efficiency.

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[4] Petitioners specifically commit to compliance with Parts 41, 101, and 141 of the Commission's regulations.

A. **Protests**

12. PPL states it requested transmission service as part of NorthWestern's 2004 open season and that it has maintained its position in NorthWestern's transmission service queue since that time. PPL argues that rather than process its transmission service request, NorthWestern seeks to force PPL to compete for transmission service as part of a second open season conducted by MSTI. PPL explains that six participants executed facilities study agreements under NorthWestern's OATT following the 2004 open season and submitted the required one-month reservation fee deposit. PPL states that it also paid a deposit equal to its proportional share of the facilities study costs. PPL notes that the facilities study agreement required NorthWestern to complete the facilities study within 60 days. PPL asserts that after receiving no communication from NorthWestern regarding the study, it approached NorthWestern in the fall of 2008 to discuss the status of the 2004 open season. According to PPL, NorthWestern acknowledged in that meeting that it never finished its 2004 open season studies.

13. PPL argues that NorthWestern should not be allowed to circumvent the terms and conditions of its OATT through a subsidiary and notes the following differences between the service it requested from NorthWestern in 2004 and the MSTI Project: (1) transmission rates under NorthWestern's OATT are cost-based whereas MSTI proposes to charge negotiated rates, with terms and conditions that will depend upon the number of customers who participate in the new open season and the size of the line, rather than PPL's individual request; (2) service under the 2004 open season is governed by NorthWestern's OATT while service on MSTI will be controlled by MSTI's OATT, the terms and conditions of which are unknown; and (3) the 2004 open season was conducted by NorthWestern, which is an established transmission provider with substantial capital and credit to support its projects, and the MSTI open season will be for transmission service from a new limited liability company with no existing facilities, and which may not be backed by NorthWestern.

14. PPL states that MSTI's request to charge market-based rates should be denied because MSTI's parent company is the monopoly transmission provider in the relevant service territory. Further, PPL argues that in other cases where the Commission approved negotiated rate authority, an ISO or RTO was proposed to operate and schedule the lines or the proposed lines were not interconnected to transmission systems owned by affiliates.[5]

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[5] PPL, February 17, 2009 Protest, at 15-16 (citing *Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147, at 61,633 (2001); *Sea Breeze Pacific Juan de Fuca Cable, LP*, 112 FERC ¶ 61,295, at P 16 (2005); *Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071 (2006)).

15. PPL states that the MSTI Project raises additional affiliate concerns, such as cross-subsidization (e.g., there is a risk that costs for shared services, such as construction services or administrative services, may not be properly allocated between the two entities even if they are using separate books and records). PPL is also concerned that NorthWestern may be using MSTI to avoid having to credit existing customers for revenues received from a NorthWestern owned and operated Montana to Idaho transmission line. PPL asserts that if NorthWestern constructed the proposed line, it would have to credit revenues received to existing transmission customers taking service at its rolled-in cost-of-service rate.

16. PPL also contends that Petitioners fail to demonstrate that transmission customers on NorthWestern's system, specifically the existing queue customers, will be held harmless as to the MSTI Project and note that the Commission has made clear that existing transmission customers cannot be used to subsidize the cost of merchant transmission facilities.

17. PPL states that NorthWestern is an active participant in the Montana energy markets and an important user of its own transmission system and that NorthWestern therefore has a financial incentive to prevent the costs of the new transmission facilities from being borne by existing customers. Therefore, PPL states that NorthWestern must demonstrate that the new project will not benefit native load customers before it places the full cost of these new facilities on new transmission service customers. PPL notes that no evidence is provided for Petitioners' claim that the MSTI Project is not required for transmission reliability on the existing NorthWestern system.

18. PPL asserts that Order No. 2000 prohibits RTOs from pancaking the rates of multiple transmission owners within the RTO for a single transaction and that the Commission has extended this prohibition to discourage non-RTO transmission owners from charging pancaked rates.[6] PPL contends that Petitioners would be charging pancaked rates for new generation owners who seek to transmit power across both the MSTI Project and NorthWestern's system.

19. PPL concludes that Petitioners' filing contains significant deficiencies that cannot be resolved based upon the information contained in the petition and thus, the Commission should either reject the petition or consolidate it with the Collector petition and set them for hearing and/or settlement procedures.

[6] PPL, February 17, 2009 Protest, at 22 (citing *Entergy Servs., Inc.*, 110 FERC ¶ 61,295, at P 72 (2005), *order on reh'g*, 116 FERC ¶ 61,275, at P 71 (2006)).

