

131 FERC ¶ 61,162
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

SunZia Transmission, LLC

Docket No. EL10-39-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued May 20, 2010)

1. On January 29, 2010, SunZia Transmission, LLC (Petitioner) filed a petition for declaratory order (Petition) requesting expedited Commission approval of its proposal to allocate firm transmission rights, reserve capacity to serve affiliated generators, and offer capacity at negotiated rates, including through pre-subscribed contracts for a transmission project it is currently developing in New Mexico and Arizona (Project). The Commission finds that Petitioner has not proffered necessary information that would support the approvals it requests. However, the Commission finds that Petitioner may be able to avail itself of some of the authorizations it seeks if it restructures its proposal to conform to Commission precedents and policy. Accordingly, the Commission denies the requested approvals without prejudice to Petitioner modifying its proposals to conform to Commission precedents and policy regarding open access to transmission service, as discussed below.

I. Background

A. Description of the Project

2. Petitioner states that it is in the preliminary stages of developing the Project, which will consist of two 500 kV transmission lines running 460-miles between a new substation located in Lincoln County, New Mexico and a new substation in Pinal County, Arizona, with interconnections to existing transmission lines through substations along the Project's path. Petitioner indicates that, depending upon market conditions, the Project will comprise either two 500 kV alternating current (AC) lines or one 500 kV AC line and one 500 kV bipolar direct current line. According to Petitioner, the Project has an expected capacity of 3,000 MW or 4,500 MW, depending upon the final configuration.

3. Petitioner states that in 2006, the Southwest Area Transmission Subregional Planning Group (SWAT), a transmission planning organization within the Western Electricity Coordinating Council (WECC), identified the need for significant

transmission expansion between New Mexico and Arizona to serve load growth, increase system power transfer limits and import capability requirements, and provide service for the growing demand for renewable energy resources, particularly from remote renewable energy zones. According to Petitioner, the Project will provide new delivery paths to electricity markets for location-constrained renewable energy resources in New Mexico and Arizona. Petitioner states that in 2006, it requested that WECC initiate the regional planning process for the Project.¹ Petitioner notes that the Project is currently in Phase 2 of the WECC Three-Phase Project Rating Process with completion expected by June 2010 and a final project rating assigned by WECC by September 2010. Petitioner states that it anticipates starting construction on the Project in early 2012 with a projected in-service date of late-2013 or early-2014.

B. Project Ownership

4. With regard to ownership of the Project, Petitioner states that on December 16, 2006, it published notice of an open season for investment in and ownership of the Project, and that it subsequently discussed the Project with numerous interested parties, including all local load serving entities in Arizona and New Mexico. Petitioner states that it owns the Project jointly, as a tenant in common, with Salt River Project Agricultural Improvement and Power District (Salt River),² and Tri-State Generation and Transmission Association, Inc. (Tri-State),³ which own 13 percent and one percent of the

¹ The WECC regional planning process is intended to inform others of the opportunity to participate in or review a project, and to solicit participation. It is intended to avoid duplicate projects and allow a new project to integrate others' needs by mutual agreement. See WECC, *Overview Of Policies And Procedures For Regional Planning Project Review, Project Rating Review, And Progress Report* (Revised April 2005), available at http://wecc.biz/library/WECC%20Documents/Miscellaneous%20Operating%20and%20Planning%20Policies%20and%20Procedures/Overview%20Policies%20Procedures%20RegionalPlanning%20ProjectReview%20ProjectRating%20ProgressReports_07-05.pdf. Petitioner states the pre-operation schedule for the Project is as follows: (1) Phase 1 - licensing, permitting, preliminary engineering, and project rating determination; (2) Phase 2 - right-of-way acquisition, solicitation and award of engineering, procurement, and construction contract(s); and (3) Phase 3 - financing, engineering, procurement, and construction.

² Salt River is a political subdivision of the State of Arizona that owns and operates electric facilities, including transmission facilities. Petition at 12.

