

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

| | | |
|----------------------------------------|---|--------------------------|
| Renewable Energy Systems Americas Inc. |) | |
| and |) | |
| PEAK Wind Development, LLC, |) | |
| |) | |
| Complainants, |) | |
| |) | |
| v. |) | Docket No. EL08-____-000 |
| |) | |
| Otter Tail Power Company |) | |
| and |) | |
| Minnkota Power Cooperative, Inc., |) | |
| |) | |
| Respondents. |) | |

**COMPLAINT REQUESTING RELIEF FROM UNDUE PREFERENCE
AND UNDUE DISCRIMINATION OR, IN THE ALTERNATIVE,
A SHOW CAUSE ORDER OR AN EVIDENTIARY HEARING
WITH FAST TRACK PROCESSING OF RENEWABLE ENERGY SYSTEMS
AMERICAS INC. AND PEAK WIND DEVELOPMENT, LLC AGAINST
OTTER TAIL POWER COMPANY AND MINNKOTA POWER
COOPERATIVE, INC.**

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ATTACHMENTS

1. Affidavit of William Noeske

 Exhibit WN-1 A copy of the FPL Energy’s Memorandum of Option for Easement Agreement and Option for Easement Agreement

 Exhibit WN-2 *Megawatt Daily* Price Report for the Midwest ISO’s Minnesota Hub (October 16, 2007)

 Exhibit WN-3 *Megawatt Daily* Price Report for the Midwest ISO’s Minnesota Hub (December 18, 2007)

 Exhibit WN-4 February 29, 2008 Letter from PEAK Wind to Minnkota

 Exhibit WN-5 March 3, 2008 Letter from Minnkota to PEAK Wind

 Exhibit WN-6 E-mail correspondence from Rod Scheel of Otter Tail to Bill Noeske of PEAK Wind

2. Affidavit of Joseph M. DeVito

 Exhibit JMD-1 Otter Tail’s March 29, 2007 Press Release: “Largest Wind Farm in North Dakota Announced;” Minnkota’s March 29, 2007 Press Release: “Minnkota, FPL Energy Announce Wind Farm Plans;” Otter Tail’s September 10, 2007 Press Release: “Portion of Langdon Wind Energy Center to be owned by Otter Tail Power Company”

 Exhibit JMD-2 Otter Tail’s February 5, 2008 Press Release: “Otter Tail Power Company, Minnkota Power Cooperative Plan to Build Generation Outlet in North Dakota”

 Exhibit JMD-3 Letter of Intent filed with the North Dakota Public Service Commission by Otter Tail and Minnkota on February 5, 2008

 Exhibit JMD-4 March 18, 2008 Application filed with the North Dakota Public Service Commission by Otter Tail and Minnkota (figures omitted)

- Exhibit JMD-5 April 17, 2008 Amended Application filed with the North Dakota Public Service Commission by Minnkota (figures omitted)
- Exhibit JMD-6 Otter Tail’s April 30, 2008 Press Release: “Otter Tail Power Company Announces Major Investment in Wind Energy Generation”
- Exhibit JMD-7 Otter Tail’s August 11, 2008 Press Release: “Part of M-Power Wind Site to be Owned by Otter Tail Power Company”
- Exhibit JMD-8 Otter Tail Organizational Chart and Midwest Construction Services Organizational Chart
- Exhibit JMD-9 Information on Otter Tail Corporation subsidiary Ventus Energy Systems
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- Exhibit JMD-11 Minnkota’s May 13, 2008 Press Release: “Minnkota, Minnesota Power Announce Strategic Agreement”
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- Exhibit OAM-6 Maple River Wind Generation Interconnection System Impact Study: Report Submitted to MAPP Design Review Subcommittee by Minnkota Power Cooperative, Inc. Prepared by Excel Engineering, Inc. (May 10, 2008)
- Exhibit OAM-7 Independent Report Performed by RES Americas on Maple River Wind Generation Interconnection System Impact Study (August 8, 2008)
- Exhibit OAM-8 Minutes of the MAPP Design Review Subcommittee Meeting on May 30, 2008
4. Form of Notice

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OTTER TAIL POWER COMPANY AND MINNKOTA POWER COOPERATIVE, INC.**

Renewable Energy Systems Americas Inc. (“RES Americas”) and PEAK Wind Development, LLC (“PEAK Wind”) [together “Complainants”] hereby file, pursuant to section 206 of the Federal Power Act (“FPA”), 16 U.S.C. § 824e, and Rules 206 and 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. §§ 385.206 and 385.212, this complaint against Otter Tail Power Company (“Otter Tail”) and Minnkota Power Cooperative, Inc. (“Minnkota”) [together “Respondents”].

As described more fully below, Otter Tail (a public utility that owns generation and transmission facilities) and Minnkota (an electric cooperative that owns an extensive interstate

transmission system much of which is located within the Otter Tail balancing authority area) are building the Pillsbury Line, a 60-mile 230 kV transmission line that was not regionally planned as required by Order No. 890, but rather secretly conceived to facilitate the interconnection and transmission of energy from an “out-of-queue” wind generation project being developed by Otter Tail and FPL Energy, LLC (“FPL Energy”) in eastern North Dakota. Access to the Pillsbury Line has been denied to a similarly-situated, prior-queued generation project being developed by RES Americas and PEAK Wind on land adjacent to the Otter Tail/FPL Energy project. In so doing, Otter Tail and Minnkota have conferred an undue preference on the Otter Tail/FPL Energy generation project and unduly discriminated against PEAK Wind and RES Americas. Furthermore, by jumping over the prior-queued request of PEAK Wind and RES Americas, Otter Tail and FPL Energy are, among other things, trying to gain prior access to the energy markets administered by the Midwest Independent System Operator, Inc. (“Midwest ISO”). The Mid-Continent Area Power Pool (“MAPP”), which reviewed the system impact study to interconnect the Otter Tail/FPL Energy generation project,¹ recognizes that energy from the generation project will overload existing transmission lines within the Midwest ISO and could threaten reliability, but has refused to require Otter Tail and FPL Energy to assume cost responsibility for the necessary physical upgrades within the Midwest ISO, which in turn will increase transmission costs for Complainants’ wind generation project.

To remedy the undue discrimination and undue preference, Complainants respectfully request that the Commission require their generation project be interconnected to the Pillsbury Line by (1) ordering, under FPA section 211A,² Minnkota to interconnect

¹ Minnkota and Otter Tail are each members of MAPP. Otter Tail is also a member of the Midwest ISO.

² 16 U.S.C. § 824j-1(b) (Supp. 2008). FPA § 211A provides in relevant part: “the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services (1) at rates that are comparable to

Complainants' wind generation project or, alternatively, (2) directing the Midwest ISO to interconnect Complainants' wind generation project by utilizing Otter Tail's transmission rights under certain grandfathered agreements ("GFAs") with Minnkota. Additionally, the Commission must ensure that, when the Complainants' wind generation project becomes operational, Otter Tail and its generator partner, as lower-queued projects, assume financial responsibility for any necessary transmission system upgrades required to interconnect and transmit power to the transmission system operated by the Midwest ISO. The Complainants also request additional remedies noted below, as well as any other relief that that Commission deems appropriate.

I. EXECUTIVE SUMMARY

Background

PEAK Wind is comprised of eighty (80) members (mostly farmers) holding approximately 30,000 acres of land spanning 20 miles in Barnes County, North Dakota. RES Americas is a leading developer of wind generation projects in the United States. Together, PEAK Wind and RES Americas are jointly developing a community-based wind generation project with a maximum generating capacity of up to 400 MW – the Glacier Ridge project.

Otter Tail and FPL Energy are developing, adjacent to Glacier Ridge project, a 358 MW wind generation project.³ Once in service, Otter Tail will own approximately 98 MW; FPL Energy will own 260 MW, of which it will sell 200 MW to Minnkota and retain 60 MW for sale to the Midwest ISO market.

those that the unregulated transmitting utility charges itself; and (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.”

³ See Exhibit OAM-4 (map of relevant generation facilities and transmission facilities).

On October 16, 2007, PEAK Wind filed with the Midwest ISO a request to interconnect phase one of its wind project (200 MW) at the Buffalo, ND substation (to transmission facilities owned by Otter Tail) on Minnkota's 345 kV transmission line. The Minnkota 345 kV line, which runs through land owned by PEAK Wind members, originates at the Coyote generating facility in western North Dakota and connects with Minnkota's Maple River Substation near Fargo, ND.

Months later, Otter Tail, Minnkota, and FPL Energy contrived a scheme to "jump over" the pre-existing, Glacier Ridge generation interconnection request. Otter Tail and FPL Energy would interconnect their generation project to a new 230 kV substation, which in turn would connect with a new 230 kV transmission line (the Pillsbury Line, jointly-owned by Otter Tail, Minnkota, and FPL Energy) that would circumvent the Glacier Ridge project and connect 60 miles downstream to the Maple River Substation. Otter Tail would "design, engineer, permit and oversee construction of the Pillsbury to Fargo 230 kV line and the Pillsbury Wind 230 kV substation."⁴ The Glacier Ridge project is closer to the Maple River Substation than the FPL Energy/Otter Tail generation project. As such, Otter Tail and FPL Energy will not only "jump over" the prior-queued interconnection request of Glacier Ridge, but also Glacier Ridge's point of interconnection. Requests to interconnect the Glacier Ridge project to the Pillsbury Line were denied because, according to Minnkota, the line was "fully subscribed" before any interconnection requests were posted.

⁴ See Exhibit WM-6 attached to the Affidavit of William Noeske. Later, to eliminate the need for Otter Tail to obtain regulatory approval by state regulators for construction of the facilities, Minnkota declared that it would solely own the transmission line. That, however, merely changed the name on the label and did not diminish the beneficial ownership of Otter Tail, who designed, permitted, and is constructing the line -- all in order to connect its generation facilities to the interstate transmission grid.

It was wrong to deny Glacier Ridge's request to interconnect to the Pillsbury Line. Otter Tail and Minnkota knew that PEAK Wind and RES Americas were developing the Glacier Ridge project and intentionally designed the Pillsbury Line to accommodate their joint project with the effect to exclude Glacier Ridge and charted a circuitous route for the transmission line that would circumvent the Glacier Ridge project. This conduct is even more egregious because (1) many members of PEAK Wind are farmers who are members of and receive electric service from an electric cooperative that has an ownership interest in Minnkota and (2) PEAK Wind had been trying to interconnect to Minnkota for almost a year before the line was announced. Additionally, the claim that the line is fully subscribed rings hollow, since representations as to the capacity of the line have changed over time and, to this day, has still not been clearly established.⁵

Although Otter Tail and FPL Energy are interconnecting their generation project to Minnkota, Otter Tail and FPL Energy's "queue jumping" will result in overloads of transmission facilities operated by the Midwest ISO.⁶ However, MAPP, which approved the system impact study to attach the generation project to the new Pillsbury Line, refuses to assess cost responsibility to Otter Tail and FPL Energy for the necessary transmission facility upgrades in the Midwest ISO system, which left unchecked, will result in additional costs for the Glacier Ridge project once it becomes operational.

Otter Tail and Minnkota granted an undue preference to a wind generation project being developed by Otter Tail and its partner FPL Energy

Even though Otter Tail has transferred operational control over some of its transmission facilities to the Midwest ISO, Otter Tail maintains transmission market power because of its

⁵ See Exhibit OAM-6.

⁶ See Exhibit OAM-8 (minutes of the MAPP Design Review Subcommittee on May 30, 2008).

preferential relationship with Minnkota. The Otter Tail and Minnkota transmission systems are highly integrated, and their relationships are governed by five GFAs entered into before the formation of the Midwest ISO and implementation of the Midwest ISO's Transmission and Energy Markets Tariff ("TEMT"). Under these GFAs Otter Tail and Minnkota "granted each other reciprocal capacity rights whereby each owner committed to make its capacity available to use by the other."⁷ As a result, Otter Tail (which is also a member of Minnkota) is able to develop generation facilities attached to the Minnkota system and utilize its transmission rights on Minnkota and thereby bypass the Midwest ISO's generation interconnection process and the prior-queued Glacier Ridge project.

Otter Tail has enhanced its transmission market power by exploiting a waiver (for which it no longer qualifies) of the Commission's standards of conduct. In other words, since Otter Tail is not required to functionally separate its employees, generation and marketing employees can freely interact with transmission employees. Otter Tail exercised this enhanced transmission market power, by designing, engineering, permitting and overseeing the construction of the Pillsbury Line, which would allow Otter Tail and FPL Energy to interconnect their project to the interstate transmission grid, but then, acting in concert with Minnkota, denied interconnection to the similarly situated Glacier Ridge project.

Otter Tail and Minnkota unduly discriminated against PEAK Wind and RES Americas

Beginning in February 2007 – almost a year before the posted date of the interconnection request involving Otter Tail and FPL Energy generation facilities – PEAK Wind repeatedly asked Minnkota to interconnect to its interstate transmission system. Minnkota stalled and

⁷ See January 22, 2008 Protest of Otter Tail Power Company, Docket No. ER08-370-000, "Affidavit of Timothy Rogelstad on Behalf of Otter Tail Power Company," at p. 9; see also GFA 314, an integrated transmission agreement or joint use agreement, which Otter Tail and Minnkota entered into before Otter Tail joined the Midwest ISO.

refused to meet with PEAK Wind for six months, which afforded FPL Energy the time to acquire easements for the wind generation project it was developing with Otter Tail. When Minnkota finally met with PEAK Wind, Minnkota suggested reducing the Glacier Ridge project by 90% or simply terminate it altogether, which would then allow Otter Tail and FPL Energy to develop a larger project. When PEAK Wind discussed the project with Otter Tail, Otter Tail urged PEAK Wind to abandon their project and instead provide FPL Energy with the necessary easements so that FPL Energy could develop a project. This is rather damning, given that Otter Tail is apparently relying on FPL Energy to obtain the necessary easements for the Otter Tail generation project. Within several hours after the meeting between Otter Tail and PEAK Wind, FPL Energy called a PEAK Wind member (who had attended the Otter Tail meeting) to see if he was now willing to lease his land to FPL Energy. Otter Tail and Minnkota subsequently concealed plans to construct the Pillsbury Line. Once those plans became known, RES Americas and PEAK Wind requested to interconnect to the line, but were informed that it was fully subscribed.

In Order No. 2003-A, the Commission emphasized that transmission providers are **required** to assist customers in siting facilities in a manner comparable to that it provides itself or its affiliates.⁸ Apparently, the affiliates of Minnkota and Otter Tail submitted the interconnection requests associated with the Otter Tail and FPL Energy generation projects.⁹ Neither Otter Tail nor Minnkota assisted PEAK Wind and RES Americas, but instead time after time tried to discourage, impede, and prevent the development of the Glacier Ridge project.

⁸ See *Standardization of Generator Interconnection Agreement and Procedures*, Order No. 2003-A, Docket No. RM02-1-001, 69 *Fed. Reg.* 15932 (March 26, 2004), FERC Stats. & Regs. [Reg. Preambles] ¶ 31,160, P 30 (2004) (“Order No. 2003-A”).

⁹ Affidavit of Joseph M. DeVito at p. 7, ¶15.

The Pillsbury Line, which was not planned according to Order No. 890 requirements, poses a significant threat to reliability in the Midwest ISO.

Directly contrary to the dictates of Order No. 890, Otter Tail is acting as agent for Minnkota to “design, engineer, permit, and oversee the construction of the” 60-mile, 230 kV Pillsbury Line outside of the regional transmission planning processes of the Midwest ISO and MAPP. This unplanned line is intended to benefit Otter Tail, Minnkota, and FPL Energy at the expense of the Midwest ISO’s customers and the generators waiting in the queue for interconnection service.

MAPP recognizes that (1) “the project crosses a portion of the MAPP bulk electric system to be delivered to the MISO footprint” and (2) energy from the Otter Tail/FPL Energy generation project will overload Midwest ISO transmission lines. However, MAPP turned a deaf ear to reliability concerns raised by its own members, refused (over the objection of the Midwest ISO) to require Otter Tail and FPL Energy to assume cost responsibility for necessary physical transmission system upgrades in the Midwest ISO, and instead simply applied a band-aid -- special protection systems (“SPS”).¹⁰

Minnkota has enhanced and flexed its transmission market power by violating open access principles and tying interconnection to energy sales at below market prices

MAPP’s cavalier attitude and actions threaten reliability. This is no small concern. In addition, it raises issues of cost responsibility for the necessary system upgrades. Here the Commission precedent is clear – the out-of-queue generator must fund the network upgrades required to interconnect the prior-queued generator. As such, once Glacier Ridge becomes

¹⁰ See Exhibit OAM-8.

operational, Otter Tail and FPL Energy should be required to pay for any required transmission upgrades, including those not previously paid for because of MAPP's use of SPS.¹¹

Minnkota has enhanced its transmission market power by violating open access transmission principles and then exercised that market power by tying interconnection to below market sales. In this regard, Minnkota has never filed with, much less received approval by, the Commission for a reciprocity Open Access Transmission Tariff ("OATT"). Compounding concerns with Minnkota's transmission operations, Minnkota received a waiver of the Order No. 889 standards of conduct and is not required to maintain an Open Access Same Time Information System ("OASIS"). Minnkota no longer qualifies for the waiver. Furthermore, Minnkota has failed to post relevant and timely interconnection and transmission information on its internet web site, which prevented PEAK Wind and RES Americas from evaluating their transmission options and needs. Notwithstanding the above, Minnkota offered to interconnect the Glacier Ridge project and eliminate any transmission impediments – but only if PEAK Wind and RES Americas would enter into a power purchase agreement ("PPA") at below market prices. Under similar circumstances, the Commission has expressed concerns that tying transmission access to sales is anticompetitive and unduly discriminatory.

“The Bottom Line”

The PEAK Wind members own land on which wind will generate electricity at a robust 42% capacity factor. When approached by PEAK Wind about the Glacier Ridge project, Minnkota stalled PEAK Wind, discussed the opportunity with FPL Energy and Otter Tail (with whom Minnkota was then participating in the Langdon Wind Center). While Minnkota was

¹¹ See *Virginia Electric and Power Co.*, Docket No. ER03-743-001, *et al.*, 104 FERC ¶ 61,249, PP 18-19 (2003) (“VEPCO”).

stalling PEAK Wind, FPL Energy secured 99-year easements from the neighbors of PEAK Wind's members. Then, under what "FPL Energy described as a "hand shake and hug" agreement,¹² FPL Energy apparently promised to sell energy to Minnkota under similar terms to the Langdon project (*i.e.*, below market price for 25 years) in return for expedited access to the interstate transmission grid in 2008, which would allow FPL Energy to earn production tax credits ("PTCs").

Once operational, FPL Energy will assign 48 MW of generation facilities to Otter Tail. In turn, Otter Tail affiliates would be involved in the manufacture, construction, cabling, and electrical work on the wind generation facilities. However, FPL Energy will operate the Otter Tail generation facilities. Subsequently, Otter Tail announced that it would purchase 49.5 MW of related wind generation facilities under development, bringing Otter Tail's total generation connected¹³ to the Pillsbury Line to approximately 98 MW.

The Pillsbury Line represents the final aspect of the symbiotic relationship between the Otter Tail, Minnkota, and FPL Energy venture. Originally conceived and presented to regulators as a line jointly-owned by Otter Tail and Minnkota, ownership is now an open issue. According to FPL Energy's EWG Certification in Docket No. EG08-92-000, the line will be jointly-owned by Otter Tail, Minnkota, and FPL Energy. However, Otter Tail will "design, engineer, permit, and oversee construction of the Pillsbury to Fargo 230 kV line and the Pillsbury Wind 230 kV substation."¹⁴ Pursuant to GFAs pre-dating the Midwest ISO, Otter Tail will have preferential transmission rights on the Pillsbury Line. Minnkota will provide 60 MW of transmission service

¹² Noeske Affidavit at p. 9, ¶ 23.

¹³ See Otter Tail's August 11, 2008 Press Release, Exhibit JMD-7.

¹⁴ Exhibit WN-6.

over the Pillsbury Line to FPL Energy so that it can access the energy markets of the Midwest ISO.

In short, Otter Tail and Minnkota perceived Glacier Ridge as a competitor and economic threat to themselves and their generation partner FPL Energy. As a result, Otter Tail and Minnkota used their transmission market power to deny access to the interstate transmission grid and thereby squelch the competition or (in the case of Minnkota) attempt to extort energy sales at below market prices.

Remedies

The undue preference and undue discrimination outlined above cannot be condoned and must be remedied. Accordingly, PEAK Wind and RES Americas respectfully request that the Commission require that the Glacier Ridge project be interconnected to the Pillsbury Line. This can be accomplished in either of two ways: (1) by ordering, under FPA section 211A, Minnkota to interconnect the Glacier Ridge project to the Pillsbury Line or (2) by directing the Midwest ISO to interconnect Complainants' generation project to the Pillsbury Line by accessing Otter Tail's transmission rights (either through the GFAs or another agreement). In this regard, Otter Tail and Minnkota should be required to make any necessary modifications to the Pillsbury Line to accommodate energy from Glacier Ridge. Additionally, the Commission should ensure that Otter Tail and FPL Energy assume cost responsibility for any necessary modifications to the Midwest ISO operated transmission system which must be made to interconnect and transmit energy from the Glacier Ridge project.

