127 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wyoming Colorado Intertie, LLC Docket No. ER09-834-000

ORDER AUTHORIZING SALE OF TRANSMISSION RIGHTS AT NEGOTIATED RATES, GRANTING AND DENYING WAIVERS, ACCEPTING OPEN SEASON REPORT AND ACCEPTING TARIFF SHEETS

(Issued May 8, 2009)

1. In this order, the Commission, acting pursuant to section 205 of the Federal Power Act (FPA),[1] grants Wyoming Colorado Intertie, LLC (WCI) authorization to sell transmission rights at negotiated rates. The Commission also grants certain requested waivers, denies certain waivers, accepts for filing WCI's open season report and accepts for filing WCI's tariff sheets,[2] to be effective on May 11, 2009, as discussed below.

I. Background

2. On March 11, 2009, WCI submitted an application for authority to sell transmission rights at negotiated rates and a corresponding open access transmission tariff (OATT) in connection with its proposal to construct a new 180-mile, 850 MW, 345 kV transmission line running from the Laramie River Station substation located in Wheatland, Wyoming, to the Pawnee substation located in Brush, Colorado (WCI Project). The proposed transmission project, which is expected to be placed into service by June 1, 2013, would connect the Western Area Power Administration (Western) with Public Service Company of Colorado. According to WCI, the WCI Project will enable generators located in Wyoming to sell electricity into Colorado and to serve consumers in other states.

[1] 16 U.S.C. § 824d (2006).

[2] Wyoming Colorado Intertie, LLC, FERC Electric Tariff Original Vol. No. 1, Original Sheets 1-455.

In particular, WCI states that the WCI Project will allow new renewable generation resources, such as wind farms, to access the interstate transmission grid.

3. WCI states that it is a wholly-owned subsidiary of AES Trans-Elect, LLC, which is a wholly-owned subsidiary of AES Trans-Elect Holdings, LLC (Trans-Elect Holdings). Trans-Elect Holdings is a Delaware limited liability company engaged, directly or through affiliates, in the development, financing, construction, ownership, operation, maintenance and management of transmission system projects.[3] Trans-Elect Holdings was formerly a wholly-owned subsidiary of AES Corporation, Inc. (AES Corporation). On April 20, 2009, LS Power Transmission, LLC (LS Power) submitted a letter informing the Commission that AES Corporation had transferred all of the ownership interests in Trans-Elect Holdings to LS Power, a subsidiary of LS Power Associates LP, whose general partner is LS Power Development LLC,[4] and that WCI is now a subsidiary of LS Power.

4. According to WCI, the WCI Project was originally developed by Trans-Elect, Inc. (Trans-Elect) and the Wyoming Infrastructure Authority (WIA) in conjunction with Western. WCI states that Trans-Elect was formed in 1999 and was an independent transmission developer, owner and operator. WCI asserts that WIA was created in 2004 by the state of Wyoming to diversify and expand the state's economy through improvements in Wyoming's electric transmission infrastructure to facilitate the consumption of Wyoming energy. Finally, WCI states that Western is part of the U.S. Department of Energy and operates the transmission lines that currently link Colorado and Wyoming.

5. In December 2006, Trans-Elect Holdings acquired the assets of Trans-Elect, including the development rights of Trans-Elect to the WCI Project. Subsequent to acquiring Trans-Elect, Trans-Elect Holdings contracted with Trans-Elect Development Company, LLC. (Trans-Elect Development) to develop the WCI Project. WCI states that Trans-Elect Development is an independent transmission development company specializing in transmission project development, construction, management, and operation.

6. Along with its application for authority to sell transmission rights at negotiated rates and corresponding OATT, WCI submitted its open season report for Commission acceptance.[5] According to WCI, the open season was conducted

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[3] WCI Filing at 3.

[4] LS Power notes that this transfer occurred on April 17, 2009.

[5] WCI Filing, Exhibit A.

from March 31, 2008 through September 19, 2008.[6] WCI states that the auction resulted in two winning bids for a cumulative 585 MW of transmission capacity of the WCI Project.

II. WCI's Application

7. As stated above, WCI proposes to develop a 180-mile transmission line that would interconnect Wyoming with Colorado, with the intent of providing an opportunity for generators located in Wyoming to sell electricity into Colorado and to access the transmission infrastructure to serve consumers in other states. In particular, WCI states that the WCI Project will allow wind generation resources in Wyoming to serve customers in Colorado in a cost-effective and reliable manner, as well as to aid the state of Colorado in meeting its renewable portfolio standard requirements for local utilities.[7]

8. WCI states that the WCI Project will relieve a major transmission constraint between stranded or undeveloped resources in eastern Wyoming and load centers along the Rocky Mountain Front Range. According to WCI, these resources include high-quality wind resources in both Wyoming and Colorado and mine-mouth coal and natural gas resources in the Powder River Basin of Wyoming. WCI states that the portion of the Colorado market devoted to its renewable portfolio standard is expected to increase from the 1,175 MW of wind currently installed in Colorado to about 2,000 MW by 2015, and growing to 3,000 MW by 2025.[8]

9. As stated in its filing, the Laramie River Station substation is located in Western's Rocky Mountain Region Control Area, and the Pawnee substation will be located at the interface between the Rocky Mountain Region Control Area and Public Service Company of Colorado's control area when the WCI Project is completed. Also, WCI states that it has discussed with Western how Western could incorporate the WCI Project as part of the Rocky Mountain Region Control Area.[9] According to WCI, it is working with state and local authorities to acquire the necessary permits and approvals for the WCI Project.