³ Tri-State is an electric cooperative corporation that generates and transports electricity to its members' systems located in New Mexico, Colorado, Nebraska, and Wyoming. *Id.*

Project, respectively. Petitioner, which owns 86 percent of the Project, is in turn owned by Tucson Electric Power Company (Tucson Electric), SouthWestern Power Group (SW Power), ECP SunZia, LLC (ECP SunZia), and Shell WindEnergy Inc. (Shell) (collectively, SunZia Owners).⁴ Petitioner states that its 86 percent share of the Project will be allocated among the SunZia Owners as follows: Tucson Electric, 1 percent; SW Power, 40 percent; ECP SunZia, 40 percent; and Shell, 5 percent.

5. Petitioner states that Tucson Electric is an investor-owned utility that serves load in a franchised service territory in southern Arizona and has a Commission-approved open access transmission tariff (OATT). Petitioner explains that SW Power is an independent developer of generation and transmission projects and is wholly and indirectly owned by MMR Group, Inc., a privately-owned construction service firm based in Baton Rouge, Louisiana.⁵ ECP SunZia is wholly owned by Energy Capital Partners I, LP and its parallel funds, each of which are investment funds whose general partner is Energy Capital Partners GP I, LLC, whose managing member, in turn, is Energy Capital Partners, LLC (ECP LLC). ECP LLC and a related entity are private equity firms that sponsor investment funds organized to invest in energy projects.⁶ Shell, a wholly-owned subsidiary of Shell Oil Company, is described by Petitioner as an independent generation developer.

6. Additionally, Petitioner represents that it is a special purpose entity that currently does not own or control any electric facilities. Petitioner suggests that there are no concerns with SW Power, ECP SunZia, and Shell currently owning or controlling any electric facilities and note those entities own or control only limited interconnection facilities required to connect individual generating facilities to the transmission grid. However, Petitioner notes that SW Power is currently developing the Bowie Power Station, a 1,000 MW natural gas generating facility in southeastern Arizona. In addition, Petitioner submits, one of ECP SunZia's owners holds membership interests in Green Energy Express LLC, which recently obtained the Commission's conditional approval for rate incentives for its proposed 2,000 MW project in Riverside County, California.⁷ Another ECP SunZia owner owns NextLight Renewable Power, LLC, which is

⁴ Salt River, Tri-State and the four SunZia Owners are referred to collectively as "Project Sponsors."

⁵ Petitioner states that SW Power is the project manager of Petitioner. Petition at 11.

⁶ See Petition at 14-15 & nn.16-17.

⁷ See *Green Energy Express LLC*, 129 FERC ¶ 61,165 (2009), *order on reh'g*, 130 FERC ¶ 61,117 (2010) (*Green Energy Express*).

developing solar power in the general vicinity of the Project. The same ECP SunZia owner also indirectly owns Empire Generating Co., LLC, which is currently developing a power plant in New York and indirectly owns less than 1 percent partnership interest in Energy Future Holdings Corporation, which holds a portfolio of competitive and regulated energy companies in Texas.⁸ Petitioner also states that Shell has an ownership interest in eight operational wind-powered generation facilities and is developing new wind generation in New Mexico and Arizona.

7. Petitioner states that Salt River, Tri-State, and Petitioner (including the SunZia Owners) entered into a Memorandum of Agreement (MOA) for Phase I of the Project. Under the MOA, the parties agreed to invest approximately \$26 million total, on a pro rata basis relative to their share of the Project, to cover the Phase I development costs.⁹ Petitioner states that the parties to the MOA may elect to continue funding the Project through Phase 2 and Phase 3 of the Project, while Petitioner will also consider participation of additional investors in the Project provided that the new investors contribute value commensurate with their risk assumed at the time of investment.¹⁰