Additionally, the Commission should take the following steps to prevent future undue preferential and undue discriminatory conduct: (1) rescind the GFAs and the preferential transmission rights or, in the alternative, strictly construe the GFAs to limit the transmission

rights to transactions to serve retail load; (2) revoke the standards of conduct waivers previously issued to Otter Tail and Minnkota, which would require Otter Tail to separate its merchant and transmission operations and Minnkota to utilize an OASIS; (3) require Minnkota to submit and receive Commission approval for a reciprocity OATT; and (4) assess appropriate civil penalties.

In lieu of the above, Complainants respectfully request that the Commission issue an order requiring Otter Tail and Minnkota to show cause why they have not violated Commission orders, rules, and regulations or, alternatively, establish an evidentiary hearing with fast track processing to address and resolve the issues. Finally, Complainants respectfully request that the Commission impose any other remedies or grant any other relief deemed appropriate.

II. PARTIES

A. Complainants

Complainants' exact legal names are Renewable Energy Systems Americas Inc. ("RES Americas") and PEAK Wind Development, LLC ("PEAK Wind"). RES Americas and PEAK Wind are jointly developing the Glacier Ridge wind generation project with a maximum generating capacity of 400 MW. What is at issue here is PEAK Wind's 200 MW interconnection request with the Midwest ISO. The project will be located on property owned by PEAK Wind members in eastern North Dakota adjacent to the 230 kV transmission line being constructed by Otter Tail for Minnkota.

1. RES Americas

RES Americas develops, constructs, owns, and operates wind farms throughout the United States. With corporate headquarters in Broomfield, CO and regional offices in Austin, TX, Portland, OR, and Minneapolis, MN, RES Americas employs 164 full-time

employees; it is one of the fastest growing wind energy development companies in the world. Over the last ten years, RES Americas has grown into one of the country's leading developers of wind generation projects, actively participating in the development of more than 12% of the installed wind power capacity in the United States. Specifically, RES Americas has developed or constructed more than 3,600 megawatts of wind energy in six different states and has more than 11,000 megawatts under development throughout the country. As a result, on a total megawatt basis, RES Americas constructed more wind projects in North America than anyone else (except M.A. Mortenson Company). The principal offices of RES Americas are located at 11101 West 120th Avenue, Suite 400, Broomfield, CO 80021.

2. PEAK Wind

PEAK Wind is a North Dakota limited liability company that is comprised of eighty (80) citizens and landowners holding approximately 30,000 acres of land spanning 20 miles and including parcels in six townships in Barnes County, North Dakota. Many of the PEAK Wind members are customers of Minnkota. PEAK Wind was formed to develop renewable and ecologically-friendly wind energy. The principal offices of PEAK Wind are located at 2730 130 Avenue SE, Tower City, ND 58071.

B. RESPONDENTS

1. Otter Tail

The exact legal name of Otter Tail is Otter Tail Power Company. Otter Tail, a wholly-owned subsidiary of Otter Tail Corporation (a Minnesota corporation), operates an electric utility in the states of Minnesota, North Dakota and South Dakota.¹⁵ Otter Tail is an investor-owned

¹⁵ See Otter Tail's SEC 10-K (for the fiscal year ended Dec. 31, 2007) at 1-2. On August 18, 2008 the Commission granted FPA § 203 approval for a corporate reorganization that would result in Otter Tail Corporation's becoming a holding company and Otter Tail Power Company a subsidiary. *Otter Tail Corporation*, Docket No. EC08-97-000, 124 FERC ¶ 62,130 (2008); see "Otter Tail Corporation's Application for Authorization under

utility and transmission-owning member of Midwest ISO. It is headquartered in Fergus Falls, Minnesota and provides electricity to residential, industrial, farm, commercial and municipal customers over a 50,000 square mile area. . . .”¹⁶ As of December 2007, Otter Tail’s transmission facilities total approximately 5,300 miles and consist of 48 miles of 345 kV lines, 405 miles of 230 kV lines, 799 miles of 115 kV lines and 4,039 miles of lower voltage, principally 41.6 kV lines.¹⁷

2. Minnkota

The exact legal name of Minnkota is Minnkota Power Cooperative, Inc. It is a wholesale generation and transmission cooperative with headquarters in Grand Forks, North Dakota.¹⁸ Minnkota is a member of MAPP. Minnkota provides wholesale electric service to 11 retail distribution cooperatives, whose service territories, which encompass 34,500 square miles, are located in northwestern Minnesota and the eastern third of North Dakota.¹⁹

Minnkota describes its transmission system as follows:

Minnkota’s transmission facilities consist of 214 miles of 345 kV, 363 miles of 230 kV, 226 miles of 115 kV and 2139 miles of 69 kV lines. NMPA owns a 15 percent undivided interest in Minnkota’s transmission system.

Section 203 of the Federal Power Act and Request for Expedited Action,” Docket No. EC08-97-000 (filed June 3, 2008) (“Otter Tail’s Reorganization Application”).

¹⁶ *In re Otter Tail Power Company*, Docket No. IN08-6-000, 123 FERC ¶ 61,213 (2008) (approving Stipulation and Consent Agreement involving Otter Tail’s illegal transmission practices). “Otter Tail used network transmission service to import power that was later sold off-system.” *Id.* at p. 62,341, P 6.

¹⁷ Otter Tail’s Reorganization Application at 3. The Midwest ISO operates Otter Tail’s transmission facilities above 100 kV. 123 FERC ¶ 61,213, p. 62,341, P 2.

¹⁸ 2006 Integrated Resource Plan of Minnkota and Northern Municipal Power Agency (“NMPA”) submitted to the Western Area Power Administration and the Minnesota Public Utilities Commission at 1-1 (“Minnkota’s 2006 Integrated Resource Plan”). A copy of Minnkota’s 2006 Integrated Resource Plan can be found at: <http://www.minnkota.com/Documents/transmission/MPC%20&%20NMPA%202006%20INTEGRATED%20RESOURCE%20PLAN.pdf>.

¹⁹ Within the service territory are 12 municipal systems that formed the NMPA; through a long-term agreement signed in 1981, Minnkota and NMPA combined their generation, transmission and financial resources to form the “Joint System.” *See* Minnkota’s 2007 Annual Report at 13. A copy of Minnkota’s 2007 Annual Report can be found at: http://www.minnkota.com/Documents/AnnualReports/MPC_AR_07_final_for_Web.pdf.

The transmission system is directly interconnected with seven area utilities: Manitoba Hydro, Montana-Dakota Utilities Company, Minnesota Power, Otter Tail Power Company, Xcel Energy, Great River Energy and the Western Area Power Administration (WAPA).

Minnkota's extensive transmission system and large number of interconnections with other utilities serves to enhance service reliability to the end-use customer and permits the sale or purchase of energy from neighboring companies.²⁰

All seven transmission-owning utilities interconnected with Minnkota are members or coordination companies of the Midwest ISO. Thus, "Minnkota is a market participant in the Midwest Independent System Operator's (MISO) energy market. This allows Minnkota to purchase energy from or sell energy into the MISO energy market."²¹

III. COMMUNICATIONS

All service and correspondence concerning this complaint should be sent to the following persons:

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²⁰ Minnkota's 2006 Integrated Resource Plan at 4-5.

²¹ *Id.* at p.1-5.

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IV. FACTS

PEAK Wind and RES Americas are developing, on 30,000 acres of land owned by PEAK Wind's members in Barnes County, ND, the Glacier Ridge wind generation project, which will be capable of producing up to 400 MW.²² For the last 18 months, Otter Tail and Minnkota have tried to thwart the attempts of PEAK Wind and RES Americas to develop the project and interconnect to the interstate transmission grid.

As explained more fully in the attached affidavit of William Noeske, many of the PEAK Wind members are farmers in eastern North Dakota and, therefore, are also members and customers of electric distribution cooperatives that receive sales and transmission service from Minnkota. In particular, the Noeske farm receives electric service from Cass County Electric Cooperative ("CCEC"), a member-owned electric distribution system serving over 30,000 members in an eight-county area in southeastern North Dakota. Since Minnkota has never maintained an OASIS and its internet web site contained no information regarding interconnection procedures, on February 20, 2007, Bill Noeske called CCEC to inquire about interconnecting the wind project to the electric transmission grid, specifically Minnkota's

²² A map of the land owned by PEAK Wind's members is attached as Exhibit OAM-4 to the Affidavit of Omar A. Martino, which is attached to this Complaint.

345 kV transmission line that runs through the Noeske property. Two weeks later, PEAK Wind was informed that Minnkota and the CCEC Engineering Department would meet with them on March 9, 2007. Minnkota cancelled the meeting two days before it was to occur. CCEC explained that Minnkota needed more time to prepare for the meeting.

A new meeting with Minnkota was rescheduled for the next week. Once again, Minnkota canceled the meeting. CCEC explained that because several parties proposed to develop wind projects near Valley City, Minnkota wanted to hold a joint meeting in Valley City in early April. When asked whether they could talk one-on-one with Minnkota, PEAK Wind was told that was not possible. PEAK Wind was never invited to any Valley City meeting in early April.

The PEAK Wind members knew they were being stalled by the very cooperative in which they held an ownership interest, but they did not know why. Then, curiously, in early April 2007, FPL Energy installed near the PEAK Wind site three meteorological towers to gather wind data; before this, PEAK Wind members were unaware of any FPL Energy interest in the area.²³

Shortly thereafter, in early May 2007, representatives from FPL Energy began to contact the Noeske family and other PEAK Wind landowners in and around the Noltimeir, Grand Prairie, and Alta townships in Barnes County, ND. FPL Energy had suddenly announced it was developing a wind farm in the area that could be 14 miles long and one and a half miles wide and was offering \$1,000 per year per landowner to retain development rights for five years; if a wind turbine was actually constructed, the landowner would receive \$4,000 per year, but would have to commit to a 99-year lease.²⁴

²³ Affidavit of William Noeske at p. 3, ¶7.

²⁴ A copy of FPL Energy's proposed easement is attached as Exhibit WN-1 to the Noeske Affidavit.

Many Barnes County landowners thought that FPL Energy's offer was too low and the 99-year lease (which would bind the next four or five generations) too long. As a result, during the summer of 2007 many local landowners rebuffed the FPL Energy offer and instead joined PEAK Wind.²⁵

PEAK Wind reached out, once again, to Minnkota. Having had no luck working through CCEC, on August 24, 2007, PEAK Wind's Bill Noeske telephoned Minnkota in an attempt to request more information on its interconnection process. After several days of trying, Noeske was finally able to talk with Mr. Dale Sollom, Minnkota's Planning Manager. Sollom agreed to set up a meeting on or around September 6, 2007. He later called to reschedule, and that meeting was also cancelled. Minnkota had now been stalling PEAK Wind for more than six months.

Frustrated that his own cooperative would not even meet with him, on September 11, 2007, Noeske called Mr. Robert Huether (Chairman of the Board of Minnkota) and expressed his concerns with Minnkota's refusal to meet with PEAK Wind members. Huether called Mr. Dave Loer (Minnkota's President and CEO), who then called Noeske. Given the large number of landowners involved in PEAK Wind, Noeske told Loer that PEAK Wind could develop up to a 400 MW wind generation project in the first phase of its project and that it would like to interconnect with Minnkota's 345kV transmission line that passes through two and one-half miles of the PEAK Wind Project.

At this point in time, Minnkota's web site did not post any interconnection requests, nor did it post any interconnection procedures.²⁶ As a result, PEAK Wind believed that it needed to meet with Minnkota in order to establish an interconnection request. Mr. Loer never informed

²⁵ See Noeske Affidavit at p. 4, ¶9.

²⁶ Noeske Affidavit at p. 13, ¶37.

PEAK Wind that it could file an interconnection request without a meeting. Mr. Loer did not inform Noeske how to file an interconnection request. Instead, Mr. Loer stalled PEAK Wind again: he scheduled yet another meeting at the end of September 2007 in Valley City, at which time PEAK Wind members could finally meet with Al Tschepen (Minnkota's Vice President of Planning and System Operations).

In the meantime, PEAK Wind officials also reached out to Otter Tail in late August 2007. As a result, on September 7, 2007, representatives from PEAK Wind met in Fergus Falls, MN with three representatives of Otter Tail, who stated that they were given the task to develop a wind project.²⁷ PEAK Wind members described their project and told Otter Tail's group that FPL Energy was also developing a project in the same area. The Otter Tail representatives did not indicate that they were working with FPL Energy to develop the site. Instead, they simply stated that Otter Tail was working with FPL Energy to develop the Langdon Wind Center.²⁸ The PEAK Wind members shared much information with Otter Tail and left the meeting with the

²⁷ The Otter Tail development group indicated that it was exploring five sites, and the PEAK Wind site happened to be one of the five. Otter Tail indicated that PEAK Wind was the only landowner group to contact them. At the time it was not clear to the PEAK Wind representatives how Otter Tail knew of their site, much less why Otter Tail was interested. Noeske Affidavit at p. 5, ¶15.

²⁸ In press releases issued on March 29, 2007 by Minnkota and Otter Tail, it was announced that Otter Tail and FPL Energy decided to construct and interconnect to Minnkota's interstate transmission system a wind generation project located near Langdon, North Dakota. See Exhibit JMD-1 ("Minnkota, FPL Energy announce wind farm plans;" "Largest wind farm in North Dakota announced;" "Portion of Langdon Wind Energy Center to be owned by Otter Tail Power Company.") Minnkota described the project as follows:

The total project at Langdon [Wind Energy Center] consists of 159 MW of wind generation from 106 General Electric 1.5 turbines. Three parties – Minnkota, FPL Energy, and Otter Tail Power Company (OTP) – made a decision in February 2007 to proceed with the project with a goal for completion by year-end. Under the arrangement, **FPL Energy owns 118.5 MW** and sells under contract 99 MW to Minnkota and 19.5 MW to OTP. **The remaining 40.5 MW is owned by OTP.**

To deliver the output of the wind farm **into the regional electric grid**, Minnkota and OTP built a new 35-mile, 115 kV line between the Langdon and Hensel substations. In addition, major upgrades were completed at both substations. The line and substation modifications cost approximately \$10 million.

Minnkota's 2007 Annual Report at 9 (emphasis added). Minnkota's purchases from FPL Energy's Langdon project "represents about 10 percent of the energy sales to our 11 member-owners." *Id.* at 2.

impression that Otter Tail was interested in doing business with them. What they did not know about Otter Tail was that it has a close business relationship with Minnkota, it jointly owns facilities with Minnkota, it had recently built, in conjunction with FPL Energy, generation facilities interconnected to Minnkota's system, and, it, in fact, is a member of Minnkota.²⁹

During the last week of September 2007, after seven months of trying, PEAK Wind members finally met face-to-face with a Minnkota official -- Al Tschepen, Vice-President of Planning and System Operations.³⁰ Mr. Tschepen discouraged the landowners from developing a 200 MW wind project and instead suggested that PEAK Wind explore using small pockets of existing, available transmission capacity ("ATC") of about 10 to 20 MW to accommodate a much smaller project. PEAK Wind members indicated that would not be sufficient, that they wanted to develop a 200 MW project. Mr. Tschepen did not provide PEAK Wind with any information or help concerning interconnection of the Glacier Ridge project to Minnkota's system.

In late September 2007, PEAK Wind Board members once again met with Otter Tail in Fergus Falls, Minnesota. This time, Mr. Randy Synstelien (Otter Tail's Manager of Power Contracts) joined the meeting. Synstelien declared that it was not economically feasible for Otter Tail or anyone else to work with PEAK Wind to develop a project. "Synstelien indicated that FPL Energy was good at building wind farms. Synstelien urged us not to build our own wind project, but instead grant FPL Energy easements so that FPL Energy could build the

²⁹ As a member of Minnkota, Otter Tail is entitled to attend Minnkota membership meetings. See 2006 Integrated Resource Plan of Minnkota and NMPA at p. 1-3.

³⁰ Noeske Affidavit at pp. 6-7, ¶18. Also attending were Scott Handy (CCEC's CEO), Ms. Bullinger (CCEC), and a few interested local people. About the same time, on September 24, 2007, PEAK Wind retained Rick Gonzalez of Excel Engineering to assist with analyzing electric transmission issues confronting the wind project. Later, it was learned that Gonzalez also represented FPL Energy and M-Power, who were also developing wind projects in the same general vicinity as PEAK Wind. *Id.* at p. 5, ¶14.

project.”³¹ In response to PEAK Wind’s concerns that the FPL Energy lease was too long (thereby committing four or more future generations) and paid too little, Synstelién preached: “Sometimes it is better to look beyond your own interests and do what is good for the community.”³²

Bill Noeske relates what happened next:

We left the meeting very dejected and disappointed. Later, I drove to Minneapolis, while the rest of the PEAK Wind members began the less than two hour drive back to Valley City. **During the drive, PEAK Wind board member Curt Marshall received a call on his mobile phone from an FPL Energy representative asking whether he was ready to sign with FPL Energy.** Curt had not talked to anyone from FPL Energy for months. It was no coincidence that FPL Energy’s representative called just hours after the Otter Tail meeting. Otter Tail had delivered a message to us, told FPL Energy that we had nowhere else to go, and FPL Energy believed it could now get us to sign their contracts. They were wrong.³³

PEAK Wind members knew that they owned prime land on which to construct a wind generation project: a wind study established that wind turbines on their land would have a capacity factor of approximately 42 percent.³⁴ As a result, after being rejected by Minnkota and Otter Tail, PEAK Wind consulted with their transmission consultant (Rick Gonzalez). Around this time, the going rate for a wind project was \$55 per MWh. Gonzalez recognized that and told PEAK Wind, “The money is in the Midwest ISO; PEAK Wind should go East.”³⁵ So they did. On October 16, 2007, PEAK Wind filed with the Midwest ISO a request (# G885) to

³¹ Noeske Affidavit at p. 7, ¶19.

³² *Id.* In hindsight, perhaps PEAK Wind should have replied that Otter Tail should look beyond its own interests and follow the law.

³³ Noeske Affidavit at p. 8, ¶20. (emphasis added).

³⁴ Capacity factor measures the productivity of a wind turbine by comparing actual production over a given period of time with the amount of power that would have been produced if the turbine had run at full capacity for the same amount of time.

³⁵ Noeske Affidavit at p. 8, ¶21.

interconnect its 200 MW wind project at the Buffalo, ND substation (owned by Otter Tail) on Minnkota's 345 kV transmission line.³⁶

In response to PEAK Wind's interconnection request, a scoping meeting (conducted by telephone) was held on or about December 5, 2007. In addition to Midwest ISO and PEAK Wind representatives, both Otter Tail and Minnkota participated in the scoping meeting.

After the scoping meeting, Gonzalez, on behalf of PEAK Wind, called Minnkota to inquire about the interconnection process and interconnection queue. Minnkota's Dale Sollom stated that Minnkota's interconnection process was to "send an email."³⁷ Gonzalez asked about where he could find the interconnection queue; Sollom answered, "it is located in my desk drawer."³⁸ When asked if information concerning the interconnection request was publicly available, Sollom stated: "Nobody has ever asked for it."³⁹ Gonzalez then asked about FPL Energy's position in the interconnection queue:

He was told that FPL Energy did not have a pending interconnection request because "FPL is working off of an RFP issued two years ago," which involved the Langdon Wind Center, a wind project being developed by FPL Energy and Otter Tail. After six months of talking to Minnkota about developing a wind project, this was the first time Minnkota ever mentioned an RFP.⁴⁰

At a December 13, 2007 meeting of the Barnes County Planning and Zoning Board in Valley City, ND, Scott Scouvil (FPL Energy's North Dakota Project Developer) informed the Board that in 2008 FPL Energy would build a 200 MW generation project in Northeastern

³⁶ *Id.* At the time PEAK Wind filed its interconnection request, the index price for on-peak energy at the Midwest ISO's Minnesota Hub, as reported in the October 16, 2007 issue of *Megawatt Daily*, was \$75.20. *See* Exhibit WN-2. To keep its options open, on December 4, 2007 PEAK Wind submitted to the Western Area Power Administration ("WAPA") two requests for interconnection service. Each request was for 200 MW at a WAPA substation south of Valley City and about five miles from PEAK Wind's project site. *Id.* at p. 10, ¶26.

³⁷ *Id.* at pp. 8-9, ¶22.

³⁸ *Id.*

³⁹ Noeske Affidavit at pp. 8-9, ¶22.

⁴⁰ *Id.*

Barnes County. When asked about interconnection plans, Mr. Scouvil stated that FPL Energy would build a 22-mile line to Otter Tail's Buffalo, North Dakota substation (on Minnkota's 345 kV transmission line); this is the same point at which PEAK Wind had requested interconnection service from the Midwest ISO two months earlier. When asked about FPL Energy's position in the Midwest ISO interconnection queue, Scouvil stated, "MISO is a mess, and we are going to just build."⁴¹ When asked where the power was going, Scouvil said, FPL Energy had a **hand shake and hug agreement** with Minnkota and Otter Tail."⁴²

Later on a Saturday in December 2007, Robert Huether (Minnkota's Chairman of the Board) informed PEAK Wind that Minnkota was close to making a deal to purchase wind energy generated in Barnes County and that, if PEAK Wind wanted to make a deal with Minnkota, PEAK Wind members should get up to Grand Forks and meet with Minnkota right away. The news was surprising: in late September, Al Tschepen said that Minnkota would issue an RFP in nine to twelve months; now just three months later, without any RFP issued, PEAK Wind was told that Minnkota was close to making a deal.