B. <u>Answers</u>

20. In their answer, Petitioners state that NorthWestern held multiple meetings following its 2004 open season to keep open season participants informed of both the process and the progress of the project. Petitioners note that participants were able to withdraw from the process without penalty during that time. According to Petitioners, the current service request queue, which contains requests for 539 MW, is potentially sufficient to support a 230 kV transmission line to southern Idaho, but such a line would not support any of the additional approximately 3,800 MW of new wind energy projects in NorthWestern's interconnection queue. In contrast, Petitioners state that MSTI's preferred 500 kV configuration would accommodate up to 1,500 MW of service and would be a more efficient use of the transmission corridor.

21. Petitioners state that the customers currently in NorthWestern's queue are not bound to finance the development of any transmission line and thus have no risk associated with the MSTI Project. Petitioners note that NorthWestern has funded all of the siting and permitting activity to date and that this has been a very substantial investment by NorthWestern, which has borne all of the risk for the MSTI project.

22. Petitioners contend that the MSTI petition seeks to address the growing demand for transmission export service from the NorthWestern system in a manner that does not require existing system customers to subsidize expansion costs to accommodate power sales that ultimately will serve other markets. Because a NorthWestern system expansion would be incrementally priced, NorthWestern concludes that a new, stand-alone export project that is open to participation by existing queue customers as well as new generation projects would likely produce the optimal transmission solution at the most reasonable cost.

23. Petitioners state that PPL's concern as to its queue seniority on NorthWestern overlooks MSTI's request that the Commission give shippers in the NorthWestern queue a tie-breaking preference in the event that service on MSTI is oversubscribed. Nevertheless, Petitioners state that if PPL or others in the current queue would prefer to remain there and pursue an expansion specific to their needs, NorthWestern has no objection to moving forward on that basis. However, Petitioners note that NorthWestern and its customers have not yet been able to agree on a definitive transmission expansion plan. Nonetheless, Petitioners state that NorthWestern will provide PPL with a facilities study agreement, will perform the study, and proceed with development and construction of an expansion to serve them, provided that PPL meets its responsibilities under NorthWestern's OATT.

24. Petitioners contend that PPL's complaint that service on MSTI will not be comparable to service on NorthWestern is essentially a concern that the unit rate for service on MSTI will be higher than the incremental rate for service on NorthWestern. Petitioners assert that new customers retain the rights—just as PPL does—to opt for

incrementally-priced service on NorthWestern instead of service at negotiated rates on MSTI. In any event, according to Petitioners, the Commission does not require rates on merchant transmission lines to be comparable to those on transmission systems. Rather, Petitioners state the Commission's policy is to take into consideration the availability of incrementally-priced cost-of-service transmission rates on a system as a means of protecting shippers on a merchant line against unjust and unreasonable rates.[7]

25. Petitioners state that contrary to PPL's claim, MSTI is a stand-alone company that will assume full market risk, and that if MSTI does not achieve sufficient market support to be commercially viable, the project will not move forward because MSTI—not NorthWestern's captive customers—will bear the full development and project risk.

26. In response to PPL's rate pancaking concerns, Petitioners state there will be no rate pancaking as a result of the MSTI Project. Petitioners contend that the idea that generators wishing to move power across multiple systems may have to pay multiple rates for the service has never been an obstacle to Commission approval of negotiated rates for merchant transmission.

27. In its answer, PPL seeks to ensure that NorthWestern's proposal for the MSTI Project in no way diminishes or devalues PPL's rights and protections under NorthWestern's OATT, including its right to the expeditious completion of the processing of its pending transmission service requests.

28. NaturEner USA believes it is important that the Collector and MSTI Projects advance as quickly as possible to bring additional renewable resources on line and, for that reason, NaturEner USA opposes PPL's request to consolidate the two petitions. NaturEner USA states that the facts, circumstances, and purposes of the two projects are distinct.

IV. <u>Technical Conference</u>

29. Based on the issues raised by Petitioners' filing and in the protests, staff convened a technical conference on March 12, 2009 in Docket Nos. EL09-29-000 and EL09-30-000 to gain a better understanding of the nature of the MSTI and Collector Projects. On March 27, 2009, Petitioners made a supplemental filing that addressed the issues raised at the technical conference. On April 14, 2009, AWEA and Northwest Renewables, PPL, and Montana Small Independent Renewable Generators (Montana Renewables) filed

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[7] Petitioners, March 3, 2009, Answer at 10-11 (citing *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P38 n.26 (2009) (*Chinook*)).

comments in response.[8] On April 21, 2009, Petitioners filed an answer. On May 6, 2009, PPL filed an answer to Petitioners' answer.