C. Planned Operations and Tariffs

8. Petitioner does not plan to file an OATT. Instead, Petitioner states that Tucson Electric will offer transmission service using its pro rata share of the Project pursuant to its existing OATT and open access same-time information system (OASIS). SW Power, ECP SunZia, and Shell plan to file separate OATTs, to provide service using their pro rata shares of the Project's capacity, which Petitioner states will have comparable provisions for operations of and service on the Project, including expansion obligations. Petitioner states that a consolidated OASIS for SW Power, ECP SunZia and Shell will be established with a single administrator to calculate their shares of total transfer capability and available transfer capability and to coordinate service for users of the Project.¹¹ Further, Petitioner states that, with regard to requests for Project expansion, those three OATTs will set forth uniform service request procedures to be administered by the

⁸ Petition at 14-15.

⁹ *Id.* at 12.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 16.

OASIS administrator and will uniformly provide for participant funding for such expansions.¹²

9. Petitioner states that the Project will have one operation and maintenance (O&M) manager to be selected from among existing transmission providers/operators through a competitive solicitation process. Salt River and Tri-State plan to use their pro rata shares of the Project's transmission capacity pursuant to their respective tariffs, with each using its existing OASIS for service requests on its portion of the line.¹³

II. Petition

10. Petitioner requests that the Commission find the following: (1) that each SunZia Owner may be allocated firm transmission rights representing 100 percent of its pro rata investment in the Project's transmission capacity; (2) that SW Power, ECP SunZia, and Shell may use up to 100 percent of their pro rata share of capacity on the Project to serve affiliated generators that are qualifying facilities (QFs) or eligible facilities of exempt wholesale generators (EWGs) with no resulting jeopardy to their QF or EWG status; and (3) that SW Power and ECP SunZia may allocate up to 100 percent of their pro rata share of the Project's transmission capacity through pre-subscribed negotiated rate contracts.

11. Petitioner also seeks expedited action for its Petition. Petitioner states that it anticipates that the Project will be in service in late-2013 or early-2014. However, Petitioner argues that the Project cannot advance in the absence of regulatory certainty with respect to the transmission capacity allocation and rate principles described in the Petition. Petitioner states that in order for the Project to remain on its proposed schedule for financing and construction, it requests that the Commission grant its requested relief and issue an order within 60 days from the date of its filing. Petitioner's arguments in support of its requests are discussed below.

III. Notice and Interventions

12. Notice of Petitioner's filing was published in the *Federal Register*, 75 Fed. Reg. 7473 (2010), with interventions and protests due on or before February 19, 2010. ECP SunZia and Tri-State filed motions to intervene. Tonbridge Power, Inc. (Tonbridge) filed

¹² *Id.* We note that Petitioner does not define what it means by "participant funding."

¹³ *Id.* at 15.

a timely motion to intervene and comments supporting the Petition.¹⁴ Electrical District No. 4 of Pinal County, Arizona (ED4) filed a timely motion to intervene and comments requesting that the Commission deny Petitioner's request for expedited action. Petitioner filed an answer to ED4's comments.

13. Tonbridge supports Petitioner's proposal for SW Power and ECP SunZia to pre-subscribe up to 80 percent of the Project's total capacity (40 percent each) through bilateral, negotiated-rate contracts with anchor customers. Tonbridge asserts that the need to obtain early commercial support to finance the significant upfront investments required for merchant transmission projects supports such anchor customer agreements. Tonbridge also asserts that permitting Petitioner to pre-subscribe capacity to the extent requested would mitigate risks faced by merchant transmission developers, such as Tonbridge and Petitioner, which are not eligible for other valuable rate incentives provided to franchised public utilities, and would advance market competition. Tonbridge urges the Commission not to treat the proposal accepted in *Chinook Power Transmission, LLC*¹⁵ as a ceiling on the amount of capacity that may be pre-subscribed by anchor customers in negotiated rate authority applications following that order.

