

125 FERC ¶ 61,336
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Renewable Energy Systems Americas Inc. and PEAK Wind Development, LLC Docket No. EL08-86-000

v.

Otter Tail Power Company and Minnkota Power Cooperative, Inc.

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 19, 2008)

1. Renewable Energy Systems Americas Inc. (Renewable Americas) and PEAK Wind Development, LLC (PEAK Wind) (collectively, Complainants) filed a complaint against Otter Tail Power Company (Otter Tail) and Minnkota Power Cooperative, Inc. (Minnkota) (together, Respondents). Complainants, developers of the proposed Glacier Ridge wind project in North Dakota, contend that Respondents secretly contrived to build a transmission line (the Pillsbury Line) and unduly discriminated against them in favor of other projects with regard to interconnection to that line. Complainants allege that Otter Tail and Minnkota schemed to permit the interconnection and transmission of energy from competing wind facilities in which Respondents had interests ahead of the Complainant's prior-queued Glacier Ridge facility. They seek as relief, among other things, that their generation project be interconnected to the Pillsbury Line. As discussed below, the Commission will set the complaint for hearing, establish settlement judge procedures, and establish a refund effective date of August 29, 2008.

I. Background

2. The Complainants are developing the Glacier Ridge project. PEAK Wind was formed to develop wind generation projects and is comprised of eighty citizens and landowners, holding approximately 30,000 acres of land in North Dakota. Renewable Americas develops, constructs, owns, and operates wind farms throughout the United States. The Complainants officially partnered on January 15, 2008.

3. Otter Tail is a public utility that owns generation and transmission facilities and sells power under market-based rate authority. It is a transmission-owning member of the Midwest Independent Transmission System Operator (Midwest ISO), and its transmission facilities are operated by the Midwest ISO. Minnkota is a wholesale generation and transmission cooperative that supplies electricity to retail distribution cooperatives in Minnesota and North Dakota. It owns an extensive interstate transmission system, much of which is within the Otter Tail balancing authority area. As a cooperative with financing from the Rural Utilities Service, Minnkota is not a public utility.

4. Otter Tail and Minnkota have jointly planned and developed the transmission in their common service area for more than half a century.¹ Together, they invested, planned and developed transmission facilities in proportion to their load serving obligations to avoid building duplicate transmission systems.²

5. FPL Energy, LLC (FPL) is the merchant generating subsidiary of FPL Group, Inc., and is a leading wind power producer in the United States. It also has natural gas, solar, hydroelectric and nuclear power plants in 25 states and Canada. Otter Tail and FPL jointly developed the Ashtabula project, the power from which will be delivered over the Pillsbury Line. The Ashtabula project is adjacent to the Glacier Ridge project.³

6. In 2006, Minnkota issued a request for proposals (RFP) seeking to expand its renewable energy supply options.⁴ It received proposals from M-Power⁵ and FPL. A representative of Minnkota met with members of PEAK Wind in the fall of 2007 regarding PEAK Wind's project.⁶ PEAK Wind and Otter Tail also met in that time frame to discuss ways to do business together. PEAK Wind submitted interconnection requests to the Midwest ISO (at Otter Tail's Buffalo substation) and Western Area Power

¹ See Otter Tail, September 30, 2008 Answer, Exhibit OTP-09 at 7.

² *Id.* at 7-8.

³ See Complaint, Exhibit OAM-4.

⁴ Minnkota, September 29, 2008 Answer at 8.

⁵ M-Power is a local community-based wind developer that has development rights to land north of the Ashtabula site. M-Power is partnered with National Wind LLC, a project developer. M-Power is not named as a Respondent, but M-Power's project will also be using the Pillsbury Line.

⁶ Complaint at 20; Minnkota, September 29, 2008 Answer, Tschepen Affidavit at P 32.

Administration on October 16, 2007 and December 4, 2007, respectively.⁷ M-Power also submitted a request to interconnect to the Buffalo substation.⁸ FPL, on behalf of the Ashtabula project, initially sought interconnection to Minnkota at the Valley City substation. According to FPL's protest, FPL may have also requested to interconnect to Otter Tail at the Buffalo substation. It is unclear whether FPL ever formally submitted an interconnection request for the Buffalo substation because according to FPL, MISO's queue made it undesirable to connect there.⁹

7. On January 3, 2008, Minnkota and Otter Tail met with FPL and M-Power to discuss the development of wind projects to serve Otter Tail and Minnkota's native loads.¹⁰ The attendees agreed on the framework of an agreement involving the construction of the 61-mile Pillsbury Line from a new 230-kV substation, which would be owned by Minnkota, to the existing Maple River substation, which is also owned by Minnkota.¹¹ FPL would pay a share of the costs (but not own any part) of the line in exchange for pro rata use of the line.¹² On the same day as the meeting, FPL, along with Otter Tail and M-Power, submitted interconnection requests to Minnkota's Maple River substation.¹³ Minnkota notes that it began engineering, procuring, and designing the Pillsbury Line in January.¹⁴ On January 16, 2008, Minnkota met with Complainants to discuss ways in which they could do business, including interconnection.