A. <u>Petitioners' Supplemental Filing</u>

30. Petitioners state that MSTI is requesting negotiated rate authority to provide it flexibility for structuring its rates for the project to allow it to recover its revenue requirement, including a fair return on investment. Petitioners state that this may entail, for example, allowing customers to opt for a longer term contract and thereby obtain a lower unit rate (once the cost of the project is determined) as a consequence of a longer amortization period for the cost of the project. It may also entail other negotiated elements, such as a negotiated return on equity, negotiated depreciation, or other negotiated components of the rate.

31. Petitioners state that the Commission's "and" pricing principle applies to service "where transmission facilities are fully integrated and support the entire transmission system," in which case the Commission favors rolled-in or incremental pricing, depending on the circumstances.[9] However, Petitioners claim that the Commission has long recognized exceptions to this pricing policy, "particularly when long transmission lines extend considerably beyond the company's high density service areas" and the lines are installed and built primarily to serve customers who requested the service.[10] Petitioners contend that these principles make it appropriate to assign the cost of the MSTI Project directly to those customers who request it to be built, and doing so will not result in "and" pricing or rate pancaking. Further, Petitioners explain that phase shifting transformers will ensure that power scheduled by MSTI customers flows onto the MSTI line. Petitioners state that MSTI is not needed to serve NorthWestern's native load customers and that assigning separate cost responsibility for MSTI to customers using that line is consistent with cost causation and is equitable.

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[8] While all the post-technical conference comments were filed in both the MSTI and Collector dockets, only PPL's comments apply to the MSTI Project. AWEA and Northwest Renewables, and Montana Renewables filed comments only with regard to the Collector Project.

[9] Petitioners, March 27, 2009 Post-Technical Conference Comments, at 10 (citing *Northeast Utilities Service Co*., 58 FERC ¶ 61,070, at 61,206, *reh'g denied*, 59 FERC ¶ 61,042 (1992); *Public Service Company of Colorado*, 59 FERC ¶ 61,311, at 62,150 (1992)).

[10] *Id.* (citing *Idaho Power Co*., 3 FERC ¶ 61,108, at 61,296, *reh'g denied*, 5 FERC ¶ 61,009 (1978) (*Idaho Power*)).

32. Petitioners claim that there are numerous transmission alternatives to the MSTI project in the region, including seven public utilities (not affiliated with NorthWestern) that could offer cost-based transmission service under their OATTs. To the west, NorthWestern co-owns the 500 kV transmission line from the 2,200 MW Colstrip Power Station along with Puget Sound Energy, Inc., Portland General Electric Co., Avista Corp., and PacifiCorp. Petitioners explain that each co-owner has the independent right to upgrade its portion of the line to increase the transfer capability and offer the extra capacity to the market at cost-based rates. In addition, Petitioners state that Bonneville owns and operates a major regional transmission system that interconnects with the NorthWestern system at several points in western Montana.

33. Petitioners state that to the south, along Path 18, existing 161 kV and 230 kV transmission lines are jointly owned by Idaho Power, PacifiCorp, and NorthWestern. Petitioners claim that Idaho Power and PacifiCorp can expand transmission capacity at cost-based rates to southern Idaho. Petitioners state that also to the south, Western and PacifiCorp own existing 161 kV and 230 kV transmission facilities from Yellowtail and Crossover, Montana, into Wyoming and points south. Petitioners claim that these entities can expand their transmission facilities to accommodate new service requests. In addition, Petitioners note, the Chinook project proposes a major transmission expansion, with negotiated rates, from Montana, through southern Idaho and on to Las Vegas, Nevada.[11]

34. Petitioners expect that the MSTI project will provide regional economic benefits by eliminating a transmission constraint to the southwest through Idaho where, Petitioners believe, attractive power markets lie for generation currently seeking to interconnect to the NorthWestern system. Moreover, Petitioners believe the MSTI Project will give customers in those markets access to new supplies of renewable energy, which will both enhance competition in wholesale power markets and bring western states closer to meeting their renewable energy targets. Petitioners also claim that MSTI will provide other regional benefits such as promoting wholesale competition and customer choice; however, despite several impact studies to date, NorthWestern has not identified any reliability benefits of the project to any entity other than the MSTI customers.

35. Petitioners state that MSTI will have its own OATT and open access same-time information system (OASIS) network and that MSTI will schedule transmission service on the line as required by the Commission-approved OATT. Petitioners state that maintenance of the line is yet to be determined, but it is likely that MSTI will contract with a third party or NorthWestern to provide maintenance services.

[11] Id. at 12 (citing *Chinook*, 126 FERC ¶ 61,134).

36. Petitioners contend that the MSTI Project is proposed in the same region where the Commission found that competition from competing merchant developers would constrain the market power of the projects addressed in *Chinook.* Petitioners point out that Chinook proposes to build a 3,000 MW line from northern Montana to Borah, Idaho and points south, which is a much larger project than the MSTI proposal. According to Petitioners, the existence of other merchant transmission projects in the same general region will enhance competition and constrain MSTI's pricing power.