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[6] *Id*., Exhibit A at 2.

[7] WCI Filing at 4.

[8] *Id*., Attachment E at 10.

[9] WCI Filing at 5.

10. WCI states that, by providing a transmission path to deliver energy, including renewable wind energy, from Wyoming to Colorado, the WCI Project will further the Commission's policy of encouraging the development of renewable energy and investment in new transmission infrastructure. Additionally, WCI maintains that the Commission has found that merchant transmission projects can play an important role in expanding competitive generation alternatives available to customers in meeting reliability needs.[10] WCI states that, to this end, the Commission has allowed the use of negotiated rates to promote construction of new transmission lines.[11]

11. WCI notes that it is a stand-alone transmission company with no generation assets. WCI also points out that it has no captive customers that must bid to retain existing service, and therefore WCI will assume all market risk of the WCI Project based solely on bids received from customers interested in purchasing transmission rights on the WCI Project.

12. According to the filing, WCI prepared its application before the issuance of *Chinook Power Transmission, LLC* and *Zephyr Power Transmission, LLC*[12] in which the Commission consolidated the ten criteria that it uses to assess requests to charge negotiated rates on a proposed merchant transmission project into a four part analysis. Because of this, WCI states that it first addressed in its application how it complies with the ten criteria, followed by how it complies with the four part analysis. WCI states that it satisfies all of the Commission's relevant criteria for authorization to sell transmission rights on the WCI Project at negotiated rates.[13]

A. <u>Open Season Report</u>

13. WCI states that its open season process for the auctioning of transmission rights was non-discriminatory, fair and transparent. WCI states that it issued a

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[10] *Id.*, (citing *Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 24 (2006) (*MATL*)).

[11] *Id*. at 6, (citing *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230 (2000) (*TransEnergie)*; *Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147 (2001) (*Neptune*); *TransEnergie U.S. Ltd.*, 98 FERC ¶ 61,144 (2002); *Northeast Utilities Service Co.*, 98 FERC ¶ 61,310 (2002) (*Northeast Utilities I*)).

[12] *Chinook Power Transmission, LLC*, and *Zephyr Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (*Chinook*).

[13] WCI Filing at 8.

press release[14] of the open season on March 31, 2008 and held a public information session, available in person or through a webcast, on April 14, 2008. Further, WCI states that it established an informational website, www.WCIntertie.com, on which all information related to the open season was posted and a special email for submitting questions was established. WCI states that, to ensure that all interested parties received identical information on the open season process, WCI posted all questions that it received along with its answers on the website.

14. WCI notes that it received applications to become qualified bidders from fourteen companies. According to WCI, eight of the parties seeking to become qualified bidders completed the registration process, which included providing satisfactory evidence of creditworthiness, and became eligible to become qualified bidders. WCI states that it then issued qualified bidder notices to those eight companies, each of which acknowledged the non-price terms and conditions for the WCI products by submitting executed precedent agreements. According to WCI, the precedent agreements required the qualified bidders to enter into a transmission service agreement if they were a winning bidder in the WCI auction. Subsequently, prior to the start of the binding phases of the auction, four of the eight qualified bidders notified WCI that they had decided not to bid.[15]

15. WCI states that at the time of the first binding round of bidding, while four companies were eligible to bid for capacity, only two submitted bids for a total of 585 MW.[16] According to WCI, the two bids were sufficient to support moving forward with continued development of the WCI Project while WCI works to sell the remaining capacity.

16. In a report on the results of its open season, WCI states that it has allocated initial transmission rights for 585 MW of transmission capacity on the WCI Project that was non-discriminatory, fair and transparent.[17] The open season

[14] WCI states that the press release resulted in coverage in industry publications such as Reuters, USA Today, Powermarketers.com, Renewables.com, Cleantechnews, Windaction.org, Electricenergyonline.com, www.oe.netl.doe.gov, T&D World, Space Daily, and US News Wire. Additionally, WCI states that it sent the press release as an e-mail to interested market participants including load serving entities, generators, power marketers and traders.

[15] WCI Filing, Exhibit A at 8.

[16] *Id.*, Exhibit A at 3.

[17] *Id.* at 2.

report notes that WCI accepted bids for 250 MW of transmission rights from Duke Energy, Ohio (Duke Energy), and 335 MW of transmission rights from GreenHunter Wind Company, LLC (GreenHunter). WCI also notes that it has continued its efforts to sell the remaining 265 MW of transmission capacity and will submit to the Commission any supplemental open season reports required by the Commission with respect to the allocation of this capacity.

17. WCI states that it engaged CRA International, Inc. (CRA) specifically to conduct various phases of the auction, which included development of bidding rules, independent confirmation of completeness of bidder registration, provision of bidding software and Internet communication services, and to conduct the auction and evaluate the auction results.[18] CRA states in its report that WCI took reasonable efforts to ensure that potential bidders had access to the same information concerning the auction. Further, CRA states that it conducted the auction and bidding process in accordance with bidding rules and procedures designed to give each qualified participant an equal and fair opportunity to partake in the auction, and concludes that it did not find anything to suggest that the open season process was not appropriate, fair, open, and nondiscriminatory.[19]

B. WCI's OATT

18. In addition to its application and open season report, WCI submitted its OATT for Commission acceptance. According to WCI, it has deviated moderately from the Commission's *pro forma* OATT as adopted in Order No. 890[20] due to the unique circumstances that merchant transmission projects face. WCI requests waivers of certain provisions of the *pro forma* OATT that are unrelated to merchant transmission lines, and WCI also asserts that the changes to several other tariff provisions reflect WCI's particular business model, and are consistent with or superior to the *pro forma* OATT.