8. On March 18, 2008, Otter Tail and Minnkota submitted an application with the North Dakota Public Service Commission to construct the Pillsbury Line between the new Pillsbury substation and the Maple River substation, which they were jointly planning.¹⁵ They decided to remove Otter Tail as joint owner of the Pillsbury Line

⁷ Complaint at 4 and 22 n.36, respectively.

⁸ See Minnkota, September 29, 2008 Answer, Tscheppen Affidavit at P 38-39.

⁹ FPL, September 29, 2008 Protest at 7-8.

¹⁰ Otter Tail, October 29, 2008 Answer at 18-19.

¹¹ FPL, September 29, 2008 Protest at 9.

¹² *Id.*

¹³ Minnkota, September 29, 2008 Answer at 9.

¹⁴ *Id.* at 11.

¹⁵ Complainants, October 14, 2008 Answer at 5-6. See also Otter Tail Corporation and Minnkota Power Cooperative, Inc. Application for Warner, Corridor Certificate and Route Permit, North Dakota Public Service Commission Docket No. PU-08-048.

around April 16, 2008.¹⁶ On May 30, 2008, the Maple River Wind Generation Interconnection System Impact Study was reviewed and approved at the Mid-Continent Area Power Pool (MAPP) Design Review Subcommittee meeting.¹⁷

9. Complainants request the Commission to direct either Minnkota (under Federal Power Act (FPA) section 211A) or the Midwest ISO to interconnect Glacier Ridge to the Pillsbury Line and to order Otter Tail and FPL to pay for any needed upgrades.¹⁸ In addition, they urge the Commission, in order to prevent future unduly preferential or discriminatory conduct, to rescind or restrict the use of the allegedly preferential transmission rights established by certain agreements between Otter Tail and Minnkota, to revoke the standards of conduct waivers previously issued to Otter Tail and Minnkota, to require Minnkota to file a reciprocity Open Access Transmission Tariff (OATT), to revoke Otter Tail's market-based rate authority, and to assess civil penalties.

II. Notice of Filing and Responsive Pleadings

10. Notice of the complaint was published in the *Federal Register*, 73 Fed. Reg. 52,349 (2008), with interventions and protests due on or before September 29, 2008. Timely motions to intervene raising no substantive issues were filed by Missouri River Energy Services, Midwest ISO, Great River Energy, MidAmerican Energy Corporation, and the National Rural Electric Cooperative Association. A timely motion to intervene and protest was filed by FPL Energy, LLC (FPL). MAPP filed comments on September 29, 2008, and supplemental comments on October 29, 2008. Otter Tail and Minnkota filed answers to the complaint on September 29, 2008; Otter Tail supplemented its answer on September 30, 2008. On October 14, 2008, Complainants filed a motion for leave to answer and an answer. On October 29, 2008, Otter Tail, Minnkota, and FPL responded to Complainants' answer.

¹⁶ Complainants, October 14, 2008 Answer at 20. *See also* Minnkota Power Cooperative, Inc. Amendment to the Application for a Waiver of Procedures and Timelines, and Consolidated Certificate of Corridor Compatibility and Route Permit, North Dakota Public Service Commission Docket No. PU-08-848.

¹⁷ MAPP, September 29, 2008 Answer at 5.

¹⁸ Complainants' Glacier Ridge project has a proposed maximum capacity of 400 MW, while Otter Tail and FPL's Maple River project and M-Power's project are rated at 208 MW and 150 MW, respectively. In its application with the North Dakota Public Service Commission, Otter Tail and Minnkota noted that the Pillsbury Line is intended to transmit 400 MW, with a maximum capacity of 680 MW. All parties admit that upgrades would be needed to interconnect the Glacier Ridge project, but the limiting elements have not been discussed in the answers.