A few days later PEAK Wind members drove to Grand Forks to meet with Dave Loer and Al Tschepen in Minnkota's office. Loer and Tschepen confirmed that Minnkota was working with wind developers on a project and that if PEAK Wind wanted to be considered it would have to put a bid in by late first quarter 2008. "Minnkota wanted the price of the energy to be \$40 to \$50 MWh."⁴³ The meeting perplexed Noeske:

I left the meeting with Minnkota shaking my head. I remembered that before PEAK Wind had submitted its interconnection request to the Midwest ISO,

⁴¹ *Id.* at p. at 9, ¶23.

⁴² *Id.* (emphasis added).

⁴³ *Id.* at p. 10, ¶24. "They also stated that Minnkota was not interested in building transmission, that is, the generation developers were responsible for getting their energy to Minnkota's system." *Id.*

the going rate for a wind project in the Midwest ISO was approximately \$55 per MWh. It did not seem fair that Minnkota would only interconnect our wind project if we would sell energy at a below the market price. I later found out that the index price for on-peak energy at the Minnesota Hub during December 2007 was \$94.30.⁴⁴

It appeared that PEAK Wind was caught between a “rock and hard place.”

In early January 2008, during a telephone call with Bill Noeske, Rick Gonzalez let it slip that, the day before, he had met with Otter Tail, Minnkota, and FPL Energy; he was very surprised that PEAK Wind was not invited to participate in the meeting. As explained in the Noeske affidavit:

Gonzalez believed that FPL Energy was planning to jump over PEAK Wind’s pre-existing interconnection request to the Midwest ISO, connect to Minnkota’s system and be the first wind project in the area to make it to market. That would pay two dividends: first, the other projects would fail and FPL Energy could scoop up rights to their land to build an even bigger wind project; second, by being first, FPL Energy would not have to pay for any future transmission upgrades on downstream transmission systems. When I asked Gonzalez how FPL Energy was going to do all this, he clammed up. This was a real eye opener because Gonzalez had previously assured us that FPL Energy would have to pay for any increased costs to interconnect the PEAK Wind facility to the transmission grid.⁴⁵

On January 15, 2008, PEAK Wind and RES Americas entered into a Memorandum of Understanding (“MOU”) for the joint development of a wind generation project on PEAK Wind’s land. The very next day (January 16, 2008), representatives of PEAK Wind and RES Americas met in Grand Forks, ND with Al Tschepen and David Loer, Minnkota’s Vice President of Planning and System Operations and CEO, respectively. RES Americas and PEAK Wind representatives described the size and location of the proposed Glacier Ridge wind project to Tschepen and Loer and discussed a variety of ways that RES Americas and

⁴⁴ *Id.* at p. 11, ¶25. A copy of the *Megawatt Daily* price report for December 18, 2007 is attached as Exhibit WN-3 to the Noeske Affidavit.

⁴⁵ Noeske Affidavit at p. 11, ¶27.

PEAK Wind could do business with Minnkota, including interconnecting to their transmission system, since Minnkota's 345 kV transmission line runs through the PEAK Wind land.⁴⁶

Joe DeVito (RES Americas' Vice President) recalls what happened next:

Minnkota expressed significant interest in the project, but only as a buyer of the project's energy. Minnkota informed us that Minnkota was not in the "merchant transmission business." However, if Glacier Ridge would provide the "right price" for energy sales, Minnkota would build the necessary transmission facilities. In this regard, Minnkota indicated that it had just completed a deal for the 99 ½ MW Langdon project. That project had a 25 year power purchase agreement.⁴⁷

At no time did they indicate that Minnkota and Otter Tail were planning to construct a new transmission line that would be located adjacent to PEAK Wind's land.

On February 5, 2008, Otter Tail and Minnkota issued a press release stating that Otter Tail had "notified the North Dakota Public Service Commission that, together with Minnkota Power Cooperative, it intends to apply for a permit to build an approximately 60-mile long 230-kilovolt line from Luverne, North Dakota, to the Maple River Substation near West Fargo."⁴⁸ Despite continued requests to discuss interconnection, Minnkota never informed PEAK Wind or RES Americas that the Letter of Intent would be or had been filed with the North Dakota Public Service Commission ("North Dakota PSC"); neither Minnkota nor Otter Tail had informed PEAK Wind or RES Americas that Otter Tail and Minnkota intended to construct a transmission line near the wind project being developed by PEAK Wind and RES Americas.

The next day, RES Americas and PEAK Wind called Minnkota. Minnkota confirmed that Otter Tail and Minnkota would jointly own the line, and the generation affiliates of

⁴⁶ DeVito Affidavit at p. 4, ¶8.

⁴⁷ *Id.* at p. 5, ¶9.

⁴⁸ A copy of the press release is attached as Exhibit JMD-2 to the DeVito Affidavit.

Minnkota and Otter Tail had made the request for transmission service.⁴⁹ When asked about the transmission capacity of the proposed line and whether there was available capacity on the transmission line for other parties, the Minnkota response was that “the line was fully subscribed at its inception.”⁵⁰ That said, Minnkota did not know what the full capability of the line would be. When questioned if the line could be expanded to allow for other companies, Minnkota’s representative responded that the line was being “fast tracked” with an in-service date by the end of 2008, and that modifications for additional users was not possible.⁵¹ In fact, Otter Tail and Minnkota had begun contacting landowners for any necessary easements to construct the transmission line.⁵²

On or about February 25, 2008, Otter Tail held an open house in Page, ND to discuss the proposed transmission line:

Otter Tail had set up five or six booths; all were manned by Otter Tail employees. This new transmission line certainly appeared to be an Otter Tail project. * * * Mr. Randy Synstelien (Otter Tail’s Manager of Power Contracts) told us that “this is a generator outlet line, and not a transmission line. It would be used to interconnect wind generation projects.” Synstelien stated that the line would have a capacity of 650 MW or even 680 MW.⁵³

When Mr. Noeske mentioned this conversation to Mr. DeVito his response was “This made me chuckle; Otter Tail could call it anything they wanted, but a transmission line is a transmission

⁴⁹ DeVito Affidavit at p. 7, ¶15. If the generation affiliates of Minnkota and Otter Tail submitted transmission service requests, one must assume that the same generation affiliates submitted the interconnection request. Note that Minnkota’s purported LGIP allows an interconnection request to be submitted by a purchaser under a Power Purchase Agreement with the owner of a generation facility or an affiliate of any such entity.

⁵⁰ *Id.*

⁵¹ *Id.* After learning of Minnkota’s proposal to construct a transmission line, PEAK Wind board member Steve Winter had a conversation with Robert Huether (Minnkota’s Chairman of Board). Huether was shocked to learn that PEAK Wind was not involved and stated: “Why wouldn’t we [Minnkota] want to work with a community group of landowners that are our own customers? Get up there; there is room for PEAK Wind.” Noeske Affidavit at p. 12, ¶30. Regrettably, Minnkota’s management did not share the views of the Chairman of the Board.

⁵² Noeske Affidavit at p. 16, ¶42.

⁵³ *Id.* at p. 12, ¶31.

line (especially if it is 230 kV and 55 miles long).”⁵⁴ Once again, PEAK Wind asked to interconnect to the transmission line. Otter Tail’s response was a blank stare.⁵⁵

After a year of trying to work with Minnkota on a wind generation project, the PEAK Wind members realized that their own cooperative had secretly negotiated to build, adjacent to their project, a transmission line intentionally designed too small to accommodate the Glacier Ridge project. Frustrated, the PEAK Wind members sought to plead their case directly to the Minnkota Board; the request was initially granted, but later denied.⁵⁶ As a result, on February 29, PEAK Wind faxed a letter to Minnkota outlining its concerns and renewing its request to meet directly with the Board.⁵⁷ On March 3, 2008, Mr. Loer faxed Minnkota’s response: PEAK Wind should submit a bid to sell energy (at below market prices) to Minnkota.⁵⁸

In the meantime, RES Americas had reached out again to Otter Tail. Otter Tail refused to discuss how or why it was trying to jump over the existing PEAK Wind interconnection request and instead focused on Otter Tail’s wind power needs, indicating that Otter Tail was looking for 2008 projects and would consider one 50 MW project for Otter Tail ownership and another 50 MW project involving a PPA: “If Otter Tail could extort a low price out of us by exercising transmission market power, then (and only then) would Otter Tail do a deal. Otherwise,

⁵⁴ DeVito Affidavit at p. 8, ¶17.

⁵⁵ Noeske Affidavit at p. 12, ¶31. At the end of the meeting, an Otter Tail representative indicated that the utility would like to talk with PEAK Wind and RES Americas; he indicated that Otter Tail wanted to secure a total of 280 MW of wind generation and that it only had 80 MW to date. Although Otter Tail and Minnkota disclosed that they planned to build a new 230 KV transmission line, very few facts had been revealed. About the only thing PEAK Wind and RES Americas did know for sure is that Otter Tail and Minnkota did not want PEAK Wind and RES Americas to participate. *Id.* at pp. 12-13, ¶32-33.

⁵⁶ Noeske Affidavit at p. 13, ¶33.

⁵⁷ Attached as Exhibit WN-4 to the Noeske Affidavit is a draft copy of the letter sent to the Minnkota Board. Substantively and materially it is the same as the letter sent to the Board.

⁵⁸ A copy of the letter is attached as Exhibit WN-5 to the Noeske Affidavit.

Otter Tail was going to build its transmission line regardless of our prior queued interconnection position.”⁵⁹

On March 11, 2008, RES Americas and PEAK Wind noticed that Minnkota had developed a new internet web page: “That new web page contained information on the interconnection queue. I [Bill Noeske] had been monitoring Minnkota’s web page for over a year, and this was the first time Minnkota had posted any information on interconnection requests.”⁶⁰

Minnkota’s interconnection queue listed a January 3, 2008 request of a 400 MW wind generation project seeking to interconnect as a network resource at Minnkota’s existing Maple River substation, just west of Fargo, ND.⁶¹ This was puzzling. First, the posting occurred more than two months after the request was allegedly made. Second, Noeske notes:

⁵⁹ DeVito Affidavit at p. 9, ¶20.

⁶⁰ Noeske Affidavit at p. 13, ¶36. Significantly, the Langdon Wind Center interconnection requests were not timely posted either. *See* Exhibit OAM-5 (Minnkota’s interconnection queue). Specifically, two requests seeking interconnection service at the Langdon substation were filed on September 11, 2006 (100 MW) and again on November 13, 2006 (60 MW). By late February 2008, when the interconnection requests were finally posted, the Langdon Wind Center had been operational for two months. *See* Minnkota’s 2007 Annual Report at 13.

⁶¹ Noeske Affidavit at pp. 13-14, ¶36. After submitting the initial interconnection request, the interconnection customer reduced the request to 358 MW. Maple River System Impact Study, Exhibit OAM-6 at p. 5.

The January 3, 2008 request involves interconnecting FPL Energy’s generation facilities to Minnkota’s interstate transmission system. However, on July 25, 2008, FPL Energy’s subsidiary, Ashtabula Wind, LLC, filed in Docket No. ER08-1297-000 a request for market-based rate authorization. In that application, FPL Energy indicates:

Applicant owns and will operate a wind-powered electric generation facility with a nameplate capacity of up to 148.5 MW (the “Facility”). * * * Currently, 99 MW of Ashtabula Wind’s output will be sold under a long-term contract with Minnkota. Ashtabula will also operate a 48 MW wind facility on behalf of Otter Tail Power

July 25, 2008 Application, Docket No. ER08-1297-000 at 2-3. In the application, FPL Energy identifies the relevant geographic market not as the transmission system to which it was interconnecting (Minnkota) nor the buyer of the majority of its power (Minnkota). Instead, FPL Energy selects the Midwest ISO as the relevant geographic market. It is difficult to harmonize the relevant geographic market with the actual transmission market. *See id.* at 9-10.

Even more curious, however, is the following statement: “Neither Applicant nor the subsidiaries of FPL Energy own or control transmission facilities, with the exception of facilities necessary to interconnect generating facilities to the transmission grid in the balancing authority areas in which they are located.” *Id.* at 12,

Minnkota officials had told me earlier that Minnkota was not interested in building a transmission line, and that any wind generator would have to build any necessary transmission facilities to transmit the wind energy to Minnkota. Yet, in light of the February 5 press release, it appeared that Minnkota was now willing to build a transmission line for a preferred project developer -- FPL Energy. Later I would learn that Minnkota and Otter Tail were proposing to build a new transmission line to serve Otter Tail's generation as well.⁶²

Third, Minnkota had admitted that the service request was made by generation affiliates of Otter Tail and Minnkota.⁶³

If an interconnection request had been made on January 3, 2008, the Large Generator Interconnection Procedures ("LGIP")⁶⁴ require a scoping meeting (concerning the January 3 interconnection request) to be held by February 4, 2008 and for Minnkota to post prior notice of the scoping meeting if an affiliate is involved.⁶⁵ Minnkota failed to post any notice of the scoping meeting. Similarly, the LGIP requires a Feasibility Study to be performed four to six weeks after a transmission provider receives an interconnection request. Such a study would typically describe the location of the generation facilities and the necessary interconnection facilities and transmission upgrades required to connect the generation project to the interstate transmission grid. Minnkota claims that a Feasibility Study was conducted and presented to the

citing Aero Energy, LLC, 115 FERC ¶ 61,128 (2006), *modified* 116 FERC ¶ 61,149 (2006). It is unclear whether FPL Energy is indirectly stating that it controls the Pillsbury Line.

⁶² Noeske Affidavit at p. 14, ¶36. Noeske also noticed a 100 MW request to interconnect to Minnkota's 69 kV substation near Valley City and recalled a meeting with Al Tschepen September 2007, at which Al Tschepen discouraged PEAK Wind from developing a large project and suggested using small pockets of existing, available transmission capacity (*e.g.*, 10 to 20 MW) at a nearby 69 kV line: "If Minnkota had posted this interconnection request when it was first made (back in August 2007), I could have understood Tschepen's suggestion. However, given the delay in posting and all else that transpired, I could not help but wonder who submitted the request and whether this August 1, 2007 interconnection request had anything to do with Minnkota's refusal to meet with us during the summer of 2007." *Id.*

⁶³ See DeVito Affidavit at p. 7, ¶15.

⁶⁴ Minnkota has not filed with the Commission a copy of the LGIP. Instead, in early March 2008, Minnkota posted on its new internet web page something similar to the LGIP promulgated by Order No. 2003.

⁶⁵ Minnkota's LGIP § 3.3.4.

MAPP's Northern MAPP ("NM") subregional planning group ("SPG") on March 6, 2008. However, neither RES Americas nor PEAK Wind was provided notice of the meeting; the existence of the study was not even recognized, much less the actual results posted on Minnkota's internet web site. In fact, as of this date, Minnkota still has not posted or released a copy of any Feasibility Study for the interconnection request. By not posting notice of the affiliate scoping meeting and Feasibility Study, Minnkota concealed that Otter Tail and Minnkota were planning to build a transmission line to benefit Otter Tail and FPL Energy and, thereby, exclude PEAK Wind and RES Americas.

Otter Tail and Minnkota did not fully reveal their transmission plans until March 18, 2008, when they filed with the North Dakota PSC in Docket No. PU-08-48 an application requesting siting authorization for a certificate of corridor compatibility and route permit for a 56.6-mile, 230 kV electric transmission line to be constructed from a proposed substation (to be located in Ellsberry Township, Barnes County, North Dakota) to the existing Maple River substation, near Fargo, Cass County, North Dakota.⁶⁶ However, the size of the line has changed and is still unknown. Page 3 of the Otter Tail and Minnkota application provides:

The purpose of the transmission line facilities is to transmit 400 MW of electricity from proposed wind projects in Barnes, Steele, and Griggs counties. However, the line will be designed to transmit up to 680 MW to allow for future growth. * * * The estimated total cost of construction is \$35,000,000.

Under the timeline proposed by Otter Tail/Minnkota, construction of the transmission line would begin in June 2008, and commercial operations commence in November 2008. The March 18 application did not identify Otter Tail's ownership interests in the generation project. Instead, page 15 of the application simply stated: "Much of the energy transmitted on the new

⁶⁶ A copy of the March 18 application is attached as Exhibit JMD-4.

transmission line will be used to serve Otter Tail Power and Minnkota customers in North Dakota, South Dakota, and Minnesota.”

Subsequently, it was noted that Otter Tail (as a public utility) was also required to seek and obtain a certificate of public convenience and necessity before Otter Tail and Minnkota could apply for the corridor certificate and route permit. In order to prevent the North Dakota PSC from conducting a substantive review of the proposed transmission line, on April 17, 2008, Minnkota filed an amended application stating that Otter Tail was no longer a project owner, but would contract with Minnkota for services.⁶⁷ Even though Otter Tail would not own the Pillsbury Line, it was soon discovered that Otter Tail would “design, engineer, permit, and oversee construction of the Pillsbury to Fargo 230 kV line and the Pillsbury Wind 230 kV substation.”⁶⁸ In fact, in its capacity as the construction manager, Otter Tail had already ordered poles and wire.⁶⁹

During a meeting on April 22, 2008, Minnkota admitted that the Pillsbury Line had not been included as part of MAPP’s transmission expansion plan in late 2007.⁷⁰ Minnkota stated that, although the technical studies on the Pillsbury Line were still being performed, the total capacity of the line would probably be somewhere between 360-420 MW -- almost 50% less than what Minnkota and Otter Tail originally indicated.⁷¹ Minnkota confirmed that the

⁶⁷ A copy of the April 17 Amendment is attached as Exhibit JMD-5 to the DeVito Affidavit. True to form, neither Minnkota nor Otter Tail provided PEAK Wind and RES Americas with advance notice of the April 17 Amendment.

⁶⁸ Exhibit WN-6.

⁶⁹ DeVito Affidavit at p. 13, ¶29.

⁷⁰ DeVito Affidavit at p. 11, ¶23.

⁷¹ DeVito Affidavit at pp. 11-12, ¶26.

Pillsbury Line was fully subscribed, that Glacier Ridge could not interconnect to it, but that RES Americas and PEAK Wind could still submit an offer to sell Minnkota power.⁷²

On April 30, 2008, Otter Tail issued a press release indicating that it “has entered into agreements to build and own 48 megawatts of wind energy generation at a wind energy facility planned in Barnes County, North Dakota.”⁷³ Before April 30, 2008, Otter Tail had not publicly disclosed that it was constructing wind facilities to be interconnected with Minnkota’s system in Barnes County. Furthermore, in prior meetings and telephone calls, Otter Tail had not previously informed RES Americas or PEAK Wind that Otter Tail was developing generation facilities that would interconnect with Minnkota’s system in Barnes County, much less that Otter Tail was competing with the Glacier Ridge project.⁷⁴

After Otter Tail issued its press release, Minnkota released the Maple River Wind Generation System Impact Study (“System Impact Study”) conducted by Rick Gonzalez.⁷⁵ Page five of the draft System Impact Study revealed:

The power purchaser of the Pillsbury wind generation is Minnkota Power Cooperative (200 MW). Otter Tail Power Company will own 98 MW of the total project once it is in-service. FPLE and M-Power are the wind generation developers for these wind farms. FPLE will retain 60 MW of wind-generated power to sell to the MISO market.

This statement in the draft System Impact Study was the first time that Minnkota or Otter Tail publicly stated that FPL Energy would retain title to 60 MW of the wind power. FPL Energy

⁷² DeVito Affidavit at p. 2, ¶2; p. 7, ¶15.

⁷³ A copy of the Otter Tail press release is attached as Exhibit JMD-6 to the DeVito Affidavit.

⁷⁴ See DeVito Affidavit at p. 13, ¶30; Noeske Affidavit at p. 16, ¶42. It is worth noting that prior to April 30, 2008, the PEAK Wind members had not even heard of their neighbors’ negotiating easements with Otter Tail that would support this generation project. Noeske affidavit at p. 16, ¶42. It would appear that Otter Tail had utilized easements obtained by a third party, possibly FPL Energy.

⁷⁵ A copy of System Impact Study is attached as Exhibit OAM-6 to the Martino Affidavit. In early May 2008, Mr. Martino discovered that Minnkota had prepared the System Impact Study and asked for a copy. Only after his asking was it provided and posted on Minnkota’s internet website. Martino Affidavit at p. 4, ¶11.

would require transmission service to the Midwest ISO market over the Pillsbury Line. The Pillsbury Line would also be necessary to transmit Otter Tail's energy.⁷⁶

Page two of the System Impact Study admits: "This is an **out-of-queue study**. All analyses were performed using base cases set up to simulate conditions through the end of 2010. Engineering judgment was used to select a list of prior queued generation projects that are likely to be in service in this time frame." [emphasis added] While these admissions raise several concerns,⁷⁷ Mr. Omar A. Martino, the RES Americas' transmission engineer, states:

My primary concern with the Maple River System Impact Study is what is not discussed, that is, the impact that the generation project would have on the interconnected system when prior-queued interconnection requests become operational. The Maple River System Impact Study only addresses transmission issues around the Maple River substation resulting from the Otter Tail/FPL Energy interconnection request. This is unrealistic. The actual impact would be aggravated when prior-queued projects are modeled in the Maple River System Impact Study. Failure to depict the impact on the interconnected system is irresponsible, negligent, and not a common transmission planning practice. At a minimum, a thoughtful analysis of the impact of the proposed generation facilities on the transmission system was sacrificed for expedition and the benefit of project sponsors.⁷⁸

Accordingly, Mr. Martino performed a study establishing that accommodating the 680 MW at Maple River and other prior-queued projects would require significant system upgrades.⁷⁹

⁷⁶ As discussed below, Otter Tail's transmission rights on Minnkota's system is a cause of great concern and helped contribute to the undue discrimination described herein.