19. WCI requests waiver from several *pro forma* OATT provisions. For example, WCI requests waiver of tariff provisions that provide for network

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[18] WCI Filing, Exhibit A at 3.

[19] *Id.*, Exhibit H at 2.

[20] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *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).

service.[21] WCI states that it is unable to provide network transmission service because the WCI Project consists of a single transmission line. WCI also requests waiver of Schedules 1 through 6 and Schedule 9 of the *pro forma* OATT because, according to WCI, it will be a merchant transmission provider that does not operate a control area and will own no generation with which to provide ancillary services. WCI states that it has also removed references to native load customers and third party sales from its OATT[22] because WCI will own no generation and therefore lack wholesale or retail power customers. Similarly, because WCI will own no generation, WCI states that it has removed provisions regarding the purchase of capacity and energy from WCI.[23] WCI also asserts that it removed section 26 from its OATT because it owns no generation for which it would seek stranded cost recovery, and it also has removed provisions for re-dispatch[24] because WCI is a transmission-only company and will be unable to provide re-dispatch service. Similarly, WCI has removed provisions that govern WCI taking transmission service on its own or other systems.[25]

20. Additionally, WCI has removed sections 13.2 and 14.2, which provide for reservation priorities because WCI states that it will allocate service to customers who have been awarded transmission capacity rights in a capacity auction regardless of when they first requested service. In similar fashion, WCI has removed sections 17.7 and 19.8 because all capacity, including new capacity, will be allocated through WCI's auction process at negotiated rates. Also, WCI has removed tariff section 27, which governs compensation for new facilities and re-dispatch, because WCI states it will sell capacity for new facilities at negotiated rates through an auction. Further, WCI deleted limitations on the rates a reseller

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[21] WCI filing, at OATT sections 1.3, 1.17, 1.18, 1.21-1.26, 1.29, 1.33, 1.44, 1.47, 1.49, 1.51, 1.53, 13.5-13.7, 14.7, 15.4, Part III and Attachments F,G,H, I and M, including Large Generator Interconnection Procedures (LGIP) definitions referring to Network Resources and Network Resource Interconnection Service, section 3.2, 3.2.2, 4.2 and Appendix I, Items 3 and 4 and sections 4.1.2 for Large Generator Interconnection Agreement (LGIA) definitions referring to Network Resource and Network Resource Interconnection Service. WCI states that it also has revised references to Firm Transmission Service in section 13.6 and 14.7 to be Firm Point-to-Point Transmission Service.

[22] *Id*. sections 1.20, 1.48, 13.5, 13.6, 13.7, 14.5, 22.1, and 25.

[23] *Id*. section 2.2.

[24] *Id*. sections 13.5, 15.4, 19.1, 19.3, 19.7, and 27.

[25] *Id*. sections 6, 8, 13.3, 14.3, 19.2, and 25.

may charge set forth in section 23.1 because WCI states it proposes that the reseller and assignee establish the rates by agreement consistent with WCI's intent to sell capacity at negotiated rates.

21. In addition to removing or requesting waiver of certain inapplicable provisions of the *pro forma* OATT, WCI states it has modified other provisions to conform to WCI's merchant transmission business model. For instance, WCI proposes to include Schedules 10, 11 and 12 to its OATT. WCI states that Schedule 10 will allow its transmission customers to take scheduling, system control and dispatch service.[26] WCI states that Schedule 11 will allow WCI to bill transmission customers for FERC annual charges on a monthly basis, and that the Commission has approved similar provisions in the past.[27] According to WCI, Schedule 12 will govern generation resources that are connected to WCI's transmission system within the Western Rocky Mountain Region Control Area and serve load outside the Western Rocky Mountain Region Control Area, and will require those generators to self-supply regulation and frequency response and generator imbalance service, since WCI is unable to provide those services.[28]

22. WCI states that it has modified Schedules 7 and 8 to reflect that WCI will sell capacity at negotiated rates through an auction process.[29] Further, WCI asserts that it has modified Section 23.4 to indicate that a resale of capacity through the OASIS will be subject to a 2.5 percent marketing fee, a modification that WCI states the Commission approved in another merchant transmission project.[30] WCI avers that this marketing fee is consistent with Commission policy because such expenses under a cost-based rate structure would be recovered as an administrative expense. Additionally, WCI states that it has modified Section 13.5 of the OATT to provide that customers pay for any necessary facility additions pursuant to Schedule 7, which provides for capacity auctions. WCI states that, because it is assuming the risk of funding the WCI Project as a merchant

[26] Schedule 10 in WCI's OATT corresponds to Schedule 1 of the *pro forma* OATT.

[27] WCI Filing at 11 (citing *Midwest Independent Transmission System Operator, Inc.*, 116 FERC ¶ 61,206 (2006), and an unpublished letter order issued in *Midwest Independent Transmission System Operator, Inc.*, Docket No. ER06-1001-001 (Dec. 19, 2006)).