III. Summary of Pleadings

A. Undue Preference and Discrimination

11. The Complaint contains many allegations of a coordinated effort by Otter Tail and Minnkota to thwart efforts by Complainants to interconnect the Glacier Ridge wind farm to the interstate grid managed by the Midwest ISO by giving an undue preference to the competing wind farms of Otter Tail/FPL and M-Power. Complainants contend that Otter Tail, acting alone and in conjunction with Minnkota, has granted an undue preference to its own generation project, and in doing so unduly discriminated against Renewable Americas and PEAK Wind. Complainants cite to the January 3, 2008 meeting among Minnkota, Otter Tail, FPL, and M-Power as an example of Respondents' undue preference. Complainants also argue that prior to January 3, 2008, they were in precisely the same situation as the Ashtabula and M-Power projects because all three had submitted a request to interconnect at points entirely different from the Maple River substation. In addition, according to the Complainants, only M-Power and Otter Tail/FPL were invited to the private meeting and offered the opportunity to modify their interconnection requests in order to take advantage of Respondents' at-that-time unannounced plan to construct a significant new transmission facility.¹⁹ Complainants further contend that they could not be faulted for not having applied to interconnect to a line they did not know was being developed, nor for not having applied to interconnect to a line that they were subsequently told was fully subscribed.

12. Complainants argue that four facts compound matters further: (1) Otter Tail is not subject to the Commission's Standards of Conduct; (2) Minnkota is an electric cooperative not generally subject to the Commission's jurisdiction as a public utility; (3) Minnkota has been granted a waiver of Order No. 889;²⁰ and (4) Minnkota has not filed, nor received Commission approval for a safe harbor OATT.²¹ They also allege that

¹⁹ Complainants, October 14, 2008 Answer at 6.

²⁰ *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs., Regs. Preambles January 1991-June 1996 ¶ 31,035, *clarified*, 77 FERC ¶ 61,335 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs., Regs. Preambles July 1996-December 2000 ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

²¹ A safe harbor OATT is a voluntary tariff that a non-public utility may file with the Commission and, upon being deemed an acceptable reciprocity tariff by the Commission, may require public utilities to provide open access transmission service to that non-public utility.

Respondents' waivers of the Standards of Conduct, combined with Grandfathered Agreements²² between the Respondents enable Otter Tail to develop new generation resources with exclusive access to Minnkota's transmission system.

13. In their answers, Otter Tail and Minnkota focus on the fact that Complainants never formally requested to interconnect to Minnkota's system. Minnkota notes that it is open to receiving a proposal for interconnection from PEAK Wind.²³ Further, Minnkota asserts that it has been open about its plans and that it has held several conversations with Renewable Americas and PEAK Wind to explain the permitting process for the Pillsbury Line. Otter Tail explains that PEAK Wind was not invited to the January 3, 2008 meeting because it had not submitted any proposals for wind power. Otter Tail emphasizes that even after being told to submit a request for interconnection by e-mail, the Complainants did not make a request to interconnect to the Minnkota transmission system. Because PEAK Wind and Renewable Americas never submitted an interconnection request, Minnkota was under no duty to consider the interconnection of their project with the Minnkota system.

14. In its September 29, 2008 answer, FPL argues that the Complainants' request for relief is nothing but an attempt to litigate their way to success when their business strategy failed. Further, FPL states that PEAK Wind's inexperience and lack of acumen about wind generation development, and even about the energy industry, hindered PEAK Wind's efforts. FPL notes that PEAK Wind submitted interconnection requests with the Midwest ISO and Western Area Power Administration but that PEAK Wind chose, however, not to submit an interconnection request to Minnkota.²⁴

15. In their October 14, 2008 response, Complainants contend that they were similarly situated with the Ashtabula project up to the point when Minnkota met exclusively with Otter Tail, FPL, and M-Power.²⁵ They state that the Commission's open access rules

²² Minnkota and Otter Tail share overlapping service territories and Minnkota's system is embedded within the Otter Tail control area. Since 1962, they have operated under an Integrated Transmission Agreement and other agreements that pre-date the Midwest ISO, known as Grandfathered Agreements. Under that specific Grandfathered Agreement, Minnkota and Otter Tail have a history of jointly investing in facilities to serve their respective members, avoiding duplication of transmission and distribution lines and substations. *See* Minnkota September 29, 2008 Answer at 24.

²³ Minnkota, September 29, 2008 Answer at 30.

²⁴ FPL, September 29, 2008 Protest at 17.

²⁵ Complainants, October 14, 2008 Answer at 16.

were intended to eliminate precisely this type of preference by a transmission owner for its own generation interests. Complainants would have liked to interconnect at the Maple River substation, but were not given a chance to secure access to the Otter Tail/Minnkota system on a comparable basis.²⁶ The Complainants state that they were not even made aware that the Pillsbury Line was being planned.