⁷⁷ Martino Affidavit at p. 5, ¶12.

⁷⁸ Martino Affidavit at p. 6, ¶14. In addition to downstream transmission constraints, RES Americas identified two other concerns. First, given that it might be difficult to construct a second transmission line adjacent to the Pillsbury Line, RES Americas asked whether Minnkota would allow use of the right of way for an additional line at a future date. The answer was "no." See DeVito Affidavit at p. 22, ¶54. Second, since the Pillsbury Line would be completed and energy flowing before anyone ever studied its actual impact on the interstate transmission grid (particularly considering that an additional 225 MW of power from Young 2 could be flowing into the Fargo area where the Pillsbury Line will terminate), RES Americas asked whether Minnkota would study the impact on RES Americas before energizing the line. Once again, the answer was "no." DeVito Affidavit at p. 14, ¶33, p. 20, ¶48.

⁷⁹ See Exhibit OAM-7. This might explain why Otter Tail originally indicated that the Pillsbury Line could accommodate up to 680 MW, but later Minnkota claimed it would only be able to transmit 360-420 MW.

Simply put, energy from the later-queued Otter Tail/FPL Energy generation project would flow over the Minnkota transmission line into neighboring systems and use up any existing transmission capacity needed by the Glacier Ridge project as well as other prior-queued projects in Minnesota.⁸⁰ In fact, the Otter Tail/FPL Energy generation project will overload transmission lines operated by the Midwest ISO.⁸¹

On May 22, 2008, the North Dakota PSC held a meeting concerning the siting of the Pillsbury Line.⁸² There was significant landowner opposition. RES Americas and PEAK Wind provided comments indicating that the line could be built to allow for a second circuit, at a cost addition of about 20%, but that Minnkota and Otter Tail had rebuffed the idea, claiming it would delay their project and possibly jeopardize the PTCs associated with the wind generation facilities owned by Otter Tail and FPL Energy. That argument was nothing more than “blue smoke and mirrors.” In point of fact, the real reason was to stifle competition and exclude the Glacier Ridge Project from interconnecting to the interstate transmission system.

Specifically, months earlier, PEAK Wind learned that FPL Energy was planning to build a 69 kV transmission line (which would cross land of PEAK Wind members) so that it could plug in a few turbines at a time in order to qualify for the PTCs.⁸³ Later, FPL Energy

⁸⁰ On May 13, 2008, Minnkota issued a news release indicating that effective in 2013 it would acquire Minnesota Power’s rights to purchase 50% of the capacity from Milton R. Young 2, a 455 MW coal-fired plant near Center, ND owned by Square Butte Electric Cooperative. A copy of Minnkota’s May 13, 2008 press release is attached as Exhibit JMD-11 to the DeVito Affidavit. Currently an existing 465-mile direct current (“DC”) transmission line (owned by Square Butte Electric Cooperative) transmits the energy from Young 2 to Duluth, Minnesota, where it is converted to alternating current for transmission to Minnesota Power and Minnkota’s service territories. As part of the transaction, Minnesota Power will acquire the DC line and use it to transmit wind energy from central North Dakota. As a result, Minnkota will construct a new 345 kV transmission line to transmit the energy from Young 2 to Minnkota’s service territory (either Fargo or Grand Forks, ND).

⁸¹ See Exhibit OAM-8 at p. 2.

⁸² Five days later Minnkota maintained that it had still not signed a PPA to support the transmission project. DeVito Affidavit at p. 21, ¶52. The “hand shake and hug agreement” was still in place.

⁸³ Noeske Affidavit at p. 15, ¶39.

representatives had contacted landowners within PEAK Wind's footprint about constructing a two-year temporary power line to run approximately five to seven miles from the Otter Tail/FPL Energy wind project to a small existing substation near Pillsbury, ND. When confronted with landowner opposition, CCEC began to aggressively seek permission to build a line across the land owned by six members of PEAK Wind and subsequently built the line over land owner opposition.⁸⁴

On May 30, 2008, MAPP's Design Review Subcommittee ("DRS") reviewed and approved Minnkota's System Impact Study. The review process was discriminatory: because RES Americas was not a transmission owner, RES Americas was banned from participating in the DRS meeting; yet the minutes indicate that representatives of other generators -- *i.e.*, FPL Energy, M-Power, and Otter Tail -- were allowed to participate.⁸⁵ More troublesome, the DRS recognized that the project crosses a portion of the MAPP bulk electric system to be delivered to the Midwest ISO footprint, where transmission overloads would occur. Instead of requiring physical system upgrades, the DRS allowed the long-term use of SPSs. The action of the MAPP DRS raises the question of serious reliability problems and forced the Midwest ISO to object to the DRS decision.⁸⁶ Regrettably, that did not deter MAPP, nor Minnkota and Otter Tail: immediately upon receiving siting authorization from the North Dakota PSC on June 6, 2008,⁸⁷ construction began on the Pillsbury Line.

⁸⁴ Noeske Affidavit at p.16, ¶43. FPL Energy's representative Kevin Cook told a PEAK Wind Board member that this temporary line was needed to commission the turbines in 2008, since the Pillsbury Line would not be completed in 2008. *Id.*

⁸⁵ See Martino Affidavit at p. 8, ¶19; Exhibit OAM-8.

⁸⁶ Exhibit OAM-8 at p. 3.

⁸⁷ *Minnkota Power Cooperative, Inc., Pillsbury-Fargo 230-kV Transmission Line Siting Application*, Case No. PU-08-48, N.D. Pub. Serv. Comm'n. (June 6, 2008).

During the summer, three events occurred that elevated concerns with Otter Tail. First, on August 11, 2008, Otter Tail announced:

Otter Tail Power Company has entered into an agreement with M-Power, LLC, to purchase a portion of its Luverne Wind Farm under development in east central North Dakota. Otter Tail Power Company's portion of the construction-ready site can support wind turbines with a total capacity of up to 49.5 megawatts (MW).⁸⁸

Second, PEAK Wind members noticed that Otter Tail's affiliates – Ventus Energy Systems (“Ventus”) and Moorhead Electric – were involved in the construction of the Otter Tail/FPL Energy wind project.⁸⁹

Three, on August 27, 2008, Ashtabula Wind, L.L.C. (*i.e.*, a subsidiary of FPL Energy) filed in Docket No. EG08-92-000 a notice of self certification of its status as an exempt wholesale generator under the Public Utility Holding Company Act of 2005. In that notice, Ashtabula states:

Applicant will own a wind-powered generation facility with a nameplate capacity rating of up to 148.5 MW, consisting of 99 GE Wind turbines with a nameplate capacity of 1.5 MW each (the Facility”). Minnkota Power Cooperative will buy 99 MW of the 148.5 MW under a long-term power purchase agreement. The facility will located near Valley City in Barnes County, North Dakota and **will operate in the Midwest Independent Transmission System Operator, Inc. control area (“MISO”).**⁹⁰

Additionally, Ashtabula notes that, among other things, its Facility includes the following:

These facilities include a 230 kV substation and approximately 9 miles of 230 kV transmission line owned by Applicant, which will connect to a substation owned by Minnkota. Also connecting Minnkota's substation to the Maple River substation near Fargo, North Dakota will be 61 mile, 230 kV 358 MW generation

⁸⁸ See Exhibit JMD-7.

⁸⁹ Noeske Affidavit at p. 17, ¶44.

⁹⁰ Ashtabula Wind, LLC's EWG Certification, Docket No. EG08-92-000 (filed August 27, 2008) at 2 (footnote omitted) [emphasis added]. The application also notes that Otter Tail “will own an adjacent 32 GE turbines with a total nameplate capacity of 48 MW.” *Id.* at n.1.

tie line. **Applicant will own a 60 MW portion of this tie-line which will be jointly owned by Applicant, Minnkota, and Otter Tail.**⁹¹

Taken together, these revelations cast light on the multifaceted business relationships involving Otter Tail, its affiliates, Minnkota, and FPL Energy. In fact, there are at least ten facets to the entangled and entrenched, cross-subsidized business relationships involving the Otter Tail/FPL Energy wind generation project and the Pillsbury Line:

1. In 2007, Otter Tail, Minnkota and FPL Energy worked together to create the Landgon Wind Center, where Otter Tail and FPL Energy each own generation facilities connected to the Minnkota system, but utilizing a new transmission line owned jointly by Minnkota and Otter Tail. This project forged relations among the triumvirate and created the template for the Pillsbury transaction.⁹²
2. Now, in 2008, Otter Tail is relying on FPL Energy to obtain the easements necessary to construct the wind project in Barnes County, ND.⁹³
3. FPL Energy is relying on Otter Tail's affiliates to build the wind project⁹⁴ –
 - a. DMI Industries likely manufactured the wind towers;
 - b. Ventus is helping to construct the wind towers; and
 - c. Moorhead Electric is providing electric support.
4. FPL Energy will operate Otter Tail's wind generation facilities.⁹⁵
5. Otter Tail will “design, engineer, permit and oversee construction of the Pillsbury to Fargo 230 kV line and the Pillsbury Wind 230 kV substation.”⁹⁶

⁹¹ *Id.* at 2-3 (emphasis added) (footnote omitted). Presumably, the EWG application refers to GFAs that confer upon Otter Tail preferential transmission rights on the Minnkota transmission system. Ashtabula also states: “Applicant will seek appropriate Commission authorization for Otter Tail’s anticipated use of Applicant’s interconnection facilities.” *Id.* at n. 2.

⁹² See Exhibit JMD-1 (Minnkota and Otter Tail press releases); see also Minnkota’s 2007 Annual Report at 9.

⁹³ Noeske Affidavit at p. 7, ¶19; see Ashtabula’s EWG Certification, at note 1.

⁹⁴ See Noeske Affidavit at p. 17, ¶44; see also Exhibit JMD-8.

⁹⁵ See FPL Energy’s Market-Based Rate Application, Docket No. ER08-1297-000 (filed July 25, 2008) at 2-3.

⁹⁶ See, Exhibit WN-6; DeVito Affidavit at 17, ¶40.

6. Otter Tail will have preferential transmission rights on the Pillsbury Line by virtue of the GFAs.⁹⁷
7. FPL Energy will sell power to Minnkota.⁹⁸
8. Minnkota will allow FPL Energy and Otter Tail to utilize Minnkota's new 230 kV substation.
9. FPL Energy "will seek appropriate Commission authorization for Otter Tail's anticipated use of Applicant's [FPL Energy's] interconnection facilities.
10. Minnkota, Otter Tail, and FPL Energy will each own a portion of the Pillsbury Line.⁹⁹

In short, Otter Tail and Minnkota have created a "perfect storm" of anticompetitive, unduly preferential and discriminatory conduct which, left unchecked, will sweep across North Dakota devastating competing wind energy developers and leaving in its wake the tell-tale signs of destruction from the exercise of market power, affiliate abuse, and cross-subsidization.

At bottom, Otter Tail is attempting to "jump over" a prior-queued request to interconnect the Glacier Ridge project to transmission facilities owned by Otter Tail. Otter Tail is doing this to benefit the Otter Tail/FPL Energy generation project at the expense of the Glacier Ridge project. Otter Tail is effectuating the "queue jump" by working with its transmission partner (Minnkota) to "design, engineer, permit and oversee construction of the" Pillsbury Line, a new 60-mile, 230 kV transmission line on which Otter Tail has preferential transmission rights. Glacier Ridge has been denied access to the Pillsbury Line, which is located just a few feet from its project. These facts lead to one inescapable conclusion – using a variety of measures, Otter Tail and Minnkota have unduly preferred the Otter Tail/FPL Energy generation project,

⁹⁷ See *infra* notes 106 to 115 and accompanying text.

⁹⁸ See System Impact Study, Exhibit OAM-6 at p. 5.

⁹⁹ See *id.*

while unduly discriminating against the Glacier Ridge project. This must be stopped, the illegal conduct remedied, and steps taken to prevent similar abuses in the future.

V.

OTTER TAIL AND MINNKOTA HAVE GRANTED AN UNDUE PREFERENCE TO OTTER TAIL'S GENERATION PROJECT AND UNDULY DISCRIMINATED AGAINST RES AMERICAS AND PEAK WIND

Otter Tail, acting alone and in conjunction with Minnkota, has granted an undue preference to its own generation project and, in so doing, has unduly discriminated against RES Americas and PEAK Wind.

Otter Tail and Minnkota each own transmission facilities. The Commission has long recognized that ownership of such interstate transmission facilities vests utilities with monopoly power over transmission.¹⁰⁰ “The most likely route to market power in today's electric utility industry lies through ownership or control of transmission facilities.”¹⁰¹ As a result, to reduce or

¹⁰⁰ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, Docket No. RM05-17-000, FERC Stats. & Regs. [Reg. Preambles] ¶ 31,241, P 14 (2007), 72 *Fed. Reg.* 12266 (Mar. 15, 2007) (“Order No. 890”) (“In April 1996, as part of its statutory obligation under Sections 205 and 206 of the FPA to remedy undue discrimination, the Commission adopted Order No. 888 prohibiting public utilities from using their monopoly power over transmission to unduly discriminate against others.”)

¹⁰¹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities; Recovery of Stranded Costs By Public Utilities and Transmitting Utilities*, Order No. 888, Docket No. RM95-8-000, FERC Stats. & Regs. [Reg. Preambles 1996-2000] ¶ 31,036, p. 31,643 (1996), 61 *Fed. Reg.* 21540 (May 10, 1996), (“Order No. 888”), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. [Reg. Preambles 1996-2000] ¶ 31,048, 62 *Fed. Reg.* 12,274 (Mar. 14, 1997) (“Order No. 888-A”), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 *Fed. Reg.* 64688 (Dec. 9, 1997) (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). The Commission added:

In this Rule, the Commission seeks to remedy both existing and future undue discrimination in the industry and realize the significant customer benefits that will come with open access. Indeed, it is our statutory obligation under sections 205 and 206 of the Federal Power Act (FPA) to remedy undue discrimination.

To do so, we must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others. If we do not take this step now, the result will be benefits to some customers at the expense of others. We have learned from our experience in the natural gas area the importance of

mitigate transmission owners' transmission market power, the Commission has encouraged transmission providers to join RTOs. "Regional institutions can . . . eliminate any residual discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility. Appropriate regional transmission institutions could: . . . (2) improve grid reliability; (3) remove remaining opportunities for discriminatory transmission practices; (4) improve market performance;"¹⁰² Otter Tail has transferred operational control over its transmission facilities (over 100 kV) to the Midwest ISO. However, Otter Tail's unique relationship with Minnkota, under which Otter Tail has preferential rights to transmit power over Minnkota facilities, provides Otter Tail with the means by which it can still exercise market power. Specifically, Otter Tail can effectively develop new generation on its system by interconnecting that generation to Minnkota's transmission system. By working in concert with Minnkota to "design, engineer, permit and oversee construction of the Pillsbury to Fargo 230 kV line and the Pillsbury Wind 230 kV substation," Otter Tail is able to prevent third parties from accessing the transmission grid.

Four additional facts compound matters. First, Otter Tail is not subject to the standards of conduct; its internal generation developers, marketers, and transmission personnel may freely exchange information. Second, Minnkota is an electric cooperative not generally subject to the Commission's jurisdiction. Third, Minnkota has been granted a waiver of Order No. 889.¹⁰³

addressing competitive transition issues early and with as much certainty to market participants as possible.

Order No. 888 at p. 31,635.

¹⁰² *Regional Transmission Organizations*, Order No. 2000, Docket No. RM99-2-000, FERC Stats. & Regs. [Reg. Preambles] ¶ 31,089, p. 30,993 (1999), 65 *Fed. Reg.* 809 (Jan. 6, 2000) ("Order No. 2000").

¹⁰³ *Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct*, Order No. 889, Docket No. RM95-9-000, FERC Stats. & Regs. [Reg. Preambles] ¶ 31,035 (1996), 61 *Fed. Reg.* 21737 (May 10, 1996) ("Order No. 889"). *See also Easton Utils. Comm'n, et al.*, Docket Nos. OA97-572-000, *et al.*, 83 FERC ¶ 61,334, p. 62,343 (1998).

Fourth, Minnkota has not filed, much less received Commission approval for, a reciprocity OATT.

A. OTTER TAIL GRANTED ITS OWN GENERATION PROJECT AN UNDUE PREFERENCE

Otter Tail has granted its own generation project an undue preference. Otter Tail hatched a plot to construct a transmission line, jointly-owned with Minnkota, to interconnect its generation to the interstate electric transmission grid.¹⁰⁴ Later, after state regulatory concerns were identified, Otter Tail modified its plan to own part of the transmission line, instead allowing Minnkota to construct the line and rely on its preferential transmission rights in the Minnkota system to access the generation. This is the type of abhorrent behavior that the Commission has struggled to eliminate. In fact, a major goal of Order No. 2003 is to “limit opportunities for Transmission Providers to favor their own generation.”¹⁰⁵ Exploiting its relationship with Minnkota, Otter Tail is attempting an end run around the Commission’s rules and regulations. This cannot and must not be condoned.

1. Otter Tail Has Transmission Market Power Because of Its Preferential Relationship with Minnkota

The Otter Tail and Minnkota transmission systems are highly integrated. Otter Tail and Minnkota have jointly planned and developed their transmission systems in their common

¹⁰⁴ Clearly, however, this was primarily an Otter Tail project. Otter Tail hosted the open house in Page, ND to introduce the Pillsbury Line to local stakeholders, and Otter Tail took the lead in preparing and filing the March 18 Application with the North Dakota PSC.

¹⁰⁵ See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, Docket No. RM02-1-000, FERC Stats. & Regs. [Reg. Preambles] ¶ 31,146, P 12 (2003), 68 *Fed. Reg.* 49846 (Aug. 19, 2003), 68 *Fed. Reg.* 69599 (Dec. 15, 2003) (“Order No. 2003”), *order on reh’g.*, Order No. 2003-A, Docket No. RM02-1-001, FERC Stats. & Regs. [Reg. Preambles] ¶ 31,160 (2004), 69 *Fed. Reg.* 15932 (March 26, 2004) (“Order No. 2003-A”), *order on reh’g.*, Order No. 2003-B, Docket No. RM02-1-005, FERC Stats. & Regs. [Reg. Preambles] ¶ 31,171 (2004), 70 *Fed. Reg.* 265 (Jan. 4, 2005), *order on reh’g.*, Order No. 2003-C, Docket No. RM02-1-006, FERC Stats. & Regs. [Reg. Preambles] ¶ 31,190 (2005), 70 *Fed. Reg.* 37661 (June 30, 2005).

service area.¹⁰⁶ In addition, Otter Tail and Minnkota jointly own a power plant with other entities. As a result, the two companies have five GFAs to govern arrangements between them.¹⁰⁷ No one agreement provides for all the necessary transmission arrangements for either party to serve its respective load.¹⁰⁸

The GFAs were entered into before the formation of the Midwest ISO and implementation of the Midwest ISO's TEMT. The treatment of these GFAs was resolved by a settlement agreement which was accepted by the Commission on June 27, 2005.¹⁰⁹ The settlement agreement provided that the agreements are included as GFAs in the TEMT solely with regard to Otter Tail's loads and transmission rights, and out-of-market with regard to Minnkota's generation, loads and transmission rights.¹¹⁰

¹⁰⁶ See June 28, 2004 Revised Testimony and Exhibits of Otter Tail Power Company in Docket Nos. ER04-691, *et al.*, Exhibit OTP-1 at 9 ("Rogelstad Testimony"). Historically, Otter Tail and Minnkota participated with other utilities in the Upper Mississippi Power Pool ("UMPP"), which is now known as MAPP. The UMPP was initially formed to share generation reserves, but also jointly planned and developed a transmission system. Prior to open access, any time a generator was added to the MAPP region, transmission studies were conducted to determine the necessary transmission additions for adding the generator to the transmission system (interconnection) and/or moving the power from the generator to load. A company could either purchase transmission service or invest in the transmission system. Otter Tail and Minnkota chose to invest in the transmission system. Generally, ownership of the transmission facilities is in discrete pieces, *i.e.*, Otter Tail owns specific line segments and Minnkota owns specific line segments, but the line segments are not contiguous.

¹⁰⁷ Specifically, Minnkota and Otter Tail rely on the following five GFAs to serve their respective loads in the common service area: (1) Interconnection, Coordinating Agreement between The Manitoba Hydro-Electric Board, Minnkota, Northern States Power Company and Otter Tail dated January 16, 1969, ("GFA 309"), (2) The Coyote Station Transmission Facilities Agreement by and between Minnesota Power & Light Company, Minnkota, Montana-Dakota Utilities Co., NorthWestern Public Service Company and Otter Tail dated as of November 30, 1978 ("GFA 311"); (3) 230 kV Interconnection Agreement between Otter Tail and Minnkota dated July 29, 1966, as supplemented ("GFA 313"); (4) Interconnection and Transmission Service Agreement between Otter Tail and Minnkota dated July 28, 1988, as amended ("GFA 314"); and (5) North Dakota-Western Minnesota 230 kV Facilities Co-ordinating Agreement between Minnkota, Otter Tail, Minnesota Power & Light Company and Northern States Power Company ("GFA 317").