14. In its comments, ED4 asserts that the Petition is premature. ED4 questions the federal and state permitting processes Petitioner has undertaken for the Project and contends that the Project's inclusion in the WECC Regional Planning Project Review and Project Rating Process is insufficient to ensure that the Project will not cause adverse reliability impacts. ED4 asserts that Petitioner relies heavily on the SWAT process to describe the Project's purpose (i.e., as a renewable energy project). ED4 contends that although the Project was announced at SWAT, it is not accurate to state that the Project originated out of the SWAT process.

15. In addition, ED4 argues that the Project would inject up to 4,500 MW of power at a new station in Pinal County with no specific identified markets or contracts or details of how the Project power will reach markets. Stating that there is considerable potential for renewable generation projects in Arizona and New Mexico, beyond the capacity of the Project, ED4 states that it is concerned about the need for expedited action for the

¹⁴ In its comments, Tonbridge states that it is a publicly traded Ontario, Canada corporation engaged in the development of merchant transmission projects in Canada and the United States through its subsidiaries, Montana Alberta Tie Ltd. and MATL LLP.

¹⁵ 126 FERC ¶ 61,134 (2009) (*Chinook*) (accepting a proposal to pre-subscribe 50 percent of a merchant transmission project's initial capacity under negotiated rate contracts).

Petition for this particular project in an area where other transmission upgrades are also needed.

16. In response, Petitioner reiterates that the Project originated out of SWAT¹⁶ and argues that, contrary to ED4's allegations, Petitioner's ongoing participation in WECC's Three Phase Rating Process ensures that any reliability concerns will be addressed before the Project may proceed. Petitioner also argues that the Petition describes the interactions it had with state and local agencies and authorities. Moreover, Petitioner adds additional detail on its interactions with the Arizona Corporation Commission, the New Mexico Public Regulation Commission, and the Pinal County Board of Supervisors.¹⁷

17. In response to ED4's argument that Petitioner has not provided enough information on how power transported over the Project will reach markets, Petitioner argues that customers of the Project will submit transmission service requests for service from Pinal County substation to their points of delivery in the same manner that location-constrained resources in other markets reach remote load centers.

18. In response to ED4's challenge to the need for expedited Commission action, Petitioner argues that with the amount of investment necessary at this stage of the Project, especially in light of the current credit markets, the Project will be unable to advance without Commission assurance as to the transmission capacity allocation and rate principles as set forth in the Petition.

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the

¹⁶ Petitioner attaches to its answer a March 8, 2010 letter from the Chairman of SWAT to verify that the Project originated out of SWAT regional planning efforts.

¹⁷ See SunZia Transmission LLC Answer at 2-4.

decisional authority. We will accept Petitioner's answer because it has provided information that assisted us in our decision-making process.¹⁸

B. Substantive Matters

21. The Commission is committed to supporting the development of new transmission infrastructure that is essential not only to providing location-constrained resources with access to markets, but also to meeting our nation's current and future energy needs.¹⁹ As discussed more fully below, the Commission finds Petitioner's proposal to be an innovative approach that has the potential to advance these goals. However, further refinements are required to Petitioner's proposal, in accordance with Commission precedents and policy to ensure that the goals of open access are preserved and that the rates for transmission service on the Project remain just and reasonable, such as by limiting Petitioner's ability to withhold Project capacity from the market.

22. With regard to Petitioner's request for expedited action, we agree with ED4 that Petitioner has not provided sufficient justification for the Commission to grant expedited approval of Petitioner's plans for allocation of firm transmission rights and negotiated rates for the Project. Nonetheless, the Commission has reviewed the facts presented in the Petition and provides guidance as to the Commission precedent and policies as they relate to the proposals made by and goals of Petitioner. Accordingly, we deny the requested approvals without prejudice to Petitioner modifying its proposals to conform to Commission precedents and policy regarding open access to transmission service, as discussed below.