16. Minnkota, in its answer, argues that the Complainants have yet to submit a request to interconnect to Minnkota's system, which makes their claims of undue discrimination ring hollow.²⁷ Otter Tail responds in its answer that PEAK Wind was not invited to the January meeting because it: (1) was not yet partnered with Renewable Americas, or any other developer, and (2) it had not responded to Otter Tail or Minnkota's request that it submit a wind project proposal for consideration.²⁸

B. Transmission Planning

17. Complainants allege that the Pillsbury Line was hastily conceived, lacked adequate regional planning under either the Midwest ISO or MAPP procedures, and violated the Commission's transmission planning principles under Order No. 890.²⁹ Complainants argue that Respondents' actions undermine the regional planning efforts undertaken by the Midwest ISO.

18. Respondents and FPL reply that the Pillsbury Line is not subject to any planning process or principles because it is a generator interconnection facility rather than part of the transmission grid. They note that Minnkota is a non-jurisdictional utility. In addition, Otter Tail states that the regional planning requirements of Order No. 890 were not in effect in late 2007 when Minnkota began planning the interconnection facility. Otter Tail also states that the Order No. 890 planning process was not intended to replace the generator interconnection process provided for in Order No. 2003.³⁰ They contend

²⁶ *Id.* at 3.

²⁷ Minnkota, October 29, 2008 Answer at 2.

²⁸ Otter Tail, October 29, 2008 Answer at 19.

²⁹ Complainants state that, although Otter Tail was originally a co-owner in the Pillsbury Line, the project was not the subject of any Otter Tail or Midwest ISO transmission plan.

³⁰ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265

that the transmission upgrades needed to interconnect the Ashtabula project did not violate the regional planning principles. MAPP objects to Complainants' characterization of the MAPP transmission planning process as inadequate and argues that Complainants confused the MAPP Design Review Subcommittee with the regional transmission planning process for the MAPP footprint.³¹

19. Complainants respond that the Pillsbury Line is not a generator interconnection facility, asserting that the classification of a transmission line depends on its potential future use rather than its initial function. They assert that, in any event, generator interconnection facilities are subject to both the MAPP and Midwest ISO regional planning processes. Otter Tail's and Minnkota's planning should have been open and transparent once Order No. 890's planning requirements were in effect. The Commission should direct that the Pillsbury Line be submitted for planning review to fully evaluate the potential effect of future uses of the line on the Midwest ISO. They reason that, because Otter Tail was still planning to co-own the Pillsbury Line when the transmission planning requirements of Order No. 890 became effective, Otter Tail violated its regional planning obligations under the Midwest ISO's tariff. Complainants also charge Minnkota with violating its regional planning obligations under MAPP's tariff.³² They claim that the MAPP Design Review Subcommittee process was used to skirt the Midwest ISO and MAPP regional planning requirements.

20. In their responses, Respondents reiterate that the Order No. 890 regional transmission planning process does not replace the generator interconnection process set forth in Order No. 2003. Respondents maintain that the Pillsbury Line is a generator

(Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005); *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004).

³¹ MAPP states that the Design Review Subcommittee has no authority to approve interconnection requests nor does it conduct studies of such requests. Further, MAPP states that the committee does not determine which upgrades must be built, but rather, determines whether a system impact study presented by a MAPP transmission provider demonstrates that the proposed system modifications will mitigate any reliability standards implicated by the proposed facilities. MAPP clarifies this committee is not a subset of its transmission planning process. *See* MAPP, October 29, 2008 Answer at 9.

³² Noting that Minnkota agreed to be subject to MAPP's Attachment K template, Complainants conclude that Minnkota agreed to implement the Order No. 890 mandates incorporated into MAPP's regional planning procedures.

interconnection facility because it is a sole use radial line that will be used only to deliver the output of the Ashtabula and M-Power projects to the Maple River substation;³³ thus, it is outside the scope of Order No. 890 regional transmission planning.

C. Interconnection Under Federal Power Act Section 211A

21. Citing case law holding that the FPA gives the Commission broad equitable powers, particularly when imposing remedies, Complainants request that the Commission order interconnection service under FPA section 211A (Open access by unregulated transmitting utilities).³⁴ In conjunction with this relief, they ask the Commission to require any necessary modifications to the Pillsbury Line to accommodate energy from Glacier Ridge and to ensure that Respondents and FPL pay for any necessary modifications to the Midwest ISO's transmission system to effectuate energy from the Glacier Ridge project.³⁵