¹⁰⁸ Rogelstad Testimony at 9.

¹⁰⁹ See *Midwest Independent Transmission System Operator, Inc.*, Docket No. ER04-691-005, 111 FERC ¶ 61,491, (2005) ("Order Approving Uncontested Partial Settlements").

¹¹⁰ See April 1, 2005 Uncontested Offer of Settlement in Docket No. ER04-691-000, *et al.*, Settlement Agreement between Midwest ISO, Otter Tail, and Minnkota at §§ 2.1, 2.2.

Otter Tail and Minnkota refer to GFA 314 as an “integrated transmission agreement” or a joint-use agreement.¹¹¹ At the time it was entered into, Otter Tail and Minnkota recognized the efficiencies of developing a joint transmission system rather than building duplicative systems to serve load obligations.¹¹² The parties jointly invested in transmission facilities in proportion to their load serving obligations and developed the joint system to efficiently and reliably serve their respective loads. If investment does not match use, then an annual true-up mechanism is used to keep each party financially whole. As a result, Otter Tail and Minnkota “granted to each other reciprocal capacity rights whereby each owner committed to make its capacity available to use by the other.”¹¹³

Similarly, section 2.01(a) of GFA 313, which resulted from the historical UMPP study process, provides “each Party will allow the other to transmit electric power and energy through its system between the several points of interconnection as defined in this agreement to the extent that such system has capacity in excess of that required for its own needs.”¹¹⁴

By providing this reciprocal transmission service, these agreements in essence provide Otter Tail and Minnkota with access to the other’s transmission system without having to submit a generation interconnection request,¹¹⁵ thereby allowing Otter Tail and Minnkota to unduly favor their own generation and unduly discriminate against PEAK Wind and RES Americas.

¹¹¹ Rogelstad Testimony at 39.

¹¹² See January 22, 2008 Protest of Otter Tail Power Company, Docket No. ER08-370-000, “Affidavit of Timothy Rogelstad on Behalf of Otter Tail Power Company,” at p. 9.

¹¹³ *Id.* Otter Tail uses this agreement to provide wheeling service over its 41.6 kV transmission facilities. The Commission accepted an amendment to this agreement on June 6, 2006. See *Otter Tail Power Co.*, Docket No. ER06-439-000, Letter Order (June 6, 2006).

¹¹⁴ It appears that Minnkota’s interest in this agreement was assigned to NMPA, an energy supplier for twelve municipal utilities in eastern North Dakota and northwestern Minnesota, which owns a 30% interest in the Coyote 1 Generation Facility and approximately 15% of the Minnkota transmission system. Minnkota is the operating agent for NMPA.

¹¹⁵ GFA 314, § 1.01.

2. Otter Tail Enhanced Its Transmission Market Power by Exploiting a Waiver of the Standards of Conduct

Otter Tail enhanced its transmission market power because of a waiver (for which it no longer qualifies) of the Standards of Conduct. In Order No. 889, the Commission required public utilities that own, operate or control transmission facilities to (1) “create or participate in” an OASIS that would provide transmission customers, by electronic means, with information regarding ATC, prices and other information that would allow customers to obtain open-access, non-discriminatory transmission service, and (2) implement standards of conduct that functionally separate transmission and wholesale merchant functions.¹¹⁶ Subsequently, the Commission determined that waivers of specific requirements of Order No. 889 would be granted to a public utility or non-public utility only under the following circumstances:

(1) if the applicant owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) if the applicant is a small public utility that owns, operates, or controls an integrated transmission grid, unless it is a member of a tight power pool . . . or other circumstances are present which indicate that a waiver is not justified. To qualify as a small public utility, the applicant must meet the Small Business Administration definition of a small electric utility, *i.e.*, disposes of no more than 4 million MWh annually.¹¹⁷

Otter Tail filed in Docket No. OA97-139-000 on December 23, 1996, and later supplemented on December 31, 1996, requesting a full waiver of the requirements of Order No. 889, including “a waiver of the requirements at 18 C.F.R. Part 37 relating to the establishment of standards of conduct”¹¹⁸ In support of its waiver request, Otter Tail maintained:

¹¹⁶ Order No. 889 at p. 31,585-3.

¹¹⁷ *Midwest Energy, Inc., et al.*, Docket No. OA96-5-000, *et al.*, 77 FERC ¶ 61,208, p. 61,853 (1996) (footnotes omitted).

¹¹⁸ December 23, 1996 “Application of Otter Tail Power Corporation for a Full Waiver of the Requirements of Order No. 889” in Docket No. OA97-139-000 at 1.

Otter Tail is a small public utility, *i.e.*, one which produces a total electric output in the previous fiscal year of less than four (4) million megawatt hours. *See* 13 C.F.R. § 121.201. Otter Tail's total production of electricity as reported in its 1995 FERC Form 11 . . . was 2,876,219 MWh."¹¹⁹

The Commission granted Otter Tail's request for a waiver because it met the definition of a small utility and was a member of a loose power pool (MAPP).¹²⁰ However, the Commission made clear that the standards of conduct waiver would be revoked when the Commission takes action on a complaint alleging that the utility has used its access to information about transmission to unfairly benefit the utility or its affiliate.¹²¹

Otter Tail no longer satisfies the standard to receive a waiver: in 2007 Otter Tail's total retail sales were 4,123,831 MWh.¹²² Furthermore, Otter Tail owns extensive transmission facilities spanning three states. As of December 2007, Otter Tail's transmission facilities total approximately 5,300 miles, including 48 miles of 345 kV lines, 405 miles of 230 kV lines, and 799 miles of 115 kV lines.¹²³

As a result of the waiver, Otter Tail's transmission personnel are not required to function independently of its marketing/supply personnel. In other words, Otter Tail's energy supply personnel have access to information about transmission service and/or interconnection requests that is not available to other potential competitors of Otter Tail's generation. Otter Tail has used its access to transmission information concerning Glacier Ridge to benefit Otter Tail's own

¹¹⁹ *Id.* at 7.

¹²⁰ *Central Minnesota Municipal Power Agency, et al.*, Docket No. OA-97-90-000, *et al.*, 79 FERC ¶ 61,260, pp. 62,129-30 (1997).

¹²¹ *See id.* at p. 62,127.

¹²² Otter Tail's 2007 Annual Report at (Highlights of the Year).

¹²³ Otter Tail's Reorganization Application at 3.

generation project. The concerns with undue discrimination and undue preference discussed herein all necessitate the Commission's revoking Otter Tail's waiver.

3. Otter Tail Utilized Its Transmission Market Power to Confer an Undue Preference on Generation Developed By Otter Tail and FPL Energy

FPA section 205(b) prohibits a public utility from granting an undue preference to “any person” with respect to the provision of transmission service subject to the Commission’s jurisdiction.¹²⁴ Interconnection is a “critical component” of that transmission service.¹²⁵ As noted above, the Commission has long recognized that transmission owners, such as Otter Tail and Minnkota, possess monopoly power. To prevent public utilities from being able to use that monopoly power to provide themselves or their affiliates with an undue advantage, the Commission requires transmission owners to provide open access transmission service, which includes standard procedures for interconnecting generators to transmission facilities. However, as explained above, Otter Tail and Minnkota have been able to circumvent the Commission’s standard interconnection and open access requirements and grant an undue preference to Otter Tail’s own generation.

An undue preference in transmission (or interconnection) service occurs when a public utility, such as Otter Tail, treats similarly situated entities differently with respect to jurisdictional transmission service. It is not necessary to show a competitive disadvantage in order to prove undue preference.¹²⁶ Nevertheless, PEAK Wind and RES Americas have, in fact, been competitively disadvantaged by Otter Tail’s plot to construct a new transmission line to

¹²⁴ 16 U.S.C. § 824d(b). FPA § 205(b) provides: “No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.”

¹²⁵ Order No. 2003, P 9.

¹²⁶ *See Sebring Utils. Comm’n v. FERC*, 591 F.2d 1003, 1009, n.24 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979).

allow its generation project to enter the market ahead of a prior-queued Glacier Ridge generation project.

“Similarly situated” does not mean “identical.”¹²⁷ The Glacier Ridge project and the Otter Tail/FPL Energy wind project are similarly situated. The two projects are located adjacent to each other and are similarly sized. In fact, the Glacier Ridge project is located closer to the Maple River substation than the Otter Tail/FPL Energy project and closer to the new Pillsbury Line and the new 230 kV substation for that matter. As a result, Otter Tail designed the Pillsbury Line to circumvent the Glacier Ridge project. Any factual differences between the two wind projects are merely “distinctions without a difference” and are therefore irrelevant.¹²⁸ Moreover, the Commission has consistently treated large wind generators as “similarly situated.”¹²⁹

Despite the fact that the Glacier Ridge and Otter Tail/FPL Energy wind projects are similarly situated, Otter Tail (acting in concert with Minnkota) has treated the two projects differently and has granted its own wind project an undue advantage. As described above and in the attached affidavits of Messrs. Noeske and DeVito, Otter Tail has taken advantage of the interrelated nature of its transmission system with that of Minnkota and Minnkota’s non-jurisdictional status to provide the Otter Tail/FPL Energy wind generation project with interconnection and transmission service while refusing to even discuss interconnection with RES Americas and PEAK Wind, even though the Glacier Ridge wind project is earlier in the queue.

¹²⁷ See *City of Vernon v. FERC*, 845 F.2d at 1047 & n. 4 (D.C. Cir. 1988).

¹²⁸ See *id.*, n. 4.

¹²⁹ Cf. *Interconnection for Wind Energy*, Order No. 661, Docket No. RM05-4-001, FERC Stats. & Regs. [Reg. Preambles] ¶ 31,186 (2005), 70 *Fed. Reg.* 47093 (June 16, 2005).

The anticompetitive preference granted to the Otter Tail/FPL Energy wind generation facility is undue and RES Americas and PEAK Wind respectfully request that the Commission remedy the undue preference by placing Glacier Ridge in the same position as the Otter Tail/FPL Energy generation project -- that is, interconnected to the Pillsbury Line.¹³⁰ The Commission could do this in either of two ways: (1) ordering, under FPA section 211A,¹³¹ Minnkota to interconnect the Glacier Ridge project or, alternatively, (2) directing the Midwest ISO to interconnect the Glacier Ridge project by utilizing Otter Tail's transmission rights under the GFAs.

B. OTTER TAIL AND MINNKOTA UNDULY DISCRIMINATED AGAINST RES AMERICAS AND PEAK WIND

FPA section 205(b) prohibits a public utility from unduly discriminating against any person in the provision of transmission service. By virtue of the integrated nature of their transmission systems and their joint ownership/operation/planning of many transmission facilities as evidenced by the GFAs, Otter Tail and Minnkota have unduly discriminated against PEAK Wind and RES Americas in favor of generation jointly owned by Otter Tail and FPL Energy, the output of which is being sold to Minnkota.

Undue discrimination involves treating similarly-situated persons differently. The U.S. Court of Appeals for the District of Columbia Circuit has found that “similarly situated” does not mean “identical” and “distinctions without a difference” are irrelevant to a

¹³⁰ See *Elec. & Water Plant Bd. v. Kentucky Utils. Co.*, 12 FERC ¶ 61,004, p. 61,008 (1980) (“discrimination which is anticompetitive in effect is presumptively undue.”).

¹³¹ 16 U.S.C. § 824j-1. FPA § 211A provides in relevant part: “the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services (1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.”

discrimination inquiry.¹³² The Glacier Ridge generation project is similarly situated to the Otter Tail/FPL Energy generation project. Both facilities will be powered by wind. Both want to interconnect to the proposed transmission line that was to be owned jointly by Otter Tail and Minnkota, but which now may or may not be owned by Minnkota only.¹³³ Despite these similarities, the two projects could not have been treated more differently. The Otter Tail/FPL Energy project has received the full support of Otter Tail and Minnkota in its attempt to interconnect to the Minnkota transmission system; whereas, as explained in the attached affidavits of Messrs. William Noeske and Joseph DeVito, PEAK Wind and RES Americas have been rebuffed at every turn. In order to justify such disparate treatment, Otter Tail and Minnkota must demonstrate factual differences which justify classifications and differences in treatment.¹³⁴ They have not even tried to demonstrate any factual differences; however, even if they were to try, they cannot.¹³⁵

Furthermore, the Commission has held that anticompetitive behavior is presumptively unduly discriminatory.¹³⁶ The Commission has long recognized that ownership of transmission facilities conveys monopoly power which can be used to unduly discriminate regarding who may

¹³² *City of Vernon v. FERC*, 845 F.2d at 1047 & n.4.

¹³³ Minnkota has represented that they have no PPAs to support the line. It seems unlikely that a rural cooperative would engage in such a large scale construction project without a PPA. In addition, as noted Otter Tail is constructing the line.

¹³⁴ *St. Michaels Utils. Comm'n v FPC*, 377 F.2d 912, 915 (4th Cir. 1967) (“...differences in rates are justified where they are predicated upon differences in facts. . . . judicial inquiry devolves on the question of whether the record exhibits factual differences to justify classifications among customers and differences among the rates charged them.”); see also *Consolidated Edison Co. of New York v. FERC*, 165 F. 3d 992, 1012 (D.C. Cir. 1998) (“to show undue discrimination, the petitioner must demonstrate that the two classes of customers are similarly situated for purposes of the rate”).

¹³⁵ Although it appears that affiliates of Otter Tail and Minnkota may have submitted an interconnection request to Minnkota; the Commission should not view this difference as relevant because Minnkota did not post its purported LGIP until two months after it allegedly received the January 3 interconnection request.

¹³⁶ See *Elec. & Water Plant Bd. v. Kentucky Utils. Co.*, 12 FERC at p. 61,008.

have access to such facilities.¹³⁷ Otter Tail and Minnkota have exercised monopoly power over their jointly-owned transmission facilities and refused to allow the Glacier Ridge wind generation facility to interconnect with their integrated transmission systems. By their actions, Otter Tail and Minnkota have created a barrier to entry for a competitor that does not exist for their own generation. Accordingly, the Commission must find that Otter Tail and Minnkota have unduly discriminated against PEAK Wind and RES Americas.

1. Otter Tail and Minnkota Have Thwarted the Attempts of RES Americas and PEAK Wind to Interconnect to the Interstate Transmission Grid.

As discussed more fully above, Otter Tail and Minnkota have thwarted the attempts of RES Americas and PEAK Wind to interconnect to the interstate transmission grid. Beginning in February 2007 – almost a year before the posted date of the interconnection request involving Otter Tail and FPL Energy generation facilities – PEAK Wind repeatedly asked Minnkota to interconnect to its interstate transmission system.¹³⁸ Even though PEAK Wind’s members are electric cooperative customers and indirect owners of the Minnkota, Minnkota first refused to discuss the request, then six months later informed them that the nearby 69 kV substation at Pillsbury, ND simply could not support a 200 MW project.¹³⁹ The Minnkota suggestion was to reduce or forget about the project.¹⁴⁰ Later, when PEAK Wind discussed the project with Otter Tail (a member of Minnkota), Otter Tail told PEAK Wind that its Glacier Ridge project was uneconomical and urged PEAK Wind to abandon their project and instead provide FPL Energy with the necessary easements so that FPL Energy could develop a project. Within

¹³⁷ See, e.g., Order No. 888 at pp. 31,634.

¹³⁸ See Noeske Affidavit at p. 2, ¶5.

¹³⁹ Noeske Affidavit at pp. 6-7, ¶18.

¹⁴⁰ It soon became apparent that what was impossible for PEAK Wind – interconnecting a 200 MW wind generation project to the Minnkota system – was more than possible for an even larger project championed by Minnkota’s partners in the Langdon Wind Center, Otter Tail and FPL Energy.

several hours after the meeting, FPL Energy called a PEAK Wind member (who had attended the Otter Tail meeting) to see if he was now willing to lease his land to FPL Energy.¹⁴¹ Otter Tail and Minnkota subsequently concealed plans to construct the Pillsbury Line.¹⁴² Once those plans became known, RES Americas and PEAK Wind requested to interconnect to the line, but were informed that it was fully subscribed.¹⁴³

Otter Tail and Minnkota have ignored Commission-recognized rights. Specifically, the Commission has long recognized that transmission providers must afford customers access to the necessary interconnection and transmission information. For instance, in Order No. 2003-A, the Commission noted the importance of transmission providers making information about the most efficient locations and interconnection voltage levels for new generating facilities on the transmission provider's transmission system available to potential interconnection customers.¹⁴⁴ Yet, despite repeated requests by PEAK Wind and RES Americas to interconnect to the Minnkota interstate transmission system, Minnkota never disclosed that, along with Otter Tail, it would be constructing a new transmission line to accommodate Otter Tail's generation project. Similarly, the Commission emphasized that transmission providers are **required** to assist customers in siting facilities in a manner comparable to that it provides itself or its affiliates.¹⁴⁵ Apparently, the affiliates of Minnkota and Otter Tail submitted the interconnection requests associated with the Otter Tail and FPL Energy generation projects.¹⁴⁶ In order to effectuate those

¹⁴¹ Otter Tail neglected to inform PEAK Wind that Otter Tail was working with FPL Energy to develop generation facilities in both Langdon and on land adjacent to the PEAK Wind project.

¹⁴² Noeske Affidavit at pp. 11-12, ¶29; DeVito Affidavit at p. 6, , ¶¶13-14.

¹⁴³ DeVito Affidavit at p. 7, ¶15.

¹⁴⁴ See Order No. 2003-A, P 630.

¹⁴⁵ Order No. 2003-A, P 30.

¹⁴⁶ DeVito Affidavit at p. 7, ¶15.

interconnection requests, Minnkota and Otter Tail proposed to construct the Pillsbury Line. Not only did Otter Tail and Minnkota not assist PEAK Wind and RES Americas, Otter Tail went out of its way to “design, permit, and oversee the construction of the “Pillsbury Line to ensure that the route circumvent circumvented the PEAK Wind project. In other words, the shortest route from the Otter Tail/FPL Energy generation project to the Maple River Substation would run through the PEAK Wind project. Rather than include PEAK Wind and RES Americas, Otter Tail and Minnkota designed the Pillsbury Line to intentionally circumvent the land owned by PEAK Wind’s members.¹⁴⁷ This is clearly shown on the map attached as Exhibit OAM-4 to the Martino Affidavit.

2. By Jumping over the PEAK Wind and RES Americas’ Prior-Queued Interconnection Request, Minnkota and Otter Tail will harm the PEAK Wind/RES Americas Project, Other Downstream Projects (including RES Americas Norwegian Grove Project), and Frustrate Midwest ISO planning.

By jumping over the PEAK Wind and RES America’s prior-queued interconnection request, Minnkota and Otter Tail inject unplanned amounts of energy into the interstate transmission grid, which will harm the Glacier Ridge project, as well as other downstream projects (including RES Americas’ Norwegian Grove Project), transmission providers, and customers.

¹⁴⁷ The Commission has explained that a waiver of the OASIS posting requirements is only appropriate for as long as an entity evaluating its transmission needs is able to obtain the information it needs to complete its evaluation. *See Black Creek Hydro, Inc., et al.*, Docket No. OA96-25-001, *et al.*, 77 FERC ¶ 61,232, p. 61,941 (1996). As discussed more fully below, Minnkota and Otter Tail failed to publicly disclose that their affiliates were involved in the interconnection request and to post required information.

a. Energy generated by the Otter Tail and FPL Energy wind projects will flow into the Midwest ISO.

In 2006, Minnkota transmitted significant amounts of excess energy for sale into the Midwest ISO market:

The Joint System recorded energy sales of 1,032,699,861 kWh to off-system customers in 2007, which is 15 percent higher than the 898,288,133 kWh sold in 2006. Off-system sales are made to other regional utilities, **primarily through Midwest Independent System Operator (MISO) energy market transactions.**¹⁴⁸

For the following reasons, the off-system sales into the Midwest ISO are likely to increase, in large measure due to energy generated at the Ashtabula project and transmitted over the Pillsbury Line.¹⁴⁹

Minnkota forecasts annual load growth of 2.5% for each of the next 20 years.¹⁵⁰ As of 2007, Minnkota admitted that it had sufficient generation resources: “Using the Minnkota future load growth projections, we have concluded that we will need additional generation resources in 2013-2016 time frame.”¹⁵¹

Against this backdrop, beginning in 2008, Minnkota began purchasing 99 MW from FPL Energy’s generation facilities at the Langdon Wind Center.¹⁵² To put this purchase in context, Minnkota has explained that purchases from FPL Energy’s Langdon project “represents about 10 percent of the energy sales to our 11 member-owners.”¹⁵³ In addition, Minnkota has

¹⁴⁸ Minnkota’s 2007 Annual Report at 15 (emphasis added).

¹⁴⁹ Minnkota can turn a significant profit by selling on-system generation in the Midwest ISO markets, given that energy prices in the Midwest ISO market “are significantly higher in cost than the energy produced from the Joint System’s generation resources.” See Minnkota’s 2006 Integrated Resource Plan at p. 1-5

¹⁵⁰ See Minnkota’s 2007 Annual Report at 13.

¹⁵¹ *Id.* at 2.

¹⁵² “Minnkota anticipates purchasing approximately 360,000,000 kWh annually from FPL Energy at this [Langdon] site under a 25-year power purchase agreement.” *Id.* at 13.