[28] WCI Filing at 12.

[29] *Id*. at 13.

[30] *Id*. at 14, citing *Montana Alberta Tie Ltd.*, 119 FERC ¶ 61,216 (2007).

transmission facility, the market price of WCI's capacity as determined in an auction should be the appropriate market signal as to whether WCI should expand its capacity to accommodate new service requests.[31]

23. WCI requests waiver of Section 7.1 to change the invoice payment period from twenty days to ten days, as well as waiver of Section 7.3 to reduce the period by which defaults must be cured from 30 days to 10 days.[32] WCI states that, because it is a transmission-only company, this reduction will lessen the financial impact on WCI of customer defaults and that Commission precedent supports this waiver.[33]

24. WCI has included three service agreements[34] that provide for firm point-to-point service on the WCI Project. The first service agreement, as provided for in Attachment A-1 of WCI's tariff, provides for initial firm transmission service for those transmission customers that take service prior to commercial operation of the WCI Project. The second service agreement, as provided for in Attachment A-2 of WCI's tariff, provides for firm transmission service for transmission customers that take service after commercial operation of the WCI Project. The major difference between these two service agreements is that Attachment A-1 includes a fee schedule for termination of service before the in-service date of July 2013. The third service agreement, as provided for in Attachment A-3 of WCI's tariff, provides for the resale, reassignment or transfer of point-to-point transmission service. Further, WCI states that it has revised Section 18.2 to provide that it will first offer non-firm transmission service sixty days prior to commercial operations commencing on the WCI Project.[35]

25. WCI has also modified its large generator interconnection procedures (LGIP) large generator interconnection agreement (LGIA), and small generator interconnection agreement (SGIA). WCI states that it modified Section 4 of its LGIP to provide that all winning bidders that were awarded long-term firm point-to-point service will comprise the initial queue for WCI's transmission system. WCI has also modified sections 11.3, 11.4.1, and 11.4.3 of the LGIA and sections

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[31] *Id.* at 15.

[32] *Id.* at 16.

[33] *Id.*, citing *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,157, at P 30 (2004).

[34] WCI OATT Attachment A-1, Attachment A-2 and Attachment A-3.

[35] WCI Filing at 17.

5.2, 5.2.1, and 5.4 of the SGIA to provide that any interconnection customer will pay the costs of network upgrades.

26. WCI states that it will file its Attachment K (Transmission Planning Process) at least sixty days prior to the commercial operation of the WCI Project, and therefore requests waiver of its Attachment K obligations. WCI argues that this request is consistent with or superior to the *pro forma* OATT because it will allow WCI to develop a workable transmission planning process after it has completed the development of the WCI Project including the interconnection arrangements for the project.[36]

27. Similarly, WCI states that it commits to filing its Attachment C (methodology to assess available transfer capability) and Attachment D (methodology for completing a system impact study) at least sixty days before the commercial operation of the WCI Project since, as WCI contends, these methodologies must reflect the actual requirements of WCI's transmission system.[37]

28. WCI has included its creditworthiness requirements in Attachment L, which requires, among other things, that a customer must maintain an investment grade credit rating for its senior unsecured debt from two of the three following credit rating services: (1) Moody's Investor Service of at least Baa3; (2) Standard and Poor's of at least BBB-; and (3) Fitch Ratings of at least BBB-. WCI states that, if a customer's credit rating falls below investment grade, the customer must provide WCI security in the form of an alternative credit option for its entire security obligation for such period of time that the customer's credit rating is below investment grade. WCI asserts that its Attachment L is necessary for WCI to obtain commercial financing of the WCI Project in the current economic climate. Further, WCI avers that its Attachment L is consistent with Commission policy because it clearly shows how determinations will be made regarding a transmission customer's creditworthiness.[38]

C. Negotiated Rate Authority and Market Power

29. WCI contends that it lacks market power and will not be able to exercise market influence over prospective customers for the WCI project. According to

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[36] *Id.*

[37] *Id*.

[38] WCI Filing at 18, citing the Commission's *Policy Statement on Electric Creditworthiness*, 109 FERC ¶ 61,186, at p. 61,904 (2004).

WCI, as a new project, the WCI Project has no captive customers, and there is no RTO or ISO in the region whose members will absorb any costs from the proposed project. Further, WCI states that it will establish tradable firm secondary transmission service rights and will provide for the posting of such rights on WCI's Open Access Same-Time Information System (OASIS).[39] This will allow transmission customers to resell their tradable firm secondary transmission service rights without restriction provided that such sales do not relieve the transmission customer of its obligations to WCI.

30. WCI states that, to mitigate affiliate concerns, it allocated capacity through a transparent open season process that was designed by an independent third-party auction managing company. Further, WCI maintains that it is committed to abiding by the Commission's Standards of Conduct. With respect to unallocated transmission capacity, WCI contends that it has posted on its website the remaining capacity that is available consistent with procedures described in WCI's OATT. When this capacity is sold, WCI asserts that it will comply with any Commission requirements governing such sales including the filing of open season reports.

31. Finally, WCI states that none of WCI's affiliates own a transmission project that would be connected to the WCI Project. WCI asserts that, because its transmission rights have been and will be allocated in an open, fair and transparent manner, the Commission should authorize WCI to sell transmission rights at negotiated rates.