22. Minnkota asserts that the Commission does not have the authority to require interconnection under FPA section 211A because that section only applies to the delivery component of transmission service, not interconnection, which is governed by FPA section 210.³⁶ According to Minnkota, the Complainants have not shown that section 210 is inadequate for their purposes and there is no need for the Commission to proceed under section 211A. Minnkota concludes that, having failed to request interconnection to its transmission system, Complainants are not entitled to the relief they have requested.³⁷

³³ See Otter Tail, October 29, 2008 Reply at 12-16, *citing S. Cal. Edison Co.*, 112 FERC ¶ 61,014, at P 40-42, *reh'g denied*, 113 FERC ¶ 61,143 (2005); *S. Cal. Edison Co.*, Opinion No. 487, 117 FERC ¶ 61,103 (2006); *Mansfield Mun. Elec. Dept.*, Opinion No. 454, 97 FERC ¶ 61,134, at 61,613-14 (2001), *reh'g denied*, Opinion No. 454-A, 98 FERC ¶ 61,115 (2002).

³⁴ 16 U.S.C. § 824j-1(b) (2006). Complainants also reference FPA section 309, which provides the Commission with such powers "as it may find necessary or appropriate to carry out the provisions of this act." 16 U.S.C. § 825n (2006).

³⁵ Alternatively, Complainants request that the Commission place them in the same position as the affiliates of Otter Tail and Minnkota as of January 3, 2008; that is, put the Glacier Ridge project in the same interconnection queue position as the Otter Tail/FPL project.

³⁶ Minnkota, September 29, 2008 Answer at 3, 58-60.

³⁷ *Id.* at 3, 60-61.

23. Similarly, Otter Tail asserts that a prior request to the transmitting utility for interconnection service is a prerequisite to a Commission order under section 211A. Otter Tail argues that since the Complainants have never made a request to interconnect their wind project to Minnkota, section 211A does not apply.³⁸

24. Complainants respond that the legislative history of section 211A and the Commission's actions support their interpretation that the "open access" envisioned by section 211A includes interconnection service.³⁹ They also argue that section 211A contains no requirement that a prospective customer first file an interconnection request with an unregulated utility; indeed, "Congress gave the Commission the statutory authority to act *sua sponte* if necessary."⁴⁰

D. Respondents' Grandfathered Agreements

25. In the alternative to interconnection under FPA section 211A, Complainants request that the Commission direct the Midwest ISO to interconnect the Glacier Ridge project to the Pillsbury Line by accessing Otter Tail's transmission rights through their Grandfathered Agreements or another agreement. The Complainants claim that Otter Tail and Minnkota have used the Grandfathered Agreements in a manner that: (1) grants an undue advantage to Otter Tail's portion of the Ashtabula project, and (2) blocks the Complainants access to the Pillsbury Line.⁴¹

26. Complainants request that the Commission find that one Grandfathered Agreement⁴² between Minnkota and Otter Tail is unjust and unreasonable because it has resulted in discrimination against Renewable Americas and PEAK Wind. Complainants argue that the Grandfathered Agreement, in essence, provides Otter Tail and Minnkota with access to the other's transmission system without having to submit a generation interconnection request, which thereby allows Otter Tail and Minnkota to unduly favor their own generation. They also urge the Commission to rescind the Grandfathered

³⁸ Otter Tail, September 29, 2008 Answer at 23-25.

³⁹ Complainants, October 14, 2008 Answer at 40-42.

⁴⁰ *Id.* at 44.

⁴¹ *See supra* n.18.

⁴² Complainants generally refer to the numerous Grandfathered Agreements which allow Otter Tail and Minnkota to operate a single joint integrated transmission system. However, Complainants only specifically reference Grandfathered Agreement No. 314 in their claims of undue discrimination.

Agreements and the preferential transmission rights or, in the alternative, strictly construe the Grandfathered Agreements to limit the transmission rights to transactions to serve retail load.

27. In its September 29, 2008 answer, Otter Tail responds that nothing in the Grandfathered Agreement provides that any party may interconnect new generation to another party's transmission system without complying with the applicable generator interconnection procedures. Otter Tail also states that the Complainants have not explained in their Complaint or their supporting affidavits how they believe the Grandfathered Agreement was used to provide an undue preference to their own interconnection request.

28. Minnkota states that it is not unlawful, or even unusual, for two neighboring utilities to work together in the planning, development, construction and operation of joint projects, including integrated transmission facilities. Minnkota notes that the Grandfathered Agreement does not relieve either Minnkota or Otter Tail of its obligation to submit an interconnection request to the appropriate entity for the interconnection of generation facilities to the transmission facilities governed by the Grandfathered Agreement.