¹⁵³ Minnkota’s 2007 Annual Report at 2.

entered into an MOU with Minnesota Power Company to acquire all the output from the Milton R. Young 455 MW coal-fired plant near Center, North Dakota, which is owned by Square Butte Electric Cooperative. Currently Minnkota and Minnesota Power each purchase approximately 50% of the output of the facility. Under the terms of the MOU, Minnkota will begin receiving additional energy from the facility in 2013. The amount Minnkota receives will gradually increase until 2026, at which time, Minnkota will begin to purchase 100% of the output of the Young facility. On top of that, Minnkota plans to purchase another 200 MW from FPL Energy's Ashtabula project.

In addition, Minnkota has explained: "The Joint System [of Minnkota and NMPA] is winter peaking, heavily influenced by approximately 40,000 customers who use electricity to heat their homes. Power requirements are the highest during cold winter days when there is significant need for space heating."¹⁵⁴ As a result, Minnkota will soon be transmitting substantial amounts of power into the interstate transmission grid operated by the Midwest ISO, and especially during the summer months.¹⁵⁵

In sum, as a result of interconnecting the Otter Tail/FPL Energy generation and constructing the associated 60-mile 230 kV transmission line, in 2009, Minnkota will have under contract an additional 200 MW,¹⁵⁶ while its load is expected to increase by only 20 MW (2.5%) from 2008.¹⁵⁷ Since Minnkota is currently a winter peaking system, virtually all of this MW would likely be transmitted into the regional grid and into the market during the summer.

¹⁵⁴ *Id.* at 13.

¹⁵⁵ Minnkota is also relying on the Midwest ISO for required services: "Minnkota currently obtains reliability coordination services from MAPP that will be provided in the future by MISO . . ." April 7, 2008 Motion to Interview and Comments of Minnkota in Docket No. ER08-637-000, *et al.* at 3.

¹⁵⁶ *See* Exhibit OAM-6 at p. 2.

¹⁵⁷ Minnkota's 2007 Annual Report at 13; *see also* Minnkota's FERC Form 714 at 9b.

Beginning in 2013, Minnkota will have an additional 225 MW from Young 2, most of which could also be transmitted on the regional grid and sold into the market. All tolled, 325 MW or more of excess Minnkota energy could regularly flow into the interstate transmission grid by 2013.

b. MAPP’s approval of the Minnkota System Impact Study adversely impacts reliability and prior-queued interconnection requests, in particular that of Glacier Ridge

On May 30, 2008, the DRS met to review the System Impact Study. The review process was discriminatory: because it was not a transmission owner, RES Americas was banned from participating in the DRS meeting; yet the minutes indicate that representatives of other generators – *i.e.*, FPL Energy, M-Power, and Otter Tail -- were allowed to participate.¹⁵⁸ The result of the meeting – approval of Minnkota’s System Impact Study – is not only unduly preferential, but raises serious concerns with reliability and cost responsibility.

The DRS meeting minutes reflect that DRS Vice Chair Sanders emphasized that “the project crosses a portion of the MAPP bulk electric system **to be delivered to the MISO footprint.**”¹⁵⁹ Against this backdrop, the meeting minutes indicate that the interconnection would result in transmission overloads in the Midwest ISO, but that MAPP approved the interconnection without requiring physical system upgrades, raising reliability concerns and leading to the objection of the Midwest ISO:

Mr. Bartel [Minnkota’s representative] indicated that project partners were reviewing whether or [sic] special protection systems (SPS) would be used to mitigate the transmission overloads for the short-term or possibly used as a long-term fix. Mr. Manjure [the Midwest ISO’s representative] enquired whether the DRS would approve an interconnection request that relies on SPS to mitigate overloads observed under N-1 conditions, and if so, would the DRS request

¹⁵⁸ See Martino Affidavit at p. 8, ¶19; Exhibit OAM-8.

¹⁵⁹ MAPP DRS Committee Meeting Minutes, Exhibit OAM-8 (emphasis added).

details of the SPS operation before granting approval. Vice Chairman Sanders responded by saying that the provisions in the current DRS policies do not allow restrictions on such interconnections (those relying on SPS). Regarding the SPS operational details, the DRS would rely on the customer obtaining the required approvals from the appropriate MAPP or MRO committees. **Some DRS members expressed concern that the current trend in using SPS could lead to reliability problems.** The DRS policies and procedures do not include limits on the use of such devices, and there is a regional approval process for the additional of SPS on the system. A motion was made to amend the original proposed motion to limit the reliance on an SPS to mitigate the overloads identified in the motion will not be allowed for longer than 2 years from the initial date of operation. This amendment failed. * * * Mr. Manjure mentioned that the no-objection vote provided by the Midwest ISO to the original study was based on the information in the report which indicated that upgrades would be made to the transmission system to reliably interconnect this wind farm. However, with the new position adopted regarding use of long-term SPS in lieu of physical upgrades, MISO would choose to withdraw the no-objection vote to the study. Vice Chairman Sanders noted that **the overloads that the SPS are being considered for are on the Midwest ISO transmission system.**¹⁶⁰

It is troubling that MAPP has little regard for reliability concerns resulting from Minnkota's interconnecting the Otter Tail and FPL Energy generation facilities, energy from which will be transmitted into the Midwest ISO transmission system. These reliability concerns certainly merit further review.

MAPP's failure to require Otter Tail and FPL Energy to assume cost responsibility for the physical transmission upgrades required in the Midwest ISO transmission system raises cost concerns for prior-queued generation facilities such as Glacier Ridge. The Commission must not allow Otter Tail, Minnkota and FPL Energy to evade cost responsibility for any additional study and/or transmission upgrades required as a result of their jumping ahead of the Glacier Ridge and Norwegian Grove projects in the generation interconnection queue.

The Glacier Ridge and Norwegian Grove projects submitted their interconnection requests to the Midwest ISO on October 16, 2007 and December 13, 2006, respectively, months

¹⁶⁰ Exhibit OAM-8 at pp. 2-3. (emphasis added).

before an interconnection request was submitted for the Otter Tail/ FPL Energy project.¹⁶¹ Realizing that the Glacier Ridge project predated them in the interconnection queue, Otter Tail, Minnkota and FPL Energy devised a unduly discriminatory/unduly preferential scheme pursuant to which they would construct the Pillsbury Line for their own generation close to, yet around, the Glacier Ridge project, refuse to allow the Glacier Ridge project to interconnect to the line, and interconnect the Pillsbury Line downstream of the proposed interconnection point for the Glacier Ridge project thereby using up the capacity that should have been “set aside” for the Glacier Ridge project. Although the Otter Tail/FPL Energy project seeks to interconnect to the Minnkota system, it is clear that the power will be transmitted off Minnkota’s system into the Midwest ISO.¹⁶² As explained in Mr. Martino’s affidavit, the interconnection of the Ashtabula project and the Pillsbury Line will cause constraints at the Maple River substation and further downstream.¹⁶³ Consistent with Commission precedent, although the Otter Tail/FPL Energy project may use any existing excess interstate transmission capacity when it comes on-line if it so chooses until the Glacier Ridge and/or Norwegian Grove facilities come on-line; once one or both of the RES Americas’ facilities come on-line, Otter Tail, Minnkota and FPL Energy must pay for any additional studies and/or upgrades required to transmit the Glacier Ridge and Norwegian Grove power into the Midwest ISO market to the extent such upgrades are needed due to Ashtabula’s use of the excess capacity.

In 2003, the Commission, in *Virginia Electric and Power Co.*, Docket No. ER03-743-001, *et al.*, 104 FERC ¶ 61,249 (2003) (“VEPCO”), established clear directions for how

¹⁶¹ Martino Affidavit at p. 6, ¶13; Noeske Affidavit at p. 8, ¶21.

¹⁶² Exhibit OAM-8 at p. 2.

¹⁶³ Martino Affidavit at pp. 5-6, ¶13, Exhibit OAM-7.

transmission providers are to address cost responsibility for related transmission upgrades when a later-queued generation project becomes operational before a prior-queued project:

[T]his case raises issues about what to do when the existing transmission system's capability to support interconnections without upgrades is sufficient to accommodate only the generator or generators that hold the highest positions in the interconnection queue. In this situation, lower queued generators must fund additional, and perhaps substantial, network upgrades in order to complete their interconnections, while those in the front of the queue are able to use that existing capability to interconnect with less need for upgrades. Tenaska [the later-queued generator] claims that, because CPV's [the earlier-queued generator] interconnection would use existing interconnection capability that could otherwise be used for Tenaska's interconnection, there is a possibility that Tenaska will end up funding network upgrades that would not be needed if CPV does not build its facility.

19. The Commission agrees that this is a valid concern, and to help avert such an outcome, directs Dominion Virginia Power to use the following procedure. If, as Tenaska states, existing transmission capability has been “set aside” for CPV and the next generator in the queue is ready to interconnect before CPV, Dominion Virginia Power must give that next generator the option of interconnecting using (to the extent it can) the transmission capability that had been set aside for CPV’s interconnection. For example, if Tenaska is next in the queue, executes its [interconnection agreement (“IA”)] (or asks that an unexecuted IA be filed), and is proceeding with its project on a timeline that places its in-service date ahead of CPV, then Dominion Virginia Power must give Tenaska the option to complete its interconnection using the excess transmission capacity that had been set aside for CPV's interconnection, if that capability can support Tenaska’s interconnection. Then, if and when CPV completes its project and interconnection, *Tenaska will have to fund the network upgrades needed for CPV’s interconnection* to the extent that the need for the upgrades is due to Tenaska’s use of the excess transmission capacity and Tenaska’s decision to have its interconnection completed ahead of CPV. This ensures that, if CPV withdraws from the queue, Tenaska will not be in the position of having funded network upgrades that turn out not to be needed. However, it also ensures that, if CPV’s project is constructed as planned, CPV will not be required to fund costs in excess of the costs applicable to its original queue position.¹⁶⁴

The Commission further held that the later-queued generator is also responsible for any additional study costs.¹⁶⁵ Therefore, in addition to the other relief requested herein, the

¹⁶⁴ *VEPCO*, 104 FERC ¶ 61,249, PP 18-19 (footnotes omitted) (emphasis added).

¹⁶⁵ *Id.* at n. 21.

Commission must, at a minimum, order Otter Tail, Minnkota and FPL Energy to pay for any and all necessary study and transmission upgrade costs resulting from their attempt to jump over the Glacier Ridge and Norwegian Grove projects in the interconnection queue. In this regard, once Glacier Ridge becomes operational, RES Americas and PEAK Wind should not be required to pay for any transmission upgrades required, but not paid for by Otter Tail and FPL Energy (because MAPP addressed Midwest ISO transmission facility overloads using SPS).

c. Otter Tail and Minnkota have turned regional transmission planning on its ear

As shown above, the Pillsbury Line was hastily conceived, with little or no planning, solely to benefit Otter Tail, Minnkota, and FPL Energy. Although originally to be owned in part by Otter Tail, it was not the subject of any Otter Tail or Midwest ISO transmission plan. Similarly, the Pillsbury Line was not part of the MAPP regional transmission planning process either.¹⁶⁶ Instead, MAPP's DRS simply reviewed the Pillsbury Line to address reliability issues, and then approved the System Impact Study of its member Minnkota over the objections of the Midwest ISO and reliability concerns voiced by its own members.

As explained more fully in the attached affidavit of Omar Martino, RES Americas repeatedly raised transmission planning concerns with MAPP. Simply put, the "planning" associated with the interconnection of the Otter Tail and FPL Energy generation facilities and the 230 kV transmission line has lacked coordination, openness, transparency, information exchange, comparability, and meaningful regional participation. Instead it has been secretive, limited, discriminatory, and produces self-dealing. The bottom line is that the maverick actions of Otter Tail and Minnkota will undermine the regional transmission planning efforts undertaken

¹⁶⁶ See Martino Affidavit at p. 4, ¶10.

by the Midwest ISO (including its transmission owners, customers, and other stakeholders) in compliance with Order No. 890.¹⁶⁷

C. MINNKOTA ENHANCED ITS TRANSMISSION MARKET POWER BY VIOLATING OPEN ACCESS TRANSMISSION PRINCIPLES AND EXERCISED THAT MARKET POWER BY TYING INTERCONNECTION TO BELOW MARKET SALES

Minnkota was able to enhance its transmission market power by violating open access principles. Minnkota never filed a reciprocity OATT. Minnkota exploited a waiver of the Standards of Conduct (after no longer satisfying the standard for waiver), and failed to comply with the terms of its posted generator interconnection procedures. Worst of all, Minnkota exercised that enhanced market power by tying the availability of interconnection to RES Americas and PEAK Wind's making sales at below market prices to Minnkota.

1. Minnkota Never Filed with the Commission a Reciprocity OATT

Minnkota has never filed with the Commission a reciprocity OATT. By way of background, the Commission recently explained:

In Order No. 888, the Commission established a safe harbor procedure for the filing of reciprocity tariffs by non-public utilities. Under this procedure, non-public utilities may voluntarily submit to the Commission a transmission tariff and a petition for declaratory order requesting a finding that the tariff meets the Commission's comparability (non-discrimination) standards. If the Commission finds that the terms and conditions of such a tariff substantially conform or are superior to those in the pro forma OATT, the Commission will deem it to be an acceptable reciprocity tariff and will require public utilities to provide open access transmission service upon request to that particular non-public utility. Order No.

¹⁶⁷ Note that the Pillsbury Line was originally presented as a joint venture, to be owned by both Minnkota and Otter Tail. See Exhibit JMD-4 at p. 2. Similarly, the Langdon-Hensel Line is jointly owned by Minnkota and Otter Tail:

The 35-mile, 115 kV transmission line between two existing substations. A new line was needed between the Langdon and Hensel substations to provide an adequate outlet for the Langdon Wind Energy Center. The project is a joint effort between Minnkota and Otter Tail Power with Minnkota taking the lead in the construction effort.

Minnkota's 2007 Annual Report at 10. There is no evidence that the 35-mile transmission line was considered as part of the MAPP/Midwest ISO transmission planning process. See Martino Affidavit at p. 4, ¶10.

890 provides that a non-public utility that already has a safe harbor OATT . . . must amend its OATT so that its provisions substantially conform or are superior to the new pro forma OATT in Order No. 890 if it wishes to continue to qualify for safe harbor treatment.¹⁶⁸

Furthermore, in Order No. 888-A, the Commission clarified that, under the reciprocity condition, a non-public utility must also comply with the OASIS and standards of conduct requirements or obtain waiver of them.¹⁶⁹

Contrary to Order No. 888 and its progeny, Minnkota has not filed with the Commission an OATT and a petition for declaratory order requesting a finding that the tariff meets the Commission's comparability (non-discrimination) standards. In 2006, Minnkota even admitted as much to the Commission:

Minnkota has established an open access transmission tariff (“OATT”) modeled closely after the Commission’s *pro forma* OATT. Because Minnkota is a non-jurisdictional G&T cooperative, **Minnkota has not submitted its OATT for filing with the Commission, nor has Minnkota voluntarily submitted its OATT as a non-jurisdictional, reciprocity tariff.** There have been no complaints, formal or otherwise, that Minnkota’s OATT does not provide for comparable open access transmission service on Minnkota’s transmission facilities.¹⁷⁰

As noted above, Minnkota’s failure to comply with the “safe harbor” procedures under Order No. 888, in part, has created the problems which underlie this Complaint.

The Commission has never been afforded an opportunity to review, much less approve Minnkota’s OATT. In point of fact, the document that Minnkota has posted on its internet web site differs from the *pro forma* OATTs promulgated by each of Order Nos. 888 and 890.

¹⁶⁸ *South Carolina Public Serv. Auth.*, Docket No. NJ07-4-000, 122 FERC ¶ 61,183, P 8 (2008) (footnotes omitted); see Order No. 888, FERC Stats. & Regs. [Reg. Preambles 1996-2000] p. 31,760.

¹⁶⁹ Order No. 888-A, FERC Stats. & Regs. [Reg. Preambles 1996-2000] at p. 30,286.

¹⁷⁰ Minnkota’s “Motion to Intervene and Protest,” *Midwest Independent Transmission System Operator, Inc.*, Docket No. ER05-560-000, *et al.* (filed Oct. 18, 2006) at 8, n.7 (emphasis added).

Earlier this year, the Commission explained that “the Commission’s policy is not to rule on safe harbor status until a non-public utility incorporates into its tariff the reforms adopted in Order No. 890.”¹⁷¹ There is no evidence that Minnkota has complied with Order No. 890. Under these circumstances, the Commission has held that a non-jurisdictional utility “must amend its tariff so that its provisions substantially conform to or are superior to the new *pro forma* OATT in Order No. 890 if it wishes to qualify for safe harbor treatment. Until it has amended its tariff in such a manner, we find, it does not qualify for such safe harbor treatment.”¹⁷² The same result should apply with equal force to Minnkota.

2. Minnkota Not Only Fails to Qualify for, but Has Violated the Terms of, the Order No. 889 Standards of Conduct Waiver

In Order No. 889 the Commission required public utilities that own, operate or control transmission facilities to (1) “create or participate in” an OASIS that would provide transmission customers, by electronic means, with information regarding ATC, prices and other information that would allow customers to obtain open-access, non-discriminatory transmission service, and (2) implement standards of conduct that functionally separate transmission and wholesale merchant functions.¹⁷³ Subsequently, the Commission determined that waivers of specific requirements of Order No. 889 would be granted to a public utility or non-public utility only under the following circumstances:

¹⁷¹ *Bonneville Power Admin.*, Docket No. NJ08-7-000, 123 FERC ¶ 61,264, P 27, ¶6 (2008) citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 191; see also *Southwest Transmission Cooperative, Inc.*, Docket No. NJ06-5-000, 118 FERC ¶ 61,121, P 12 (2007); *Southwest Transmission Cooperative, Inc.*, Docket No. NJ07-7, 122 FERC ¶ 61,001, P 6 (2008); *Southwestern Power Admin.*, Docket No. NJ07-9-000, 123 FERC ¶ 61,079, P 10 (2008).

¹⁷² *Bonneville Power Admin.*, 123 FERC ¶ 61,264, P 27; see also *Southwest Transmission Cooperative, Inc.*, 118 FERC ¶ 61,121, P 12, n.10 (2007).

¹⁷³ Order No. 889, FERC Stats. & Regs. [Reg. Preambles 1996-2000] at p. 31,585-3.

(1) if the applicant owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) if the applicant is a small public utility that owns, operates, or controls an interstate transmission grid, unless it is a member of a tight power pool . . . or other circumstances are present which indicate that a waiver is not justified. To qualify as a small public utility, the applicant must meet the Small Business Administration definition of a small electric utility, *i.e.*, disposes of no more than 4 million MWh annually.¹⁷⁴

Minnkota filed in Docket No. OA98-9-000 on January 12, 1998, and later supplemented on May 20, 1998, a “request for a waiver of the Order No. 889 reciprocity requirements to separate the operation of its transmission system function from the wholesale marketing function, and to submit standards of conduct.”¹⁷⁵ Minnkota stated: “The requested waiver was grounded on Minnkota’s status as a small electric utility under the Small Business Administration definition.”¹⁷⁶ To that end, Minnkota maintained that it “disposed of approximately 3.55 million MWh in 1997, less than the small electric utility threshold of 4 million MWh annually.”¹⁷⁷

Despite comments filed by Minnesota Power on March 10, 1998 showing that Minnkota’s sales in 1995 and 1996 exceeded, 4 million MWhs, the Commission granted Minnkota’s request for a waiver because Minnkota met the definition of a small utility, was not a member of a tight power pool, and no other circumstances indicated that a waiver was not justified.¹⁷⁸ However, the Commission made clear that a waiver of any aspect of Order No. 889 was not permanent:

¹⁷⁴ *Midwest Energy, Inc., et al.*, Docket No. OA96-5-000, *et al.* 77 FERC ¶ 61,208, p. 61,853 (1996) (footnotes omitted).

¹⁷⁵ Minnkota’s Supplemental Information, Docket No. OA98-9-000 (filed May 21, 1998) at 2.

¹⁷⁶ *Id.* at 1.

¹⁷⁷ *Id.*

¹⁷⁸ *Easton Utilities Comm’n., et al.*, Docket No. OA97-572-000, *et al.*, 83 FERC ¶61,334, pp. 62,343 (1998) (footnote omitted).

The Commission also has held that a waiver of Order No. 889 will remain in effect until the Commission takes action in response to a complaint to the Commission that an entity evaluating its transmission needs could not get information necessary to complete its evaluation (for OASIS) or an entity complains that the public utility has used its access to information about transmission to unfairly benefit the utility or its affiliate (for standards of conduct).¹⁷⁹

Minnkota no longer satisfies the standard to receive a waiver: in 2007 Minnkota disposed of 4,282,285 MWh.¹⁸⁰ Furthermore, as discussed above, Minnkota's transmission facilities are anything but limited and discrete – it owns or operates 214 miles of 345 kV, 364 miles of 230 kV, 226 miles of 115 kV, and 2,138 miles of 69 kV transmission lines. In addition, the concerns with undue discrimination, undue preference and transmission planning violations discussed herein all necessitate the Commission's revoking Minnkota's waiver. There is, however, another reason to revoke the waiver. As discussed below, PEAK Wind and RES Americas were unable to evaluate their transmission needs and could not obtain the necessary information to complete their interconnection and transmission evaluations because of Minnkota's failures to post significant interconnection and transmission information.