B. Comments

37. PPL states that while expanding transmission capacity and providing greater access to renewable resources is a commendable goal, neither negotiated nor pancaked rates are necessary for a transmission provider to build new transmission capacity in its service territory. PPL explains that to the extent NorthWestern is concerned about the costs of constructing new transmission facilities to accommodate transmission service on the proposed MSTI line, NorthWestern's OATT provides that it must be compensated for any such costs. PPL argues that NorthWestern provides no justification for its request to forego this established process.

38. PPL states that Commission policy generally prohibits entities from charging negotiated or market-based rates in markets where they or their affiliates possess market power.[12] PPL argues that in determining whether negotiated rates are just and reasonable for a merchant transmission project, the Commission has stated that it looks to whether the project is to be built in its own or an affiliate's service territory.[13] PPL adds that the Commission also looks to whether the merchant or its affiliate owns transmission facilities in the particular region in which the project is to be built.[14] PPL states that in this case, MSTI will connect directly with the NorthWestern transmission system in the middle of its service territory and parallel existing NorthWestern transmission paths to southern Idaho. PPL contends that allowing MSTI to charge negotiated rates in these circumstances is not just and reasonable and raises significant market power concerns.

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[12] PPL, April 14, 2009 Reply Comments, at 9 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008); *order on clarification*, 124 FERC ¶ 61,055 (2008), *order on reh'g and clarification*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008) FERC Stats. & Regs. ¶ 31,285 (2008).

[13] *Id.* (citing *Chinook*, 126 FERC ¶ 61,134 at P 38).

[14] *Id.*

39. Further, according to PPL, the Commission generally requires affiliated transmission-owning utilities with interconnected transmission systems to adopt a single system rate reflecting the combined cost of both systems.[15] PPL argues that NorthWestern provides no support for its proposal to deviate from this precedent and charge pancaked rates for service from NorthWestern's system and over the MSTI line.

40. PPL states that theoretical competition by other entities that could potentially build transmission does not mitigate NorthWestern's market power in its transmission service territory. PPL argues that in determining whether generators should be authorized to make sales at market-based rates, the Commission examines whether a generator has the ability to exercise market power in the relevant market.[16] According to PPL, the generator must demonstrate that competitors have the uncommitted capacity available to mitigate its ability to exercise market power in the relevant geographic market.[17] PPL states that NorthWestern has made no showing that the owners of the other transmission lines or merchant transmission projects, in the area of the MSTI Project can actually build the necessary transmission to accommodate requests for new transmission service and mitigate NorthWestern's ability to exercise market power.

41. Although NorthWestern now claims that the MSTI line is not needed to serve retail customers reliably and that it will not provide regional benefits, PPL contends that NorthWestern has failed to provide evidence supporting those claims. PPL points out that NorthWestern admits the power flow studies for the MSTI line are not complete. PPL argues that, according to the MSTI website, the MSTI line will: (1) "strengthen the Western Power Grid through additional transmission capacity and improved reliability, flexibility, and performance," (2) "meet the growing demand for electricity that fuels economic growth," and (3) "provide energy diversification, bi-directional transmission capacity, market competition, and supplier choice to Montana, Idaho and the western region."[18] PPL asserts that these purported benefits appear to apply equally to all customers in the region, including the retail customers for which NorthWestern is responsible. Moreover, according to PPL, NorthWestern does not provide evidence that

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[15] *Id.* at 17 (citing *See, e.g.*, *Consol. Edison Co. of N.Y., Inc., et al.*, 86 FERC ¶ 61,063, at 61,242 (1999)).

[16] *Id.* at 10 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 65).

[17] *Id.* (citing *PPL Montana, LLC*, 120 FERC ¶ 61,096, at P 46 (2007), *appeal pending*, Nos. 07-73256 and 07-73547 (9th Cir. Aug. 16, 2007)).

[18] *Id.* at 14-15 (citing the MSTI website at http://www.msti500kv.com/about/benefits.html).

using phase shifters to control flows on the MSTI line is an efficient transmission investment rather than an unnecessary cost included solely to buttress its regulatory argument that NorthWestern's other customers should bear no part of the expense of the new line.

42. PPL points out that NorthWestern has already undertaken preliminary siting and permitting work for the MSTI Project. PPL warns that the Commission should be wary of NorthWestern's statements that it is using its own planning resources to assist in the MSTI Project, because using these resources to promote the MSTI Project discriminates against customers whose pending service requests under NorthWestern's OATT are being neglected.