29. In their October 14, 2008 response, Complainants maintain their initial position that the Grandfathered Agreement allows Otter Tail and Minnkota to operate a single jointly integrated transmission system whereby no interconnection requests need to be made. They also state that, at a minimum, the Grandfathered Agreement should be modified to allow third parties, when delivering power, to be recognized as having delivered power into the Otter Tail zone of the Midwest ISO, regardless of whether their connection is with Minnkota or Otter Tail.

E. Reliability Concerns

30. Complainants claim that the Pillsbury Line threatens reliability in the Midwest ISO because power from the Ashtabula project will be transmitted from Minnkota's system into the Midwest ISO. According to the Complaint, although the power from the Ashtabula project will overload transmission lines within the Midwest ISO, MAPP has refused to assign the costs of any necessary system upgrades to the developers of that project. As a result, Glacier Ridge and other prior queued interconnection customers will be held responsible for those costs, which is inconsistent with Commission precedent.⁴³ PEAK Wind should be held harmless from any costs incurred to interconnect the Glacier Ridge project that would not have been incurred but for the interconnection of the Pillsbury Line.

⁴³ Complaint at 57.

31. In its comments, MAPP explains the role of its Design Review Subcommittee. It is a peer review group to ensure MAPP members comply with planning and reliability standards. It states that the Design Review Subcommittee approved Minnkota's study after considering the effect on reliability and that it placed conditions on the approval, including requiring Minnkota to restudy as necessary to account for prior queued projects. MAPP rejects Complainants' assertion that its Design Review Subcommittee turned a deaf ear to the reliability concerns caused by the Maple River project within the Midwest ISO. MAPP also states that the Design Review Subcommittee does not make cost allocation recommendations or address financing and cost responsibility. Otter Tail and Minnkota's answers contain similar explanations. The Midwest ISO did not comment.

32. Complainants counter that their project should have been considered an "expected facility addition" and included in Minnkota's interconnection study; the Commission should require MAPP to cause the Design Review Subcommittee to remedy this by scheduling a restudy that includes the upgrades that will be necessary to accommodate Glacier Ridge's prior queue position. Respondents and FPL acknowledge that the interconnection of M-Power and Ashtabula to Maple River will be restudied to include Glacier Ridge as a higher queued project if Glacier Ridge does proceed with its interconnection request in the MISO queue, and that Respondents and FPL would be responsible for the cost of additional upgrades required as a result of that restudy.⁴⁴

F. Waivers of Standards of Conduct and Order No. 889

33. Otter Tail and Minnkota received waivers of the requirements of Order No. 889, including the Commission's Standards of Conduct,⁴⁵ because they were small electric utilities (disposing of no more than 4 million megawatthours (MWh) annually).⁴⁶ Complainants allege that neither of the Respondents currently satisfies that standard, because each sold more than 4 million MWh in 2007. They also imply that because Otter Tail owns extensive transmission facilities spanning three states, it no longer satisfies the

⁴⁴ Otter Tail, October 29, 2008 Answer at 10; Minnkota, October 29, 2008 Answer at 14; FPL, October 29, 2008 Answer at 12.

⁴⁵ 18 C.F.R. Part 358 (2008).

⁴⁶ Order No. 889, FERC Stats. & Regs. ¶ 31,035 at 31,896-97 & n.1072 (discussing the 4 million MWh threshold). See *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 61,129-30 (1997) (granting Otter Tail's request for waiver), and *Easton Utilities Commission*, 83 FERC ¶ 61,334, at 62,343 (1998) (granting Minnkota's request for waiver).

standard to receive a waiver. Complainants also argue that Otter Tail, as a result of its waiver of the Standards of Conduct requirement, was able to unduly discriminate against Complainants.

34. Otter Tail responds that it, by definition,⁴⁷ remains a “small public utility” because its total production of electricity, which it defines as net generation as opposed to total sales, remains below 4 million MWh.⁴⁸ It maintains that Complainants’ reference to its total retail sales, which include purchases for resale, is incorrect.

35. Minnkota does not dispute Complainants’ assertion that it no longer meets the standard for a waiver, but states that because its waiver has not been revoked, the waiver remains in effect. The waiver would not automatically be invalid, and the Commission would have to take action to revoke it.⁴⁹ Further, Minnkota asserts that revocation would be prospective only, so Minnkota would simply have to abide by the Standards of Conduct and Open Access Same-Time Information System requirements in the future,⁵⁰ and Complainants would not be entitled to the relief they seek. Minnkota states that Complainants still have to submit an interconnection request if they want to interconnect with Minnkota.