III. <u>Notices and Interventions</u>

32. Notice of WCI's filing was published in the *Federal Register*, 74 Fed. Reg. 12,348 (2009), with interventions and protests due on or before April 1, 2009. Basin Electric Power Cooperative and PacifiCorp filed timely motions to intervene. Duke Energy, the Wyoming Infrastructure Authority (WIA), the Interwest Energy Alliance (Interwest), the Western Grid Group and GreenHunter filed timely motions to intervene and comments in support of WCI's filing. Also, the Governor of Wyoming filed a letter strongly endorsing the Project and requesting FERC approval.

33. In its comments, Duke Energy states that WCI's proposal, taken as a whole, is consistent with the Commission's policy and precedent applicable to merchant transmission projects. Further, Duke Energy asserts that the approval of the WCI

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[39] WCI Filing at 19.

Project would be consistent with the Commission's policy of encouraging investments in transmission infrastructure necessary for the development of new renewable energy projects.

34. WIA states that the WCI Project, if built, will provide substantial benefits to the state of Wyoming and to the western power grid because it will transport much needed renewable energy to load centers along the Front Range of the Rocky Mountains in Colorado. Further, WIA contends that, as the Commission has recognized, the construction of transmission infrastructure has not kept pace with the need for additional energy resources, particularly renewable energy resources, and that developing transmission is essential to meeting national energy goals.[40] Finally, WIA adds that the necessary requirements for Commission approval for a merchant project that is not within an RTO or ISO have been met because: (1) as represented by its open season report, subscription to the WCI Project's capacity was established through an open season process that was non-discriminatory, fair and transparent; (2) the WCI Project's sponsors will take ultimate financial responsibility and market risk for the cost of the project; (3) service will be provided under an OATT; and (4) there are no grounds for finding that the WCI Project sponsors or the WCI Project itself raise any affiliate, market power, reliability, or property rights concerns.

35. Interwest supports the filing and urges the Commission to approve WCI's application in accordance with its proposed OATT, along with its variations from the Commission's pro-forma OATT that reflect the fact that this will be a merchant transmission line. Interwest and the Western Grid Group state that the WCI Project embodies the type of transmission line envisioned in 2003 by the multi-stakeholder Rocky Mountain Area Transmission Study, and that the WCI Project will benefit both electricity consumers and the wind industry in the Rocky Mountain region.

36. GreenHunter states that it participated, and was a successful bidder, in the recently-completed auction of transmission capacity by WCI, and has executed a transmission service agreement between GreenHunter and WCI. Because of this, GreenHunter requests that the Commission approve the application submitted by WCI.

[40] WIA comments at 3, citing generally *In the Matter Of Integrating Renewable Resources Into the Wholesale Electric Grid*, Docket No. AD09-4-000, transcript of Technical Conference of March 2, 2009.

IV. Discussion

A. Procedural Matters

37. 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 this proceeding.

B. Substantive Matters

38. The Commission believes that merchant transmission projects, such as that proposed by WCI in this filing, can play a useful role in expanding competitive generation alternatives for customers and meeting reliability needs.[41] WCI is proposing an innovative merchant transmission project that will provide a link between two regions and allow for efficient and economic access to existing and new generation sources, such as newly-developed wind farms. The WCI Project thus has the potential to provide benefits to electric customers in Colorado and producers in Wyoming. Moreover, WCI does not have a pre-existing transmission network and does not have a franchised service territory, and thus does not currently have any end-use captive customers. Additionally, customers of the WCI Project will be served on an open access and non-discriminatory basis. We conclude, therefore, that it is appropriate to authorize the sale of transmission rights as discussed below.

39. The Commission has evaluated several merchant transmission owners' requests to charge negotiated rates to determine whether they comport with section 205 of the FPA.[42] Recently, the Commission issued an order that refined and clarified the criteria for granting negotiated rate authority to merchant transmission projects.[43] In *Chinook*, the Commission clarified its analysis of granting merchant transmission owners' requests for negotiated rate authority by focusing on the following four areas of concern: (1) justness and reasonableness of rates;

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[41] *See Sea Breeze Pacific Juan de Fuca Cable, LP*, 112 FERC ¶ 61,295, at P 21 (2005); *Neptune*, 96 FERC ¶ 61,147 at 61,633; *TransEnergie*, 91 FERC ¶ 61,230 at 61,838.

[42] *See, e.g., TransEnergie*, 91 FERC ¶ 61,230 (granting the first merchant transmission owner's application for negotiated rate authority in June of 2000).

[43] *Chinook*, 126 FERC ¶ 61,134 (2009).

(2) potential for undue discrimination; (3) potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements.[44]

1. Just and Reasonable Rates

40. To approve negotiated rates for a merchant transmission project, the Commission must find that the rates are just and reasonable.[45] For the reasons discussed below, WCI's application supports a finding that negotiated rates on the WCI Project are just and reasonable. Consistent with the finding in *Chinook*,[46] WCI meets the definition of a merchant transmission owner, insofar as WCI assumes all market risk associated with its project, does not already own transmission facilities in the particular region of the project, and has no captive customers. Therefore, the WCI Project will succeed or fail based on whether a market exists for its services; it has no ability to pass on any costs to captive ratepayers.