1. Allocation of Firm Transmission Rights

a. Petitioner's Position

23. Petitioner states that since 2006, investment in the Project has been open to all potential investors and that the Project Sponsors effectively engaged in open season bidding for the opportunity to invest in the Project. Petitioner also states that the Project Sponsors are taking the full up-front risk of Project development through to commercial operation. Petitioner notes that despite its interposition, the SunZia Owners are in effect

¹⁸ We will treat ED4's comments, in which ED4 requests that the Commission deny Petitioner's request for expedited approval, as a protest for the purposes of Rule 213(a)(2).

¹⁹ *Tres Amigas LLC*, 130 FERC ¶ 61,207 (2010) (*Tres Amigas*); *see also California Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061 (2007).

the direct joint venture owners of the Project for Commission regulatory purposes.²⁰ Petitioner argues that even if the Project had not held an open season for investment, the SunZia Owners should be allocated 100 percent of “their pro rata shares of the Project’s capacity” because they are fully funding their shares of the Project.²¹ Petitioner adds that the Commission has consistently held that participant funding should accord priority rights to use the line.²²

b. Commission Determination

24. Petitioner requests that the Commission find that each SunZia Owner “may be allocated firm transmission rights representing 100 percent of its *pro rata investment in the Project’s transmission capacity*”²³ based on their participation in the process that Petitioner characterizes as an “open season” for investment. The manner in which Petitioner has framed its request presumes that by owning the Project, each of the SunZia Owners should have firm transmission service rights to the extent of each owner’s ownership interest in the Project. However, the extent to which investment in a transmission project grants a party firm transmission service rights is governed by the Commission’s open access policies.²⁴ As proportionate owners of the Project, the SunZia Owners are responsible for providing access to firm transmission service rights on their respective portions of the Project in a fair, open, and transparent manner consistent with the Commission’s open access policies.²⁵ The SunZia Owners may

²⁰ Petition at 17 n.18.

²¹ *See id.* at 17.

²² *See id.* (citing *Northeast Utilities Serv. Co. and NSTAR Elec. Co.*, 127 FERC ¶ 61,179, at P 27 & n.27, *order on reh’g*, 129 FERC ¶ 61,279 (2009) (*NU/NSTAR*)).

²³ Petition at 16 (emphasis added).

²⁴ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

²⁵ Our determination addresses only the Commission-jurisdictional portion of the Project (i.e., the 86 percent owned-jointly by the SunZia Owners), not the portion owned by Salt River and Tri-State, which are non-jurisdictional entities. However, the Commission has stated that where a transmission facility is jointly owned by a public utility subject to the Commission’s jurisdiction and a non-jurisdictional entity, the jurisdictional public utility is required to offer service over its share of the joint facilities and any joint ownership contracts must not include restrictions on the usage of jointly

(continued...)

therefore set aside capacity for their own use (or, as discussed below, the use of their affiliates) only to the extent they comply with the requirements of Order No. 888.

25. Each of the SunZia Owners is a transmission owner/provider of Project capacity in proportion to its investment in the Project, because each, in response to the open season for investment in the Project, invested in the jurisdictional portion of the Project by way of an investment in Petitioner. Additionally, the SunZia Owners executed the MOA under which the parties agreed to invest approximately \$26 million total, on a pro rata basis, to cover the Phase I development costs. Thus, the SunZia Owners may have ownership shares in the Project in proportion to their pro rata investment in the Project. However, this does not equate to these entities having exclusive discretion to use the capacity on their portion of the Project in any manner they wish. Our concern here is how and whether each owner's share of capacity is made available on a not unduly discriminatory basis and at rates that are just and reasonable.

26. Regarding Petitioner's assertion that the SunZia Owners should have exclusive firm transmission service rights based on their pro rata ownership shares on the theory that the Project involves participant funding, we disagree. As we have found above, each of the SunZia Owners is responsible for providing access to firm transmission service rights on their respective allotted portion of the Project consistent with the Commission's open access policies.