43. According to PPL, because NorthWestern has effectively abandoned the 2004 open season, it has left customers that have pending transmission service requests with only one realistic alternative capable of constructing transmission service from NorthWestern's system into Idaho. Thus, PPL states that while customers may not be required to take service on the MSTI line, if that project goes forward they have no viable alternative if they want transmission service from NorthWestern's system into Idaho to be completed in a timely manner.

44. PPL argues that despite NorthWestern's assertions, the MSTI line does not build on the 2004 open season and is not a reasonable alternative to the 2004 open season, because the service requests source from various locations on NorthWestern's system and sink in southern Idaho. PPL argues that customers taking service on NorthWestern's system may be required to pay a rate that includes the cost to move power across NorthWestern's system pancaked with the incremental MSTI rate, as opposed to one rate if NorthWestern were to complete the 2004 open season. PPL states that 2004 open season participants should not have to contract for transmission service on the MSTI line in order to obtain the transmission capacity they have already requested, nor should they have to bear costs that have already been paid as part of the 2004 open season process.

45. PPL states that NorthWestern should be required to complete the 2004 open season consistent with the requirements of NorthWestern's OATT before proceeding with MSTI. PPL contends that NorthWestern is required by the terms and conditions of its OATT to honor the 2004 open season requests and that NorthWestern cannot avoid processing those requests by offering MSTI as an inferior alternative.

C. <u>Petitioners' Answer</u>

46. Petitioners assert that PPL's request that the Commission require NorthWestern to complete the 2004 open season before proceeding with the MSTI open season would be harmful to the market and is unnecessary. Petitioners state that NorthWestern has the capability to process PPL's service request while also exploring market interest in the MSTI Project. Petitioners state that it would be unfair to off-system customers interested

in the MSTI project to delay it until the 2004 open season is completed. As Petitioners point out, that open season has already been in the evaluation stage for several years as customers in that queue have come and gone.

47. Petitioners claim that while PPL conceded that an alternative to the 2004 open season is appropriate, PPL has failed to offer practical suggestions for an approach that is superior to the MSTI open season that is currently proposed. Moreover, Petitioners explain, while the OATT is well suited to case-by-case transmission requests to serve load on the transmission provider's system, it can produce inefficient cost allocations and delays when there are numerous generation projects that require transmission to deliver power to off-system markets. Petitioners contend that the Commission recognized the inefficiencies of sequential studies for large service queues in the Large Generator Interconnection Process reform proceedings where it acknowledged that the interconnection process can break down in circumstances when large numbers of generators seek to interconnect to a constrained transmission system[19] and that this is the same problem that NorthWestern has experienced with its transmission export line. Petitioners assert that giving the market the option to decide on the most attractive transmission export line provides an opportunity to streamline the process, formulate a commercially viable plan through customer negotiations, and develop transmission expeditiously and efficiently while ensuring that those customers who require the line will bear the costs. Petitioners point out that the OATT process under the NorthWestern tariff and the tariffs of other regional transmission providers remains available as a backstop.

48. According to Petitioners, the Commission's policy allows negotiated pricing for transmission services when consumers have cost-based alternatives,[20] and Petitioners state that they have identified seven such alternatives. Further, according to Petitioners, the Commission cited specifically to the MSTI proposal as a competitive alternative to the projects in *Chinook*. Petitioners claim that if MSTI is the competitive alternative that supported negotiated rate authority for the applicants in *Chinook*, then those projects necessarily present competitive alternatives that support negotiated pricing for MSTI.

49. Petitioners note that PPL points to the Commission's policy on market-based pricing for wholesale power sales, which does not apply here. Instead, according to Petitioners, that policy focuses on the potential for generators and other wholesale sellers to exercise market power based on their estimated shares of the market during the annual peak and the four seasonal peaks in the relevant market. Petitioners state that those

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[19] Petitioners, April 21, 2009 Post-Technical Conference Reply Comments, at 3 (citing *Interconnection Queuing Practices*, 122 FERC ¶ 61,252, at P 4 (2008)).

[20] *Id.* at 4-5 (citing *Chinook*, 126 FERC ¶ 61,134).

measures focus on market shares in short-term energy sales, not the sale of long-term products. Petitioners contend that Order No. 697-A specifically recognizes that competitive entry may alleviate potential market power concerns in long-term markets, such as the markets that MSTI will serve.

50. Petitioners state that PPL's reliance on excerpts from the MSTI website and similar extracts describing the regional energy benefits of the MSTI Project provide no support that the project is needed for, or provides, transmission reliability benefits that should be borne by NorthWestern's native load customers. Petitioners contend that MSTI is an economic project that will be built only if supported by an open season and that allocating the costs of MSTI to the customers reserving capacity on the line to export power off of the NorthWestern system ensures that those customers requiring the line to be built, and the consumers benefiting from it, appropriately bear the costs of that line.