41. Additionally, WCI is a new entrant into the transmission market in Wyoming and Colorado, and therefore is not increasing its presence in the area. Furthermore, WCI will increase the transmission options available to customers. Moreover, once the WCI Project is operational, the Commission's open access requirements will ensure that WCI cannot effectively control barriers to entry in the relevant markets.

42. Another disciplining force on the negotiated rates that WCI will be able to charge is the cost of expansion on neighboring utilities. Pursuant to their OATTs, traditional public utilities have an obligation to expand their transmission capacity, upon request, at cost-based rates.[47] The WCI Project will connect with Public Service Company of Colorado, from which customers could secure service at a cost-based rate. Therefore, the cost of expansion provides additional downward pressure on the negotiated rates that WCI will be able to charge its customers.

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[44] *Id*.

[45] 16 U.S.C. § 824d(a) (2006).

[46] *Chinook*, 126 FERC ¶ 61,134 at P 38.

[47] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *pro forma* OATT section 15.4, *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).

43. Further, as described in *Chinook*,[48] the Commission will continue to require merchant transmission owners retaining control of their projects to create firm tradable secondary transmission rights. It will also require merchant transmission owners to create and maintain an OASIS for customers to purchase and sell these rights. WCI states that it has agreed to provide service pursuant to a Commission-approved OATT, including firm tradable secondary rights that will be posted on its OASIS.[49] We also note WCI's commitment to sell the remaining transmission capacity consistent with procedures described in WCI's OATT and to submit the open season report to the Commission once such capacity is sold.

2. **Undue Discrimination**

44. As described in *Chinook*,[50] in order to prevent undue discrimination when granting merchant transmission owners negotiated rate authority, the Commission primarily looks to two things: (1) the terms and conditions of a merchant transmission developer's open season; and (2) its OATT commitments (or in the RTO/ISO context, its commitment to turn operational control over to the RTO or ISO).

45. In analyzing the allocation of transmission rights, we have stated that "the open season process should be employed to initially allocate transmission rights and the parameters of the open season process should be non-discriminatory, fair and transparent."[51]

46. In regards to its open season, WCI states that it held an open season that was non-discriminatory, fair and transparent that resulted in the auctioning of over 65 percent of the capacity (585 MW out of a possible 850 MW). In addition to the initial transmission capacity awarded based on its open season and auction, WCI has committed to allocating all remaining initial long-term firm transmission capacity (transmission capacity remaining prior to commercial operation of the WCI Project) through its capacity allocation process.

47. According to its OATT, WCI will allocate initial long-term firm transmission capacity to eligible customers, provided that the WCI Project has available transmission capability to provide the requested service. WCI asserts

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[48] *Chinook*, 126 FERC ¶ 61,134 at P 39.

[49] WCI Filing at 25.

[50] *Chinook*, 126 FERC ¶ 61,134 at P 40.

[51] *E.g.*, *Northeast Utilities I*, 98 FERC ¶ 61,310.

that it will post all requests for transmission service on its OASIS for 30 days, as well as announce the request by publication in an electric industry trade press and other widely distributed publications. If, during the 30 day notice period, additional transmission service requests are received and the WCI Project has available transmission capability, transmission service will be awarded to all parties requesting service. However, if additional long-term firm transmission service requests are received and there is insufficient transmission capability, WCI will hold an auction to allocate the available transmission capability. This auction will be conducted through an independent auction manager, who will evaluate all bids submitted by eligible customers based on each bid's gross revenue present value until the remaining available transmission capacity is equal to zero.[52] The independent auction manager will provide the auction results to WCI, who will then award service to the winning eligible customers.

48. Once the WCI Project has become commercially operated, WCI's OATT provides for a similar, though not identical, allocation process for requests for long-term firm transmission service. WCI states that it will allocate transmission capacity to all eligible customers requesting service, provided that there is enough available transmission capability on WCI's system.[53] If the total capacity of the requests for transmission service exceeds the available transmission capability, WCI will hold an auction for capacity through its OASIS, rather than through an independent auction manager.[54] WCI states that the results of the capacity auction for long-term firm transmission service will be posted on its OASIS within five business days following the close of the capacity auction.[55]

49. As an additional measure to prevent undue discrimination, WCI asserts that it has established a fixed rate for transmission service for customers to which it awarded capacity in the open season that will be adjusted annually in accordance with a fixed escalation rate. Further, WCI maintains that it will not require users of adjacent grids who do not have transmission rights to the WCI Project to contribute to the WCI Project through mandatory grid use or system benefits

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[52] WCI OATT, Schedule 7 at 2.1.2.6.

[53] WCI notes that, as provided for in allocating initial long-term firm transmission capacity, a request for long-term firm transmission capacity after commercial operation of the WCI Project will be posted on its OASIS for 30 days, as well as announced through the publication in an electric industry trade press and other widely distributed publications.

[54] WCI OATT, Schedule 7 at 2.2.6.