3. Minnkota Failed to Post Relevant Interconnection and Transmission Information

Minnkota failed to post relevant interconnection and transmission information. As noted above, Minnkota has not filed with the Commission a reciprocity OATT; neither has Minnkota filed with the Commission the LGIP. Instead Minnkota unilaterally revised the *pro forma* LGIP,¹⁸¹ posted that on its internet web site, and then failed to comply with the purported LGIP.

¹⁷⁹ *Id.* (footnote omitted).

¹⁸⁰ Minnkota's 2007 Annual Report at 32.

¹⁸¹ Among other things, Minnkota revised the definition of Interconnection Customer, by adding the underscored language:

First, Section 3.3.4 of Minnkota's Purported LGIP requiring Minnkota to establish a Scoping Meeting provides:

Within ten (10) Business Days after receipt of a valid Interconnection Request, Transmission Provider **shall establish** a date agreeable to Interconnection Customer for **the Scoping Meeting**, and such date shall be no later than thirty (30) Calendar Days from receipt of the valid Interconnection Request, unless otherwise mutually agreed upon by the Parties.¹⁸²

Minnkota informed RES Americas that generation affiliates of Minnkota and Otter Tail had submitted the associated transmission and (apparently) the interconnection requests.¹⁸³

Purported LGIP section 3.4 provides: "Before holding a Scoping Meeting with its Affiliate, Transmission Provider shall post on its Web Site an advance notice of its intent to do so."¹⁸⁴ No such notice was posted on Minnkota's web site before or after the Scoping Meeting with its affiliate.

Interconnection Customer shall mean any entity, including the Transmission Provider, Transmission Owner or any of the Affiliates or subsidiaries of either or an entity that is, or will be, a purchaser under a Purchase Power Agreement with the owner of the Generating Facility, or an agent of any such entities, that proposes to interconnect a Generating Facility with the Transmission Provider's Transmission System.

Minnkota has not demonstrated that this language is consistent with or superior to the *pro forma* OATT. Moreover, this language allows Minnkota and Otter Tail to request interconnection before even beginning development thereby allowing them to discriminate and exercise market power.

¹⁸² Minnkota's Purported LGIP § 3.3.4 (emphasis added). Section 3.3.4 also provides:

The purpose of the Scoping Meeting shall be to discuss alternative interconnection options, to exchange information including any transmission data that would reasonably be expected to impact such interconnection options, to analyze such information and to determine the potential feasible Points of Interconnection. * * * On the basis of the meeting, Interconnection Customer shall designate its Point of Interconnection, pursuant to Section 6.1, and one or more available alternative Point(s) of Interconnection.

Id.

¹⁸³ See DeVito Affidavit at p. 7, ¶15. Minnkota's Purported LGIP provides: "**Affiliate** shall mean, with respect to a corporation, partnership or other entity, each such other corporation, partnership or other entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such corporation, partnership or other entity."

¹⁸⁴ Since Otter Tail is a member of Minnkota, an Otter Tail affiliate would also be an affiliate of Minnkota for purposes of the Purported LGIP.

If an interconnection request was filed on January 3, 2008, a Scoping Meeting would have been held by February 4, 2008. The notice of the meeting should have been provided beforehand. By not posting prior notice of the Scoping Meeting, Minnkota and Otter Tail concealed the nature of their proposed transaction and prevented other generators from understanding the true nature of the interconnection request and queue. This prevented RES Americas and PEAK Wind from accurately evaluating their interconnection and transmission needs.

Second, on the basis of the scoping meeting, the Interconnection Customer, pursuant to section 3.3.4 is required to identify the Point of Interconnection. Minnkota posted on its web site an interconnection queue listing for the January 3, 2008 request with the Point of Interconnection as the Maple River Substation. That posting, however, is inaccurate and misleading.

Minnkota's Purported LGIP provides:

Point of Interconnection shall mean the point, as set forth in the Standard Large Generator Interconnection Agreement, where the Interconnection Facilities connect to the Transmission Provider's Transmission System.

In turn Interconnection Facilities are defined as follows:

Interconnection Facilities shall mean the Transmission Provider's Interconnection Facilities and the Interconnection Customer's Interconnection Facilities. Collectively, Interconnection Facilities include all facilities and equipment between the Generating Facility and the Point of Interconnection, including any modification, additions or upgrades that are necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System. Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades. [underscoped emphasis added]¹⁸⁵

¹⁸⁵ Accordingly, either the Pillsbury Line is an interconnection facility that cannot be used by Otter Tail and FPL Energy, or, contrary to Otter Tail's assertions, it is a transmission line because it is not sole use. Otter Tail and Minnkota cannot have it both ways.

If, as Minnkota claims, the Point of Interconnection under the request is the Maple River Substation, then the Pillsbury Line would constitute Minnkota's interconnection facilities. Logic and the law dictate that a 60-mile, 230 kV transmission line connecting two substations which will be used by three different parties cannot be an interconnection facility.¹⁸⁶ Moreover, the definition of Interconnection Facilities, prevents such an outcome: interconnection facilities are to be sole use facilities, yet the energy of FPL Energy and Otter Tail must necessarily be transmitted over the line.

Whatever the reason Minnkota posted the Maple River Substation as the Point of Interconnection, the posting concealed the fact that Minnkota (and Otter Tail) intended to construct a new 230 kV substation and a new 230 kV transmission line linking that substation with the Maple River Substation. This concealment prevented RES Americas and PEAK Wind from understanding the true nature of the interconnection request and the transmission system addition. It also prevented RES Americas and PEAK Wind from accurately evaluating their interconnection and transmission needs.

Third, section 3.4 of Minnkota's Purported LGIP provides: "Interconnection Study reports . . . shall be posted to Transmission Provider's Web site subsequent to the meeting between Interconnection Customer and Transmission Provider to discuss the applicable study results." Apparently Minnkota conducted a Feasibility Study.¹⁸⁷ That study was even discussed at a meeting of the NM SPG.¹⁸⁸ However, Minnkota has to date failed to post the availability of the Feasibility Study. At this time, the actual capacity of the line is still unclear. Prior compliant

¹⁸⁶ See *Nevada Power Co.*, Docket No. ER02-1913-005, 111 FERC ¶ 61,161, P 12 (2005); *Detroit Edison Co.*, Docket No. ER03-19-000, *et al.*, 102 FERC ¶ 61,282, P 16 (2003).

¹⁸⁷ See Martino Affidavit at p. 4, ¶9.

¹⁸⁸ *Id.*

posting of the Feasibility Study would have allowed RES Americas and PEAK Wind to understand the true nature of the interconnection request and the transmission system addition.

Similarly, Minnkota also failed to timely post the availability of the System Impact Study. Specifically, as explained in the Martino Affidavit, RES Americas discovered that a system impact study had been drafted.¹⁸⁹ Only after Mr. Martino's inquiring about the existence of the study was it posted on the web site several days later. In the meantime, RES Americas obtained a copy of the study from another source. Once again, Minnkota's violation prevented RES Americas and PEAK Wind from accurately evaluating their interconnection and transmission needs.

4. Minnkota Unduly Discriminated against RES Americas and PEAK Wind by Conditioning Access to the Transmission Grid upon Sales of Energy to Minnkota

Minnkota improperly exercised its enhanced transmission market power and unduly discriminated against PEAK Wind and RES Americas by refusing to allow the Glacier Ridge project to interconnect to Minnkota's transmission facilities unless PEAK Wind and RES Americas would sell energy to Minnkota at below market prices.¹⁹⁰ Addressing this type of undue discrimination was at the heart of the Commission's open access initiatives in Order No. 888:

We find that utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices. We propose to prevent this discrimination by requiring all public utilities owning and/or

¹⁸⁹ *Id.* at p. 4, ¶11.

¹⁹⁰ *See* DeVito Affidavit at p. 2, ¶2; Noeske Affidavit at p. 10, ¶25.

controlling transmission facilities to offer non-discriminatory open access transmission services.¹⁹¹

Minnkota's unduly discriminatory conduct is similar to that of Transcontinental Gas Pipe Line Corporation ("Transco") in *ANR Pipeline Co. v. Transcontinental Gas Pipe Line Corp.*, Docket No. CP98-74-000, *et al.*, 91 FERC ¶ 61,066 (2000), where the Commission ordered Transco to allow the interconnection requested by ANR Pipeline Company ("ANR"). In that case, ANR had requested to interconnect with Transco's mainline facilities in Evangeline Parish, Louisiana so that it could deliver its shippers' gas directly into Transco's mainline for firm service. Transco refused ANR's request because (1) ANR already had access to Transco's system (albeit through an interruptible feeder lateral) and (2) constructing the interconnect would cause Transco to bypass its own feeder lateral for the benefit of the interconnecting party and its shippers to the detriment of Transco and its ratepayers. The Commission held that Transco's refusal to interconnect was unduly discriminatory and ordered the interconnect. The Commission should similarly order Minnkota to interconnect with the Glacier facility.

Minnkota repeatedly stalled PEAK Wind's efforts to interconnect Glacier Ridge.¹⁹² When Minnkota finally posted its interconnection procedures and interconnection queue (more than a year after PEAK Wind first asked to interconnect to the Minnkota system) the Pillsbury Line was already fully subscribed with pre-arranged interconnection requests.¹⁹³ It is curious that Minnkota told Mr. DeVito that the line was fully subscribed a month before the

¹⁹¹ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Notice of Proposed Rulemaking, Docket No. RM95-8-000, 60 *Fed. Reg.* 17662 (Apr. 7, 1995), *FERC Stats. & Regs. [Proposed Regs.]* ¶ 32,514, p. 33,052 (1995).

¹⁹² See *e.g.*, Noeske Affidavit at pp. 2-3, ¶6; p. 4, ¶10.

¹⁹³ See Noeske Affidavit at pp. 14-15, ¶38; DeVito Affidavit at p 7, ¶15; p 13, ¶29; Exhibit OAM-5.

interconnection requests were posted.¹⁹⁴ Notwithstanding the above, Minnkota indicated that if Glacier Ridge were to sell Minnkota below market power, transmission could be arranged.¹⁹⁵ As such, Minnkota has unlawfully tied the availability of interconnection service to PEAK Wind and RES Americas making sales to Minnkota.¹⁹⁶

The Supreme Court has established four factors to determine whether an illegal tying arrangement exists: (1) two separate products or services are involved; (2) purchase of a desired product or service cannot be made without the purchase of an additional product or service (the tied product or service); (3) the seller must have “appreciable economic power” in the market of the desired product or service; and (4) the arrangement affects a substantial volume of commerce in the tied market.¹⁹⁷ By applying these four factors, it is evident that Minnkota has engaged in an unlawful tie. The two separate products are transmission service and power purchases. Purchase of the desired product (transmission service) cannot be had without the tied product or service (power purchases). Minnkota clearly has “appreciable economic power” in the transmission market in the Otter Tail balancing authority area.¹⁹⁸ Finally, the arrangement affects a substantial volume of commerce in the tied market. Minnkota’s refusal to transmit

¹⁹⁴ DeVito Affidavit at p. 7, ¶15; p. 13, ¶29.

¹⁹⁵ DeVito Affidavit at p. 2, ¶2; Noeske Affidavit at p. 10, ¶25.

¹⁹⁶ See *Arkansas Oklahoma Gas Corporation*, Docket No. IN97-3-000, 80 FERC ¶ 61,221 (1997). There the Commission believed that a local distribution company (“LDC”) was engaged in an illegal tying operation under NGA section 4. In order for producers, who were connected to the LDC’s system, to obtain off-system transportation, the LDC required them to sell gas to the LDC (which in turn was be used to make retail sales). The Commission explained: “By tying its interstate transportation to the sales provision, AOG appears to have unduly discriminated against current and potential shippers, in violation of NGA section 4(b)” *Id.* at p. 61,870. Ultimately, the case was resolved when the LDC agreed to provide the transportation service without requiring sales. *Arkansas Oklahoma Gas Corporation*, Docket No. IN97-3-001, 81 FERC ¶ 61,340 (1997). The same result should apply here.

¹⁹⁷ *Eastman Kodak Co. v. Image Technical Services, Inc., et al.*, 504 U.S. 451, 461-62 (1992); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9-18 (1984).

¹⁹⁸ See Order No. 888 at pp. 31,634-35.

power for wind generators unless they sell power affects a substantial volume of wind generation from getting to market.

This unlawful tying arrangement is no different from the tying arrangement the Commission found discriminatory in *Panhandle Eastern Pipe Line Co.*, Docket No. RP88-88-000, *et al.*, 43 FERC ¶ 61,121, p. 61,377 (1988). In that case, Panhandle proposed in its tariff to tie the term of transportation service to the term of the shipper's sales contract. The Commission found that that provision of the tariff had the effect of forcing customers to purchase gas from Panhandle in order to retain their firm transportation rights for converted capacity; and as a result, rejected the tariff provision as discriminatory. Minnkota's actions in tying transmission services to purchases of power is no less discriminatory and should not be allowed.¹⁹⁹

VI. RELIEF SOUGHT

In light of the above, Complainants respectfully request that the Commission take appropriate action to remedy the undue preference that Otter Tail afforded its own generation and the undue discrimination Otter Tail and Minnkota wrought against PEAK Wind and RES Americas. Additionally, the Commission should take steps to mitigate the transmission

¹⁹⁹ The courts have recognized that the quintessential objectives of antitrust laws are to preserve economic efficiency and protect price competition for the benefit of consumers. *See, e.g., Nat'l. Soc'y. of Prof'l. Eng'rs. v. United States*, 435 U.S. 679, 695 (1978). By abusing their transmission market power and engaging in unduly preferential and unduly discriminatory conduct, Otter Tail and Minnkota have run afoul of these legally protected objectives. It is a long-settled proposition that the Commission must consider the anticompetitive effects of the actions by entities it regulates. *FPC v. Conway Corp.*, 426 U.S. 271, 279 (1976); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 274 (1973) (interpreting the legislative history of the FPA as indicating "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest."); *Gulf States Utils. Co., et al. v. FPC*, 411 U.S. 747, 758 (1973) ([“the Federal Power Act] vested the Federal Power Commission with important and broad regulatory power This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations”); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968) (“because competitive considerations are an important element of the ‘public interest,’ we believe that . . . the Commission was obliged to make findings related to the pertinent antitrust policies”).

market power of Otter Tail and Minnkota, thereby preventing future occurrences of undue discrimination. Finally, the Commission should assess civil penalties against Otter Tail for violations of the Commission's rules and regulations.

In lieu of the above, Complainants respectfully request that the Commission (1) issue an order requiring Otter Tail and Minnkota to show cause why they have not violated Commission orders, rules, and regulations or, alternatively, (2) establish an evidentiary hearing with fast track processing to address and resolve the issues.

A. REMEDY THE UNDUE PREFERENCE AND UNDUE DISCRIMINATION

The FPA vests the Commission with jurisdiction over the transmission of electric energy and the sale of such energy at wholesale in interstate commerce.²⁰⁰ The interstate transmission grid operated by Minnkota is integrated with that of Otter Tail (a Midwest ISO member) and other portions of the transmission grid in North Dakota, South Dakota, Minnesota, and Canada; electricity in Minnkota's transmission grid is part of a commingled stream of electricity that flows in interstate commerce into neighboring states.²⁰¹ Accordingly, the acts that Minnkota takes when operating its interstate transmission system can and do affect public utilities and their transmission and wholesale sales in the upper Midwest. In 2005, Congress recognized these types of concerns when amending the FPA to allow the Commission to require generally non-jurisdictional entities, such as Minnkota, to interconnect parties wrongly denied interconnection to the interstate transmission grid.²⁰²

²⁰⁰ See 16 U.S.C. § 824.

²⁰¹ See *FPC v. Southern California Edison Co., et al.*, 376 U.S. 205, 208-210 (1972) (any transmission on a system interconnected with systems in other states is interstate transmission); see also *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 462-63 (1972).

²⁰² See 16 U.S.C. § 824j-1(b).

Furthermore, FPA section 309 provides that “[t]he Commission shall have power to perform any and all acts and to prescribe, issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this act.”²⁰³ Courts construing FPA section 309 have held that the statute vests the Commission with broad equitable powers, particularly when imposing remedies:

[W]e observe that the breadth of agency authority is, if anything, at its zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates that statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.²⁰⁴

In this regard, the United States Court of Appeals for the District of Columbia Circuit explained: “The principles of equity are not to be isolated as a special providence of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law.”²⁰⁵ As a result, the Commission itself has recognized what the courts have said: “The Commission, in exercising its discretion, has the duty of exploring all equitable considerations.”²⁰⁶

Against this backdrop, the Complainants request that the Commission remedy the undue preferential and discriminatory conduct by

1. ordering, under FPA section 211A, Minnkota to interconnect the Complainants’ generation project to the Pillsbury Line or, alternatively, directing the Midwest ISO to interconnect Complainants’ generation project to the Pillsbury Line by

²⁰³ 16 U.S.C. § 825h (2000).

²⁰⁴ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967); *see* FPA § 309, 16 U.S.C. § 825n.

²⁰⁵ *Id.* at 160.

²⁰⁶ *Black Marlin Pipeline Co.*, Docket No. CP75-93-001, 21 FERC ¶61,008, p. 61,027 (1982), citing, *Continental Oil Co., et al. v. FPC*, 378 F.2d 510 (5th Cir. 1967).

accessing Otter Tail’s transmission rights (either through the GFAs or another agreement);

2. requiring any necessary modifications to the Pillsbury Line to accommodate energy from Glacier Ridge; and
3. ensuring that Otter Tail, Minnkota, and FPL Energy assume cost responsibility for any necessary modifications to the Midwest ISO operated transmission system which must be made to effectuate energy from the Glacier Ridge project.²⁰⁷

Alternatively, the Complainants request that the Commission return the *status quo ante* and place RES Americas and PEAK Wind in the same position as the affiliates of Otter Tail and Minnkota on January 3, 2008. Under similar circumstances, where a transmission provider granted an undue preference to an affiliate and favored customers which prevented their service from being curtailed, the Commission concluded that the most “appropriate remedy in our view is to return the parties affected to the *status quo ante* to the extent possible.”²⁰⁸ Accordingly, the Commission required the transmission provider, in honoring service requests, to reposition the aggrieved customers in the queue.²⁰⁹ The Commission’s reasoning applies with equal force to the facts underlying the instant Complaint, and, therefore, the same remedy is appropriate here -- given the harm caused by the undue discrimination against PEAK Wind and RES Americas, the Glacier Ridge project should be placed in the same interconnection queue position as the Otter Tail/FPL Energy project.²¹⁰

²⁰⁷ See, e.g., *Borden, Inc., et al. v. FERC*, 855 F.2d 254 (5th Cir. 1988) (Commission can order a pipeline to pay monetary recompense and prejudgment interest to a municipal customer).

²⁰⁸ *Panhandle Eastern Pipe Line Company, et al.*, Docket Nos. CP86-232-000, *et al.*, 39 FERC ¶ 61,274, p. 61,906 (1987) (subsequent history omitted) (“Opinion No. 275”).

²⁰⁹ See *id.*

²¹⁰ The Commission in Opinion No. 275 noted:

B. MITIGATE THE TRANSMISSION MARKET POWER OF OTTER TAIL AND MINNKOTA

1. Ensure that the Otter Tail/Minnkota GFAs do not continue to provide Otter Tail and Minnkota with unchecked transmission market power

As noted above, Otter Tail has exploited the interrelated nature of its transmission system with that of Minnkota's generally non-jurisdictional status. In particular, Otter Tail has engaged in anticompetitive conduct and conferred upon its generation an undue preference, while working in concert with Minnkota to unduly discriminate against Complainants and other generators.²¹¹ This must end. The Commission should find that the GFAs are unjust and unreasonable; that is, the GFAs should be rescinded. These dated agreements are a vestige of the past and conflict with open access transmission principles. They are not "just and reasonable."

Pursuant to FPA section 206, once the Commission finds that a practice is unduly discriminatory and/or unduly preferential, it shall determine a "just and reasonable" practice to be thereafter observed and in force.²¹² Although Otter Tail is a public utility and Minnkota is not, PEAK Wind and RES Americas respectfully request that the Commission find that both have acted in concert by virtue of their highly integrated transmission system and joint ownership/operation of transmission facilities as evidenced by the GFAs to unduly discriminate

We take care to note that although equity requires the repositioning of shippers on the queue, it will have the effect of depriving the on-system customers with whom Panhandle discussed the opening of interim transportation, and PTC, through no fault of their own, of their priority on the queue. Nevertheless, we believe equity compels this result.

Id. at 61,907. Thus, in the instant proceeding, establishing a repositioned queue is required even if it would deprive others of their priority on the queue.

²¹¹ Similarly, Minnkota exploits its preferential access to Otter Tail's system by gaining access to and from public utility transmission systems without first filing a reciprocity OATT.

²¹² 16 U.S.C. § 824e(a). FPA § 206 (a) provides "Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

against PEAK Wind and RES Americas and grant an undue preference to generation owned by FPL Energy and Otter Tail. The Commission should not allow Otter Tail and Minnkota to evade the Commission's open access requirements through Minnkota's non-jurisdictional status. Because Otter Tail and Minnkota have used the GFAs to engage in unduly discriminatory behavior towards RES Americas and PEAK Wind, and have granted an undue preference to FPL Energy, RES Americas and PEAK Wind respectfully request that the Commission rescind the GFAs.