36. Complainants respond that waivers of the functional unbundling requirements within the Commission’s Standards of Conduct are not a license to discriminate. They assert that Otter Tail and Minnkota were negotiating Power Purchase Agreements at the same time that they were planning transmission system expansions to support those

⁴⁷ Otter Tail notes that the Commission used the Small Business Administration definition of a small electric utility. Otter Tail notes that a small electric utility was defined as one that disposes of 4 million MWh or less of electric energy in a given year. *See* Otter Tail, September 29, 2008 Answer at 43, *citing* 13 C.F.R. § 121.201 n.1 (2008).

⁴⁸ Otter Tail, September 29, 2008 Answer at 43-44, *citing* Otter Tail Power Company, “FERC Form 1: Annual Report of Major Electric Utilities, Licensees and Others for the year ending 2007,” filed April 9, 2008, revised April 25, 2008 and June 13, 2008, at page 401, line 9.

⁴⁹ Minnkota, September 29 Answer at 51-53, *citing* *Easton Utilities Commission*, 83 FERC ¶ 61,334, at 62,343 (1998), *Central Minnesota Municipal Power Agency*, 79 FERC ¶ 61,260, at 62,127 (1997).

⁵⁰ Minnkota states that, although it is not required to do so, it is in the process of establishing an Open Access Same-Time Information System because of its commitment to open access policies, which includes maintaining an OATT and adopting Large Generator Interconnection Procedures. *See* Minnkota September 29, 2008 Answer at 17.

Power Purchase Agreements. The absence of functional unbundling protections led to Otter Tail and Minnkota not providing PEAK Wind with equal access to information.

37. Otter Tail argues that there is no relationship between its waiver of the Standards of Conduct and the fact that Complainants were not informed about a potential competitor's request for generator interconnection service. It asserts that the Large Generator Interconnection Procedures require that discussions between interconnection customers and transmission providers be confidential in order not to compromise interconnection customers' competitively sensitive information.

G. Queue Jumping

38. Complainants assert that Otter Tail is attempting to "jump over" the Complainants' prior-queued request to interconnect the Glacier Ridge project to transmission facilities owned by Otter Tail.⁵¹ They assert that Otter Tail is doing this to benefit the Ashtabula project at the expense of the Glacier Ridge project. In addition to the other relief requested, Complainants assert that the Commission must order Otter Tail, Minnkota, and FPL to pay for any study and transmission upgrade costs resulting from those entities' attempt to jump over the Glacier Ridge project in the interconnection queue. Once Glacier Ridge becomes operational, Renewable Americas and PEAK Wind should not be required to pay for any transmission upgrades.⁵²

39. Otter Tail states that the Commission has already dismissed claims regarding queue-jumping. In the Midwest ISO interconnection queue reform proceedings, Renewable Americas asked the Commission to sanction transmission owners who permit generators to "jump over" the Midwest ISO queue by requesting interconnection service from non-jurisdictional transmission providers. Otter Tail quotes the Commission's response to Renewable America's request:

The purpose of Order No. 2003 is to encourage interconnection of generators, not to discourage it. While some generators may, for logistical reasons, be able to interconnect to a neighbor of the Midwest ISO, and while other generators may find it impractical to do so, different generators are in different situations, and some will have advantages that others will not be able to use.⁵³

⁵¹ Complaint at 38.

⁵² *Id.* at 59.

⁵³ Otter Tail, September 29, 2008 Answer at 28, *quoting Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183, at P 134 (2008).

Otter Tail further asserts that it, Minnkota, and FPL decided to interconnect with the Minnkota transmission system instead of the Midwest ISO system, in part because of the long lead time needed for the Midwest ISO to process interconnection requests.⁵⁴

40. In its answer, FPL asserts that the Complainants have “buyer’s remorse,” as they regret seeking to interconnect with the Midwest ISO rather than with Minnkota. FPL further asserts that the Complainants are themselves trying to “queue jump” to the Minnkota queue through litigation, asking the Commission to compensate them for the results of their unsuccessful business strategy and interconnection choices.⁵⁵

41. Minnkota states that its interconnection queue is entirely separate from the Midwest ISO and Western Area Power Administration queues. The Complainants cannot legitimately claim that Minnkota has granted an undue preference in favor of the Ashtabula and M-Power Projects when the Complainants have sought interconnection with transmission facilities owned and/or controlled by other transmission providers.⁵⁶

42. In their answer, the Complainants assert that the Midwest ISO and Minnkota interconnection queues are effectively merged. Under a seams operating agreement,⁵⁷ while the Ashtabula and M-Power projects will be interconnected to MAPP (Minnkota) and Glacier Ridge will be interconnected to Midwest ISO, the system impact studies on one system consider the effects and the need for transmission upgrades on both systems.⁵⁸

43. MAPP refutes Complainants’ assertion that the Midwest ISO and Minnkota queues are effectively merged. MAPP states that MAPP transmission providers and the Midwest ISO administer their own queues independently of each other,⁵⁹ and that Complainants’ reference to the seams operating agreement is misplaced.