[55] *Id*. Schedule 7 section 2.2.7.

charges. Additionally, WCI's OATT provides for the expansion of its system if it cannot accommodate an application for transmission service due to insufficient capability, consistent with its planning obligations in Attachment K.[56]

50. WCI states that its Accounting Policy clarifies that WCI will assume financial risk for the WCI Project, as well as keep separate books from those of any affiliate and that these books will comply with Part 101 of the Commission's Regulations under the Uniform System of Accounts and be subject to examination under Part 41 of the Commission's regulations.[57] Also, WCI asserts that its accounting books and records will be audited by an independent auditor and shall use generally accepted accounting principles. Finally, the lack of protests (and the abundance of support) indicates that no entities believe they have been treated unfairly in WCI's transmission rights auction process.[58]

51. As described above, WCI provided public notice and a public information session, with all potential bidders receiving the same information. The independent auditor concludes that it found nothing to suggest that the open season was not appropriate, fair, open and nondiscriminatory. We also note that no participants have filed protests or raised issues that would lead us to believe otherwise. Based on the evidence presented by WCI above, and consistent with the findings in *Chinook*,[59] we conclude that the open season overseen by WCI and conducted by its independent auction manager CRA, was provided for in a manner that was non-discriminatory, fair and transparent, and therefore is accepted.

52. With respect to WCI's submitted OATT, to the extent deviations from the *pro forma* OATT are necessary, we have found that merchant transmission developers must explain and support the deviations sufficiently.[60] As in *MATL*, the Commission will evaluate OATT deviations on a case-by-case basis.[61]

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[56] *Id*. section 15.4(a).

[57] *Id*. Exhibit C.

[58] *See MATL*, 116 FERC ¶ 61,071 at P 37 ("[T]he Commission's concern in evaluating the open season process is to provide transparency in the bidding process and to enable unsuccessful bidders to determine if they were treated in a fair manner.").

[59] *Chinook*, 126 FERC ¶ 61,134 at P 61-62.

[60] *Id.* P 47.

[61] *MATL*, 116 FERC ¶ 61,071 at P 55-60.

53. WCI states that it does not anticipate that the WCI Project will provide network or ancillary services. With regard to the latter, while we typically require that ancillary services be provided by the transmission provider under its OATT, we recognize that this may not be practical for merchant transmission developers, such as WCI, who do not own generation resources, and thus, the means to provide generation-based ancillary services. Therefore, to the extent WCI demonstrates that it is not in a position to provide ancillary services, WCI must negotiate precedent agreements with its customers to ensure that ancillary services for the project will be provided.[62]

54. We note that many of the deviations from the *pro forma* OATT submitted by WCI are identical to previously accepted modifications from the *pro forma* OATT in *MATL*.[63] Similarly in this case, we agree that certain differences from the *pro forma* OATT should be allowed. We find that WCI has adequately supported the provisions for which it seeks waiver and has also demonstrated that its proposed modifications to tariff provisions are reasonable. Accordingly, we accept WCI's OATT and make it effective May 11, 2009, as discussed in the body of the order.

3. Undue Preference and Affiliate Concerns

55. In the context of merchant transmission, our concerns regarding the potential for affiliate abuse arise in situations where the merchant transmission owner is affiliated with participants in the open season, and/or customers that subsequently take service on the merchant line.[64]

56. As discussed above, we find that WCI's open season process was provided for in a manner that was non-discriminatory, fair and transparent. In addition, WCI states that none of its affiliates own a transmission project that would be connected to the WCI Project,[65] nor does it have any captive customers.[66] Therefore, we conclude that WCI was not able to offer a rate to affiliates that is unduly lower than rates to non-affiliates or, conversely, able to charge a higher

[62] *See Chinook*, 126 FERC ¶ 61,134 at P 64.

[63] *See MATL*, 116 FERC ¶ 61,071 (2006); *Montana Alberta Tie Ltd.*, 119 FERC ¶ 61,216 (2007).

[64] *See Chinook*, 126 FERC ¶ 61,134 at P 48.

[65] WCI Filing at 21.

[66] *Id*. at 22.

rate to a regulated affiliate with captive customers.[67] Further, WCI has committed to conduct all affiliate and non-affiliate transactions in a transparent manner and post all results on its OASIS.[68]

57. WCI avers also that it has committed to abide by the Commission's Standards of Conduct. Finally, WCI contends that it will comply with all of the Commission's applicable reporting requirements. WCI states that the Commission has found similar commitments to have satisfied these criteria.[69] In light of these commitments and assurances, we find that, consistent with the findings in *Chinook*,[70] WCI adequately addresses any affiliate concerns present at this stage of the WCI Project.

58. We also find that there should not be any cross-subsidization issues due to the lack of affiliate presence in the particular regions, the lack of any native load customers and the commitments made by WCI. As the project develops, we will hold WCI to the commitments made herein. In this regard, we note that LS Power recently purchased Trans-Elect Holdings, the indirect upstream owner of WCI, and that LS Power is reported to be developing the Overland Intertie Project, which is a transmission line that would, as proposed, interconnect with the WCI Project. Our approvals here are based on representations in this application that no WCI affiliates own transmission that will interconnect with this project. To the extent that circumstances change in the future, WCI must promptly notify the Commission of that fact, and address how the WCI project continues to satisfy the just and reasonable rate, undue discrimination and undue preference and affiliate concern factors described above.

4. Regional Reliability and Operational Efficiency

59. As described in *Chinook*,[71] merchant transmission developers will be required to comport with all applicable requirements of the North American Electric Reliability Corporation (NERC) and any regional reliability council.

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[67] *See Chinook*, 126 FERC ¶ 61,134 at P 50.

[68] WCI OATT, Schedule 7 section 2.2.7.