51. Petitioners state that MSTI's connection to the NorthWestern system does not establish a system-wide integrated network.[21] Petitioners state that MSTI will sell point-to-point rights for off-system transmission, and phase shifting transformers will direct the power of MSTI's customers from NorthWestern onto the MSTI line. Petitioners contend that these are the exceptional circumstances that the Commission discussed in the *PSCo* case,[22] and the *Idaho Power* cases,[23] where a line essentially serves a radial function to deliver power to off-system markets outside of NorthWestern's franchised service area.

52. Moreover, Petitioners state that PPL provides no policy reason why the Commission should deny negotiated pricing flexibility for customers choosing to participate in a transmission expansion that will be implemented through an open season process. Petitioners claim that the customer's request for service together with the off-

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[21] Petitioners note that the Commission may require rolled-in pricing when facilities both meet the test of integration and provide system-wide benefits to all customers who use the transmission network. *Sierra Pacific Power Co. v. FERC*, 793 F.2d 1086, 1088 (9th Cir. 1986) *(Sierra)*; *Northeast Texas Electric Coop., Inc.*, 111 FERC ¶ 61,189, at PP 13, 27-28 (2005). Additionally, Petitioners state that transmission facilities are integrated when, in addition to being interconnected, they are designed to operate in parallel, or looped. *Sierra*, 793 F.2d at 1088. Petitioners point out that MSTI will not be designed to operate in parallel with NorthWestern's existing transmission network, but rather will provide a path for transmission exports from that system.

[22] *Id.* at 8 (citing *Public Service Co. of Colorado*, 62 FERC ¶ 61,013, at 61,061 (1993) (*PSCo*)).

[23] *Id.* at 8-9 (citing *Idaho Power*, 3 FERC at 61,296; *see also Idaho Power Co.*, 46 FPC 384 (1971)).

system delivery of power were the key reasons why the Commission decided to assign cost responsibility for the transmission line directly to the customer in *Idaho Power*. Petitioners assert that that the Commission's approach is consistent with fundamental cost-causation principles and directly applicable here.

V. **Discussion**

A. **Procedural Matters**

53. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding in which such notices and motions were filed.

54. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R § 385.214(d) (2008), the Commission will grant the late-filed motion to intervene from the Montana Public Service Commission given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

55. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by Petitioners, NaturEner USA, and PPL because they have provided information that assisted us in our decision-making process.

56. With respect to PPL's motion to consolidate the MSTI (Docket No. EL09-30-000) and Collector (Docket No. EL09-29-000) dockets, we are not persuaded to do so. While we recognize that several parties may be affected by both projects, the two filings raise distinct issues and affect different customers. Therefore, the Commission will address the MSTI Project here and the Collector Project in a separate order, issued concurrently, and deny the motion for consolidation.

B. **Substantive Matters**

57. Petitioners have not shown that negotiated rate authority for the MSTI Project would be just and reasonable, as required by *Chinook*,[24] particularly in light of the affiliate relationship between MSTI and NorthWestern. Accordingly, we deny Petitioners' request for negotiated rate authority for the MSTI Project, as discussed below.

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[24] *Chinook*, 126 FERC ¶ 61,134.

58. Notwithstanding the outcome here, the Commission remains committed to the development of new transmission infrastructure that is essential to access and deliver power from locationally constrained resources and to meet our Nation's future energy requirements. The Commission remains flexible in evaluating new proposals for transmission development and pricing. This flexibility, however, cannot compromise consumer protections by exceeding the bounds of the Federal Power Act[25] or the Commission's open access requirements.[26] We acknowledge the need for innovative proposals to develop new transmission projects, especially in regions rich in potential to deliver renewable energy to load centers.[27] Here the Petitioners have attempted to insulate native load customers from the costs and risks associated with an export-only project. Additionally, they have sought flexibility to efficiently and effectively facilitate the development of this project. We nonetheless find that negotiated rate authority is inappropriate here. However, we believe NorthWestern has ample opportunity to accomplish many of its objectives and construct a project comparable to the MSTI proposal on a cost-of-service basis by requesting appropriate tariff waivers.

59. The Commission's analysis for evaluating the appropriateness of merchant transmission owners' negotiated rate authority focuses on the following four areas of concern: (1) the justness and reasonableness of rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and efficiency requirements.[28] We focus here on the "just and reasonable rate" aspect of the analysis, as applied to the MSTI Project, and find that

[25] 16 U.S.C. §§ 791, *et seq.* (2006).

[26] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2008), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009). *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[27] *See, e.g.*, *California Independent System Operator Corp.*, 119 FERC ¶ 61,061 (2007) (describing unique challenges associated with location-constrained resources).