⁵⁴ *Id.* at 28.

⁵⁵ FPL, September 29, 2008 Protest at 2.

⁵⁶ Minnkota, September 29, 2008 Answer at 22.

⁵⁷ Midwest ISO and MAPP are parties to a seams operating agreement, which generally provides a mechanism for the parties to coordinate interfaces on the Midwest ISO/MAPP market-to-non-market seam.

⁵⁸ Complainants, October 14, 2008 Answer at 33.

⁵⁹ MAPP notes that, in the future, the Midwest ISO and MAPP transmission providers will coordinate to a significant degree on generation interconnection studies

IV. Discussion

A. Procedural Matters

44. 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.

45. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2008), prohibits an answer to a protest or an answer, unless otherwise permitted by the decisional authority. We will accept all of the answers and replies because they have provided information that assisted us in our decision-making process.

B. Hearing and Settlement Judge Procedures

46. We find that Complainants raise issues of material fact that cannot be resolved based on the record before us and that, based on our review of the record, the practices in question may be unduly discriminatory or preferential. Accordingly, we will institute a proceeding and a trial-type evidentiary hearing under section 206 of the FPA to establish a more complete factual record upon which to determine whether Respondents unduly discriminated against Complainants, or otherwise violated their obligations under the Commission's rules for open access transmission and interconnection service.

47. The issues to be addressed at hearing include, among others:

(1) Is the Pillsbury Line an interconnection facility or a transmission line?

(2) Did Otter Tail violate the requirements of the Commission's open access rules regarding the provision of interconnection service or transmission service over the Pillsbury Line (including service associated with Direct Assignment Facilities) during the time it was jointly planning the line to interconnect and transmit the output of the Ashtabula and M-Power projects?

(3) What was Otter Tail's role with respect to the development of the Pillsbury Line (i.e., interconnection customer, transmission provider)? Was Otter Tail at any time planning to be a co-owner of the facility and, if so, what would its

through revisions to their respective regional transmission planning processes. *See* MAPP, October 29, 2008 Supplemental Comments at 10.

ownership share have been and what capacity rights would it have retained in the line?

(4) Was the Pillsbury Line planned as a generation Interconnection Facility or was it also planned to serve as a network facility at some future time?

(5) Did Otter Tail and/or Minnkota condition access to the Pillsbury Line upon Complainants' selling power to Minnkota or Otter Tail?

(6) Why did PEAK Wind and/or Renewable Americas not submit an interconnection request to Minnkota prior to construction of the Pillsbury Line?

(7) In what form did FPL and M-Power request interconnection to Minnkota on January 3, 2008, and what information did Minnkota provide to them regarding how to request interconnection?

(8) Is the Pillsbury Line subject to the Commission's planning process? If so, why was PEAK Wind not invited to the January 3, 2008 meeting and provided the same information about the potential opportunity to interconnect to Minnkota's Maple River substation?

(9) What is the capacity of the Pillsbury Line? Identify the limiting elements that would prevent an additional 200 MW of the capacity (in addition to the capacity subscribed pursuant to the interconnection requests submitted on or before January 3) from being used?

(10) Is Complainants' project similarly situated with other projects connected to the Pillsbury Line? If so, did Otter Tail and Minnkota together or individually unduly discriminate against Complainants?

(11) Does Otter Tail still qualify for waiver of the requirements of Order No. 889, and if not, in which year did it fail to qualify?

48. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁶⁰ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding;

⁶⁰ 18 C.F.R. § 385.603 (2008).

otherwise, the Chief Judge will select a judge for this purpose.⁶¹ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

49. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as amended by section 1285 of the Energy Policy Act of 2005, requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,⁶² we will set the refund effective date at the earliest date possible, i.e., the date of the filing of the complaint, which is August 29, 2008.

50. Section 206(b) of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Based on our review of the record, we expect that if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures or, if the case were to go to hearing immediately, August 31, 2009. We thus estimate that if the case were to go to hearing immediately we would be able to issue our decision within approximately four months of the filing of briefs on and opposing exceptions, or by February 28, 2010.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction

⁶¹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

⁶² See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Electric Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning this complaint, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) The refund effective date established pursuant to section 206(b) of the Federal Power Act is August 29, 2008.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.