[69] WCI Filing at 22, citing *Northeast Utilities*, 98 FERC ¶ 61,310 at p. 62,329; *MATL*, 116 FERC ¶ 61,071 at P 40-41; and *Neptune Regional Transmission System, LLC*, 103 FERC ¶ 61,213, at PP 21-22 (2003).

[70] *Chinook*, 126 FERC ¶ 61,134 at P 65.

[71] *Chinook*, 126 FERC ¶ 61,134 at P 53.

Further, we also encourage such entities to participate in regional planning processes required by Order No. 890 as their projects move forward.

60. Because the WCI Project is located in an area without an RTO or ISO, WCI will retain operational control of the WCI Project once it is placed into service.[72] As such, WCI states that it has committed to work with reliability coordinators located in its region to ensure coordination of the physical energy flows on the WCI Project with those on neighboring systems. WCI anticipates that the WCI Project will be under the Western-run Reliability Coordinator operating out of Loveland, Colorado.[73] For purposes of the authorizations granted herein, we assume that WCI will adhere to reliability requirements given by said Reliability Coordinator. Finally, WCI contends that in the event that Reliability Coordinators in the Western Electric Coordinating Council (WECC) are consolidated, WCI anticipates that the WCI Project will fall under one of the WECC Reliability Coordinators.[74] Accordingly, the Commission finds that WCI has met the regional reliability and operational efficiency requirement subject to WCI's continued commitment to be run by Western's Reliability Coordinator.

5. <u>Waiver Requests</u>

61. In its application, WCI requests the following waivers and blanket authorizations: (1) waiver of Part 35 in order to permit the filing to become effective as proposed; (2) waiver of the filing requirements in subparts B and C of part 35 of the Commission's regulations, except for sections 35.12(a) (Filing of initial rate schedules), 35.13(b) (general information to be filed with rate schedules), 35.15 (notices of cancellation or termination), and 35.16 (notices of succession); (3) blanket authorization for the issuance of securities or assumptions of liabilities under section 204 of the FPA and Part 34 of the Commission's regulations; and (4) waiver of Part 141 of the Commission's regulations as it relates to filing FERC Form No. 1.

62. Because WCI is proposing to charge negotiated rates, the regulations requiring the filing of cost-based data are not applicable. Therefore, for good cause shown and consistent with out findings for other merchant transmission proposals,[75] we will waive the filing requirements of subparts B and C of Part 35

[72] WCI Filing, Attachment En. 1.

[73] *Id.* at 23.

[74] *Id.*

[75] *See Chinook*, 126 FERC ¶ 61,134 at P 68.

of the Commission's regulations, except for the requirements of sections 35.12(a), 35.13(b), 35.15, and 35.16.

63. The Commission denies WCI's request for blanket authorization concerning the issuance of securities and assumptions of liabilities because: (1) compliance with these requirements is required by the FPA and our regulations; (2) WCI has not made a sufficient affirmative showing that exceptions to those statutory requirements and regulations are warranted; and (3) while the Commission has traditionally waived non-regulatory requirements in the past for certain entities, such as power sellers with market-based rates, it has not done so for transmission providers, and such denial is therefore consistent with Commission precedent.[76]

64. The Commission also denies WCI's request for waiver of the Commission's 60-day prior notice requirement under Part 35 of the Commission's regulations and an effective date of March 12, 2009. WCI has failed to provide evidence of good cause to support this waiver based on the sole argument that it "would clarify the terms and conditions that will govern service on the WCI Project and enhance the ability of shippers to assess such service."[77] Therefore, we will assign an effective date of May 11, 2009, sixty days after filing.

65. The Commission will grant WCI's request for waiver of the Form No. 1 filing requirement. In analyzing the merchant transmission owner's request for waiver, the Commission needs to weigh: (1) the need for the Commission and the public to have access to the information contained in Form No. 1, and (2) developing policies that will promote competition.[78] For public utilities with cost-based rates, the information provided in Form No. 1 is necessary to ensure that rates are reasonable. However, WCI's rates will be negotiated rather than cost-based, and like merchant generators with market-based rate authority, WCI will not have captive customers. On balance, therefore, especially given that there is no immediate need for this information, the Commission will grant WCI's request for waiver of the Form No. 1 requirement.

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[76] *See, e.g.*, *MATL*, 116 FERC ¶ 61,071 at P 65; *TransEnergie U.S. Ltd.*, 98 FERC ¶ 61,144 at 61,457; *TransEnergie U.S. Ltd.*, 98 FERC ¶ 61,147 at 61,502; *Conjunction LLC*, 103 FERC ¶ 61,198, at P 26-27 (2003).

[77] WCI filing at 27.

[78] *See MATL*, 116 FERC ¶ 61,071 at P 66.

<u>The Commission orders</u>:

(A) WCI is hereby granted authority to sell transmission rights at negotiated rates, as discussed in the body of this order.

(B) The Commission accepts for filing WCI's open season report, as discussed in the body of this order.

(C) WCI's proposed OATT is accepted for filing to become effective May 11, 2009, as discussed in the body of this order.

(D) The Commission grants WCI's requests for waiver of the provisions of subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, as discussed in the body of this order.

(E) The Commission denies WCI's request for blanket authorization for the issuance of securities or assumptions of liabilities pursuant to section 204 of the FPA and Part 34 of the Commission's regulations, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.