[28] *Chinook*, 126 FERC ¶ 61,134 at P 37.

Petitioners have not shown that negotiated rate authority for the MSTI Project would be just and reasonable.

60. In *Chinook*, the Commission explained that its inquiry into whether negotiated rate authority is just and reasonable, begins as follows: "In determining whether negotiated rates are just and reasonable, the Commission first looks to whether the merchant transmission owner has assumed the full market risk for the cost of constructing a particular transmission project and is not building within the footprint of its own (or an affiliate's) traditionally regulated transmission system."[29] Because the merchant transmission developers at issue in *Chinook* were new entrants to the transmission markets in their respective geographic areas, having no affiliates with transmission assets therein, these initial concerns were satisfied.[30] In the instant case, however, the MSTI Project would be located, in large part, within the footprint of its affiliate's (NorthWestern's) traditionally regulated transmission system. Thus, we find that the MSTI proposal fails to satisfy this element of the just and reasonable factor that we set forth in *Chinook*, which we have found is appropriate to consider in assessing eligibility for negotiated rate authority for transmission service. We will next examine the evidence provided by MSTI to see if it has demonstrated that it has adequately addressed the issues raised by its plan to build in its affiliate's footprint.

61. First, the record indicates that NorthWestern has played a substantial role in the preliminary development stages of the MSTI Project, which undermines Petitioners' assertion that MSTI has assumed the full risk of the MSTI Project. Petitioners indicate that MSTI would hold an open season, provide service pursuant to its own OATT and OASIS, be subject to the Commission's cross-subsidization rules, and keep its own separate books and records. However, we note that NorthWestern has thus far conducted and funded the preliminary siting, planning and environmental work.[31] Although Petitioners state that NorthWestern is conducting such work at its own expense, it appears that MSTI would enjoy an undue preference not available to others as a result of NorthWestern's preliminary work and its status as an incumbent utility. Indeed, NorthWestern indicates that it may yet exercise eminent domain rights through the MSTI

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[29] *Id.* P 38.

[30] *Id.* P 55-56.

[31] Petitioners, March 3, 2009, Answer at 7 ("…NorthWestern has funded all of the siting and permitting activity to date. This has been a very substantial investment by NorthWestern which has borne all of the risk for the MSTI project.").

Project.[32] Any benefits to MSTI from NorthWestern's use of eminent domain rights would show that NorthWestern is not independent of MSTI and is effectively subsidizing the MSTI Project, leading to concerns that NorthWestern's ratepayers may be harmed or that MSTI enjoys an affiliate preference that is not available to other transmission providers in the region. In light of these characteristics, we find that the MSTI Project is more appropriately viewed as an expansion of NorthWestern's system, as opposed to a stand-alone merchant transmission project.[33]

62. Second, in evaluating Petitioners' request for negotiated rate authority, it is appropriate to consider the affiliated MSTI and NorthWestern in the aggregate as a single entity. Such consideration not only is consistent with Commission precedent in evaluating other forms of negotiated and market-based rate authority,[34] it also recognizes the affiliated entities' disincentive to compete with each other.[35] Petitioners repeatedly

[32] *See* Petitioners, March 27, 2009 Post-Technical Conference Comments at 24 ("It is not yet clear at this point whether NorthWestern or MSTI will be required to exercise [eminent domain] rights.").

[33] Such considerations were not at issue in *Chinook*, and we therefore reject Petitioners' argument that the MSTI Project is similarly situated to Chinook, and should be approved as such.

[34] In both the natural gas transportation context and the market-based rate context for power sales, the Commission has treated affiliates operating in the same relevant geographic market as essentially a single entity for the purposes of a negotiated rate inquiry. *See, e.g.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 290 ("All sellers are required to receive authorization from the Commission prior to undertaking market-based rate sales, and as discussed herein, all new applicants for market-based rate authority are required to, among other things, provide a horizontal market power analysis. The first step for a seller seeking market-based rate authority is to file an application to show that it and its affiliates do not have, or have adequately mitigated, market power."); *Alternatives to Traditional Cost-of-Service Ratemaking*, 74 FERC ¶ 61,076, at 61,234 n.59 (1996) ("The capacity on pipeline systems owned or controlled by the applicant's affiliates should not be considered among the customer's alternatives. Rather, the capacities of an applicant's affiliates offering the same product are to be included in the market share calculated for the applicant. Similarly, alternative pipelines must be aggregated with their respective affiliates in order to identify meaningful alternatives to customers.").