Where parties to a contract affecting rates seek unilaterally to change the agreement, those challenges are reviewed under the "public interest" standard.²¹³ Both the courts and the Commission have acknowledged that this public interest standard is more difficult to satisfy than the just and reasonable standard.²¹⁴

The public interest standard, however, does not apply where third-parties, *i.e.* parties who did not sign a contract or join an agreement, challenge the agreement. In these circumstances, the proper standard of review is the just and reasonable standard. In *Maine Public Utilities Commission v. FERC*,²¹⁵ the U.S. Court of Appeals for the D.C. Circuit held that parties to a settlement agreement could not bind non-signatories to the public interest standard. In that case, the court held that FPA Section 206²¹⁶ guarantees that when acting on a complaint by a third

²¹³ The public interest standard (also known as the *Mobile-Sierra* doctrine) was established in two companion decisions, *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) ("*Mobile*") and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Recently, the Supreme Court ruled that there is only one statutory standard, the just and reasonable standard, but that contracts with fixed terms enjoyed a presumption which can be overridden by a contracting party by a showing that the contract violates the public interest. *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733 (2008).

²¹⁴ See *e.g. Northeast Utilities Service Co. v. FERC*, 55 F.3d 686, 691 (1st Cir. 1995); *Wisc. Pub. Power Inc. v. FERC*, 493 F.3d 239 at 271 (D.C. Cir. 2007).

²¹⁵ *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) ("*Maine PUC*"), rehearing *en banc* pending.

²¹⁶ 16 U.S.C. § 824e (2000 & Supp. 2008).

party that is not a signatory to an agreement, the Commission is obligated to determine whether the rate (or practice) is unjust and unreasonable, not whether it is against the public interest.²¹⁷ The D.C. Circuit explained that “when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply; the proper standard of review remains the ‘just and reasonable’ standard in section 206 of the Federal Power Act.”²¹⁸

Under *Maine PUC*, the Commission must review challenges to the GFAs by non-signatories like RES Americas and PEAK Wind under the just and reasonable standard, not the public interest standard. As Otter Tail and Minnkota admit, the GFAs provide them the ability to plan and develop their transmission systems jointly. However, Otter Tail and Minnkota have chosen to develop their transmission systems in a manner that is unduly discriminatory and unduly preferential in that Otter Tail and Minnkota have refused to even discuss interconnecting the RES Americas/PEAK Wind generation facility to the integrated transmission system, while allowing a later-queued wind generation facility owned by FPL Energy and Otter Tail to prepare to interconnect to the transmission system. Accordingly, RES Americas and PEAK Wind respectfully request that the Commission either modify or rescind the GFAs because they result in unduly discriminatory and unduly preferential practices.

In the alternative, the Commission should strictly construe the GFAs and limit Otter Tail’s use of the Minnkota transmission system solely to serve Otter Tail’s retail load, the stated purpose of the GFAs; that is, Otter Tail should not be able to utilize the GFAs to transmit excess energy that will be sold to third parties. Similarly, Minnkota should only be able (under

²¹⁷ The Commission recently recognized the *Maine PUC* precedent in *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201, 62,290-92 (2008) (Comm’rs Wellinghoff and Kelly, dissenting in part) and *Westar Energy, Inc.*, 123 FERC ¶ 61,252, P 21 (2008).

²¹⁸ *Maine PUC*, 520 F.3d at 478.

the GFAs) to utilize Otter Tail’s facilities to serve Minnkota’s retail load. As a result, Minnkota should not be able (under the GFAs) to utilize Otter Tail’s transmission system to sell excess energy in the Midwest ISO energy markets.

2. Ensure that Otter Tail and Minnkota Comply with Fundamental Requirements of Open Access Transmission

a. The Commission should revoke Otter Tail’s waiver of the Standards of Conduct

Complainants respectfully request that the Commission issue an order revoking Otter Tail’s waiver of the Order No. 889 Standards of Conduct²¹⁹ and directing the utility to make any necessary compliance filings to ensure and confirm compliance with the rules.

b. The Commission should require Minnkota to file a reciprocity OATT, create its own OASIS and comply with posting requirements

Complainants respectfully request that the Commission issue an order finding that Minnkota can neither receive nor provide open access transmission service until (i) Minnkota files an OATT (and LGIP/LGIA) with the Commission and (ii) the Commission finds that Minnkota’s filed OATT substantially conforms or is superior to the Order No. 890 *pro forma* OATT. Additionally, the Commission should revoke Minnkota’s waiver of the Order No. 889 Standards of Conduct²²⁰ and direct Minnkota to establish, maintain, and utilize its own OASIS.

C. ASSESS CIVIL PENALTIES

The Commission should assess civil penalties against Otter Tail in connection with Otter Tail’s knowing and willful violations of the Commission’s rules and regulations outlined above. FPA section 316A, in pertinent part, provides: “Any person who violates any provision

²¹⁹ *Central Minnesota Municipal Power Agency, et al.*, Docket No. OA-97-90-000, *et al.*, 79 FERC ¶ 61,260 (1997) (order granting Otter Tail waiver of Order No. 889 standards of conduct).

²²⁰ *Easton Utils. Comm’n., et al.*, Docket No. OA97-572-000, *et al.*, 83 FERC ¶61,334 (1998) (order granting Minnkota waiver of Order No. 889 standards of conduct).

of part II of this title or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than \$1,000,000 for each day that such violation continues.”²²¹ Otter Tail’s unduly preferential conduct constitutes a serious on-going violation of the FPA and the Commission’s regulations. Otter Tails violations are anticompetitive, based on abuses of its transmission market power, and, as such, merit significant civil penalties.

D. FURTHER PROCEEDINGS

1. Show Cause Order

In lieu of or in addition to the remedies outlined above, Complainants respectfully request that the Commission issue an order requiring the Respondents to show cause why they have not violated the Commission’s orders, regulations, and Commission-approved tariffs. Specifically, Complainants respectfully request that the Commission require each of the Respondents to:

1. File an answer to the allegations contained herein. The answer should conform to the requirements of Rule 213 of the Commission’s Rules, 18 C.F.R. § 385.213 (1996). In its answer, each Respondent should be required to admit or deny, specifically and in detail, each allegation set forth in this pleading and set forth every defense relied on. If the Respondent believes that an allegation is only partially accurate, it should specify that part of the allegation it admits and that part of the allegation it denies.
2. Show cause why --
 - a. Otter Tail and Minnkota have not granted Otter Tail’s generation project an undue preference in interconnection to the interstate transmission grid;

²²¹ 16 U.S.C. § 825o.

- b. Otter Tail and Minnkota have not granted FPL Energy's project an undue preference in interconnection to the interstate transmission grid;
- c. Otter Tail and Minnkota did not confer an undue preference upon their affiliates' interconnection request;
- d. Otter Tail and Minnkota have not unduly discriminated against RES Americas and PEAK Wind in their attempts to interconnect to the interstate transmission grid;
- e. Otter Tail and Minnkota did not unduly discriminate against RES Americas and PEAK Wind by conditioning access to the jointly-owned transmission system upon selling power to Minnkota;
- f. the GFAs between Otter Tail and Minnkota should not be rescinded, or in the alternative, strictly construed to permit one party's access to the other transmission facilities only to serve the party's retail load;
- g. Otter Tail's waiver of the Standards of Conduct should not be revoked.
- h. Otter Tail should not be assessed civil penalties for violations outlined above;
- i. Minnkota has not violated the reciprocity requirements of Order Nos. 888 and 890 by not filing or obtaining approval for a reciprocity OATT;

- j. Minnkota's waiver of the Order No. 889 Standards of Conduct should not be revoked and Minnkota required to establish and utilize its own, separate OASIS;
 - k. Minnkota and Otter Tail's failure to include the Pillsbury Line in transmission planning processes by MAPP and the Midwest ISO does not violate the transmission planning principles set forth in Order No. 890, the Midwest ISO tariff, and the MAPP Attachment K template.
- 3 Separately state all the facts and the arguments that it advances. Each of the Respondents should be required separately to support, with exhibits, affidavits and/or prepared testimony any facts that it alleges, and each Respondent's separate statement of material facts should include citations to supporting data.
4. Respond to the following requests for information and documents:
- a. all agreements (signed or unsigned, written or oral) between Otter Tail, Minnkota, FPL Energy, and affiliates of the above, concerning (i) the wind generation project being developed by FPL Energy and Otter Tail in and around Barnes County, ND, (ii) the Pillsbury Line, and (iii) new Pillsbury Wind 230 kV substation;
 - b. all communications between Otter Tail, Minnkota, FPL Energy, and affiliates of the above concerning the wind generation project being developed by FPL Energy and Otter Tail in and around Barnes County, ND;

- c. copies of all interconnection requests submitted to Minnkota involving wind generation projects being developed by FPL Energy and Otter Tail in and around Barnes County, ND or the Pillsbury Line;
- d. copies of all transmission service requests involving wind generation projects being developed by FPL Energy and Otter Tail in and around Barnes County, ND or the Pillsbury Line; and
- e. Produce all documents pertaining to the matters identified pursuant to “a” through “d,” as well as any and all analyses, reports, studies, workpapers, correspondence (received or sent by any Respondent and its affiliates), and/or supporting documentation concerning the wind generation projects being developed by FPL Energy and Otter Tail in and around Barnes County, ND or the Pillsbury Line.

2. Evidentiary Hearing

If the Commission does not impose the remedies outlined above or issue a show cause order, Complainants respectfully request that the Commission establish hearing procedures in which the matters set forth herein may be fairly and effectively resolved. Complainants have raised issues of material fact that are “best resolved in an evidentiary hearing.”²²²

3. Other Relief

In addition to the above, Complainants respectfully request that the Commission impose any other remedies or grant any other relief deemed appropriate.

²²² See *Aquila, Inc. v. Public Serv. Co. of Colo.*, Docket No. EL03-33-000, 102 FERC ¶ 61,111, 61,293 (2003).

VII.
ADDITIONAL INFORMATION TO COMPLY WITH RULE 206

The following information is submitted in compliance with the requirements of Rule 206(b) of the Commission's Rules of Practice and Procedure.²²³

Rule 206(b)(1)-(2): Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements; explain why the action or inaction violates applicable statutory standards or regulatory requirements.

These matters are addressed at pages 3 to 11. The alleged actions are at pages 16 to 39. The extent to which these actions violate applicable statutory standards or regulatory requirements are addressed at pages 39-71.

Rule 206(b)(3): Set forth the business, commercial, economic or other issues presented by the actions or inaction as such relate to or affect the complainant.

Complainants' commercial and economic interests in the matters presented are set forth on pages 4 to 11 and pages 50-55.

Rule 206(b)(4): Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction.

Complainants are unable to estimate the costs of any facilities needed to upgrade the Midwest ISO facilities absent a detailed study by the Midwest ISO, which has not yet been performed. That said, the projected construction costs of the Pillsbury Line, *i.e.*, approximately \$35 million, is a good proxy for the minimum amount at issue.

Rule 206(b)(5): Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction.

Extensive discussion of the reliability impacts are discussed herein. For example, pages 2 through 5, page 8 and the Affidavit and Exhibits of Omar A. Martino discuss the overload of

²²³ 18 C.F.R. § 385.206(b) (2008).

existing transmission lines throughout the Midwest ISO caused by the Otter Tail/FPL Energy generation project and MAPP's failure to address such matters. The reliability concerns associated with this action can also be found at pages 33 to 35 and 55 to 56 and the impact of such actions on a coordinated regional planning process is discussed at pages 59 to 60.

Rule 206(b)(6): State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and, if so, provide an explanation why timely resolution cannot be achieved in that forum.

The issues presented herein are not pending in an existing Commission proceeding.

Rule 206(b)(7): State the specific relief or remedy requested.

The specific relief sought is addressed on pages 11 to 12 and 71 to 82.

Rule 206(b)(8): Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts, affidavits, and testimony.

The Complainants have provided citations, and, where appropriate and available, various supporting exhibits. In addition, the Complainants attach the Affidavits and Exhibits of William Noeske, Joseph M DeVito, and Omar A. Martino.

Rule 206(b)(9): State (i) whether the Enforcement Hotline, Dispute Resolution Service, Tariff-based dispute resolution mechanisms, or other informal procedures were used; (ii) whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint; (iii) what types of ADR procedures could be used; and (iv) any process that has been agreed on for resolving the complaint.

The Complainants have made several attempts with the Respondents to resolve informally the underlying concerns, but the Complainants have not pursued any of those informal procedures. The extensive factual record, coupled with the need for *immediate Commission action*, would render the above informal procedures ineffective and inefficient under the circumstances.

Rule 206(b)(10): Include a form of notice suitable for publication in the *Federal Register* and submit a copy of the notice on a separate 3½ inch diskette in ASCII format.

A form of notice, in paper and electronic form, is attached to this complaint.

Rule 206(b)(11): Explain with respect to requests for Fast Track Processing pursuant to Section 385.206(h), why the standard process will not be adequate for expeditiously resolving the complaint.

RES Americas and Peak Wind are attempting to develop their project. As such, remedying the undue discrimination and market power as set forth herein, as soon as possible is essential.

VIII.

CONCLUSION

On July 31, Chairman Kelliher testified before the United States Senate's Committee on Energy and Natural Resources.²²⁴ The Chairman explains:

With respect to transmission policy, the Commission has three overarching goals: first, to protect the reliability of the bulk power system; second, to assure open and nondiscriminatory access to the transmission grid, the interstate highway system for wholesale power sales; and, third, to encourage development of a robust transmission grid. There is a relationship among these goals. It is not enough to have open access to the grid – the grid itself must be robust enough to assure reliability and support competitive wholesale markets.

PEAK Wind and RES Americas agree with the Chairman. Regrettably, the actions of Otter Tail and Minnkota do not comport with these goals. Despite being a 60-mile, 230 kV transmission line, the Pillsbury Line was not part of the transmission plan of Minnkota, MAPP, Otter Tail, or

²²⁴ Testimony of the Hon. Joseph T. Kelliher, <http://www.ferc.gov/EventCalendar/Files/20080731102123-Chairmantestimony.pdf> (July 31, 2008) (“Chairman’s Testimony”).

the Midwest ISO.²²⁵ Rather than contribute to a robust transmission grid, Otter Tail and Minnkota are stitching together a “crazy quilt” of unplanned projects designed to advance their own financial interests at the expense of a fair and orderly market and a reliable transmission system.

Specifically, the Pillsbury Line was designed, engineered, permitted, and built by Otter Tail to benefit the generation project it is developing with FPL Energy. According to FPL Energy, the Pillsbury Line will be jointly-owned by Otter Tail, Minnkota and FPL Energy. Furthermore, instead of assisting PEAK Wind and RES Americas in siting facilities in a manner comparable to that it provides itself or its affiliates (as required by Order No. 2003-A), Otter Tail is “jumping over” Glacier Ridge’s prior-queued request to interconnect at the Buffalo Substation at transmission facilities owned by Otter Tail on Minnkota’s 345 kV line. This undue preference was compounded by undue discrimination, that is, Glacier Ridge was denied access to the Pillsbury Line.

An even more serious matter, however, is the fact that MAPP recognizes that energy from the Otter Tail/FPL Energy generation project will overload Midwest ISO transmission lines, but has turned a deaf ear to reliability concerns raised by its own members and has refused

²²⁵ Chairman’s Testimony at 2. Chairman Kelliher emphasized:

The planning requirements of Order No. 890 are particularly important. Having an open and transparent planning process helps eliminate opportunities for discrimination and provides customers with information and studies that will help them decide whether potential upgrades could reduce congestion or enable integration or new resources.

Chairman’s Testimony at 9-10. The Pillsbury Line is a prime example of what happens when open and transparent planning does not occur.

to require Otter Tail and FPL Energy to assume cost responsibility for necessary physical transmission system upgrades in the Midwest ISO. Reliability of the electric transmission grid cannot be sacrificed to benefit a few bad actors that have failed to satisfy fundamental requirements of open and nondiscriminatory access to the interstate transmission grid.

WHEREFORE, RES Americas and PEAK Wind respectfully request that the Commission (1) remedy the undue preference and undue discrimination by requiring that the Glacier Ridge project be interconnected to the Pillsbury Line by (a) ordering, Minnkota to do so under FPA section 211A or (b) directing the Midwest ISO to interconnect the project by accessing Otter Tail's transmission rights the GFAs; (2) ensure that Otter Tail and FPL Energy assume cost responsibility for any necessary modifications to the Midwest ISO operated transmission system which must be made to interconnect and transmit energy from the Glacier Ridge project; (3) prevent future unduly preferential and unduly discriminatory conduct by (a) rescinding the GFAs and the preferential transmission rights or, in the alternative, strictly construing the GFAs to limit the transmission rights to transactions to serve retail load; (b) revoking the standards of conduct waivers previously issued to Otter Tail and Minnkota, which would require Otter Tail to separate its merchant and transmission operations and Minnkota to utilize an OASIS; (c) requiring Minnkota to submit and receive Commission approval for a reciprocity OATT; and (4) assessing appropriate civil penalties. In lieu of the above, the Commission should issue an order requiring Otter Tail and Minnkota to show cause why they have not violated Commission orders,

rules, and regulations or, alternatively, establish an evidentiary hearing with fast track processing to address and resolve the issues. Finally, RES Americas and PEAK Wind request that the Commission impose any other remedies or grant any other relief deemed appropriate.

Respectfully submitted,

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Renewable Energy Systems Americas, Inc. and
PEAK Wind Development, LLC

LIST OF ATTACHMENTS

Attachment 1: Affidavit of William Noeske

- Exhibit WN-1 A copy of the FPL Energy's Memorandum of Option for Easement Agreement and Option for Easement Agreement
- Exhibit WN-2 *Megawatt Daily* Price Report for the Midwest ISO's Minnesota Hub (October 16, 2007)
- Exhibit WN-3 *Megawatt Daily* Price Report for the Midwest ISO's Minnesota Hub (December 18, 2007)
- Exhibit WN-4 February 29, 2008 Letter from PEAK Wind to Minnkota
- Exhibit WN-5 March 3, 2008 Letter from Minnkota to PEAK Wind
- Exhibit WN-6 E-mail correspondence from Rod Scheel of Otter Tail to Bill Noeske of PEAK Wind

Attachment 2: Affidavit of Joseph M. DeVito

- Exhibit JMD-1 Otter Tail's March 29, 2007 Press Release: "Largest Wind Farm in North Dakota Announced;" Minnkota's March 29, 2007 Press Release: "Minnkota, FPL Energy Announce Wind Farm Plans;" Otter Tail's September 10, 2007 Press Release: "Portion of Langdon Wind Energy Center to be owned by Otter Tail Power Company"
- Exhibit JMD-2 Otter Tail's February 5, 2008 Press Release: "Otter Tail Power Company, Minnkota Power Cooperative Plan to Build Generation Outlet in North Dakota"
- Exhibit JMD-3 Letter of Intent filed with the North Dakota Public Service Commission by Otter Tail and Minnkota on February 5, 2008
- Exhibit JMD-4 March 18, 2008 Application filed with the North Dakota Public Service Commission by Otter Tail and Minnkota (figures omitted)
- Exhibit JMD-5 April 17, 2008 Amended Application filed with the North Dakota Public Service Commission by Minnkota (figures omitted)
- Exhibit JMD-6 Otter Tail's April 30, 2008 Press Release: "Otter Tail Power Company Announces Major Investment in Wind Energy Generation"

- Exhibit JMD-7 Otter Tail’s August 11, 2008 Press Release: “Part of M-Power Wind Site to be Owned by Otter Tail Power Company”
- Exhibit JMD-8 Otter Tail Organizational Chart and Midwest Construction Services Organizational Chart
- Exhibit JMD-9 Information on Otter Tail Corporation subsidiary Ventus Energy Systems
- Exhibit JMD-10 Information on Otter Tail Corporation subsidiary DMI Industries
- Exhibit JMD-11 Minnkota’s May 13, 2008 Press Release: “Minnkota, Minnesota Power Announce Strategic Agreement”

Attachment 3: Affidavit of Omar A. Martino

- Exhibit OAM-1 Map of Minnkota and Northern Municipal Power Agency Joint Service Territory
- Exhibit OAM-2 Map of Otter Tail Service Territory
- Exhibit OAM-3 Map of MAPP System
- Exhibit OAM-4 Map showing Otter Tail, FPL Energy, PEAK Wind generation projects, Pillsbury Line, and Related Transmission Facilities
- Exhibit OAM-5 Minnkota’s Interconnection Queue
- Exhibit OAM-6 Maple River Wind Generation Interconnection System Impact Study: Report Submitted to MAPP Design Review Subcommittee by Minnkota Power Cooperative, Inc. Prepared by Excel Engineering, Inc. (May 10, 2008)
- Exhibit OAM-7 Independent Report Performed by RES Americas on Maple River Wind Generation Interconnection System Impact Study (August 8, 2008)
- Exhibit OAM-8 Minutes of the MAPP Design Review Subcommittee Meeting on May 30, 2008

Attachment 4: Form of Notice

CERTIFICATE OF SERVICE

I hereby certify that I have this day served via electronic mail and via overnight delivery the foregoing document upon the following parties as required by Rule 206(c) of the Commission's Rules and Regulations, 18 C.F.R. § 385.206(c):

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DATED at Washington, D.C., this 29th day of August, 2008.

Marcia A. Stanford