[35] *See Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220 (2006) ("While affiliates are required to act independently under the Commission's rules, this does not mean that affiliates will compete for the same service or product in a given market.").

assert that MSTI is a stand-alone entity, independent of NorthWestern, and that MSTI alone bears the risks of the MSTI Project, insulating NorthWestern (and its customers) from any risk associated with the project. However, under the facts of this case, we cannot ignore the strong incentives not to compete among affiliates, especially when those affiliates are interconnected. Petitioners have not addressed such competitive disincentives in a way that ensures that MSTI will not benefit from its proximity to and affiliation with NorthWestern, or vice versa. Due to the absence of meaningful competition between NorthWestern and MSTI in light of the affiliate relationship, the MSTI Project would concentrate the combined affiliates' control over transmission in and around Montana and potentially increase their market power. Such a potential increase in market power by the incumbent utility indicates that granting negotiated rate authority to MSTI is not warranted here.

63. Third, we note that Petitioners' request for negotiated rate authority on the MSTI Project establishes an undesirable incentive vis-à-vis NorthWestern's obligation to expand its system at cost-based rates pursuant to its OATT.[36] Despite this obligation, the affiliate relationship between NorthWestern and MSTI creates the incentive for NorthWestern to withhold capacity and/or to delay the timely expansion of its facilities in response to requests for service under its OATT as a means of favoring its affiliate project. We note Petitioners' pledge that NorthWestern will continue to honor its obligation to expand pursuant to the OATT. However, in light of the comments filed by PPL in this proceeding, it appears that longstanding requests for transmission service on NorthWestern have not led to the construction of new capacity.[37] Therefore, without making any determination on the specific arguments made by the parties with respect to

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[36] NorthWestern's OATT states, in relevant part: "[i]f the Transmission Provider determines that it cannot accommodate a Completed Application for Firm Point-To-Point Transmission Service because of insufficient capability on its Transmission System, the Transmission Provider will use due diligence to expand or modify its Transmission System to provide the requested Firm Point-To-Point Transmission service, consistent with its planning obligations in Attachment K, provided the Transmission Customer agrees to compensate the Transmission Provider for such costs pursuant to the terms of Section 27." NorthWestern, OATT § 15.4(a).

[37] PPL explains that transmission service requests originally made in a 2004 open season have yet to lead to the construction of new capacity sufficient to accommodate such requests.

the 2004 open season and subsequent negotiations,[38] we cannot find that based on the record in this case NorthWestern's obligation to expand will serve as a disciplining force on negotiated rates that could be charged by its affiliate on the MSTI Project. In addition to this practical concern as to NorthWestern's obligation to expand, conveying negotiated rate authority on MSTI could also provide an incentive for the combined affiliates to impede the timely completion of service requests on NorthWestern while expediting requests for service on MSTI, if the combined affiliates are able to recoup a potentially higher return on their investment through negotiated rates on MSTI. Therefore, we find that negotiated rate authority for the MSTI Project could undermine or supplant NorthWestern's obligation to expand its system at cost-based rates, which is an important component of open access.

64. We find that these concerns about the affiliate relationship between MSTI and NorthWestern are further exacerbated by the lack of an independent operator, such as an ISO or RTO.[39] We find MSTI's proposal to retain operational control of its system and operate it under its own OATT and OASIS is insufficient in light of the incentives not to compete that its affiliation with NorthWestern could establish.

65. For the reasons set forth above, we deny Petitioners' request for negotiated rate authority on the MSTI Project.[40]

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[38] We affirm that NorthWestern has an obligation to expand and act on transmission service requests consistent with its OATT. While parties have raised concerns regarding NorthWestern's processing of the 2004 open season requests, we find that this is not the appropriate forum to address such issues.

[39] In *Northeast Utilities Service Co.*, 98 FERC ¶ 61,310 (2002), the Commission permitted a merchant transmission provider to charge negotiated rates even though it would interconnect to an affiliate with captive customers. However, in that case, the merchant line turned control over to an ISO, which would ensure that the merchant did not pose barriers to entry or act in an unduly discriminatory manner. In the case at hand, Petitioners do not propose to turn control of the MSTI Project over to an ISO or RTO.

[40] Because we determine that Petitioners do not meet the threshold requirements for negotiated rate authority, we do not reach Petitioners' arguments regarding the presence of cost-based alternatives. Likewise, because Petitioners' request for negotiated rate authority has not been shown to be just and reasonable, we need not address whether such negotiated rate authority for the MSTI Project represents a form of impermissible "and" pricing. Further, in light of our decision to deny Petitioners' request to view MSTI as a stand-alone entity and allow it to charge negotiated rates on the proposed MSTI Project, the issue of whether MSTI could grant customers from NorthWestern's queue a tie-breaking preference in the MSTI open season becomes moot.

<u>The Commission orders</u>:

Petitioners' request for negotiated rate authority, and preferential treatment of some customers, for the MSTI Project is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.