27. The SunZia Owners contend that the Commission's approval of a participant-funded transmission project in *NU/NSTAR* supports their request. We disagree. In *NU/NSTAR*, the transmission owner/provider proposed to build a project for an unaffiliated transmission customer that funded all of the transmission owner's portion of the project pursuant to a transmission service agreement in exchange for firm rights to that line. The Commission affirmed that, as the funder of the line, the customer had priority rights to use the capacity.²⁶ By contrast, Petitioner proposes here for the SunZia

owned transmission facilities by third parties. *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,691-92 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) (Order No. 888).

²⁶ The Commission noted that *NU/NSTAR* remained subject to open access requirements including the obligation to expand as necessary to serve future transmission customers. *NU/NSTAR*, 127 FERC ¶ 61,179 at P 27.

Owners, as funders of the project, to acquire firm transmission service rights for the purpose of providing service to *third parties*, including affiliates, pursuant to OATTs. As transmission providers, the SunZia Owners are subject to the Commission's open access policies with regard to the sale of those rights to third parties, including affiliates as discussed below.

28. With regard to the operational and tariff plans for the Project, Petitioner states that Salt River, Tri-State, and Tucson Electric plan to offer transmission service using their respective shares of the Project pursuant to each entity's existing OATT and OASIS. SW Power, ECP SunZia, and Shell plan to file and maintain separate OATTs for their pro rata shares of the Project. Petitioner also plans to have one OASIS administrator to calculate SW Power's, ECP SunZia's, and Shell's shares of total transfer capability and available transfer capability and to coordinate service to users of the Project. Petitioner also states that it will designate one O&M manager for the Project. The Commission finds these operational and tariff plans to be reasonable as they will streamline and ensure efficient operation, maintenance and use of the Project. However, to ensure that usage rights on the Project, responsibility for operation of the line, transmission planning, and interconnection and expansion requests are clearly detailed to provide for transparent and nondiscriminatory access to the Project's transmission capacity, the SunZia Owners should develop and file a coordinated ownership and operating agreement(s), along with any required OATTs.²⁷

2. Allocation of Capacity to Serve Affiliated Generators

a. Petitioner's Position

29. Petitioner requests that SW Power, ECP SunZia, and Shell be able to use up to 100 percent of their pro rata share of the Project to transmit power from affiliated generators that are QFs or eligible facilities of EWGs with no resulting jeopardy to their QF or EWG status. Petitioner states that "to the extent that the line is used by affiliated generators, its use would be equivalent to a generat[or] tieline."²⁸ Petitioner also states that the

²⁷ Similar agreements exist for other jointly-owned projects in the West, such as the California-Oregon Intertie. *See PacifiCorp*, 121 FERC ¶ 61,278 (2007) (approving an uncontested offer of settlement that provides for the shared usage, coordinated operation, maintenance, and planning of the jointly-owned California-Oregon Intertie, including through a Coordinated Operation Agreement and a Path Operating Agreement). As noted above, such agreements must not include restrictions on the usage by third parties of transmission facilities jointly owned by public and non-public utilities. *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,691-92.

²⁸ Petition at 18.

Commission has consistently allowed generators to own and operate generator tielines to connect with the grid, while maintaining their generation only status. According to Petitioner, “[u]nder Commission precedent, entities that own generation exempt from certain [Commission] regulation (i.e., QFs and eligible facilities of EWGs) may build interconnecting transmission facilities as proprietary generat[or] [tielines] that [the Commission] considers to be part of the QF or eligible facility of the EWG.”²⁹ Petitioner also states that such generator tielines are typically subject only to interconnection and transmission requests for any unutilized portion of the line pursuant to sections 210, 211, and 212 of the Federal Power Act (FPA),³⁰ but the Commission has required the QF or EWG to file an OATT where a third party requests service on the line.

30. Petitioner states that Shell intends to use the Project to transmit power generated by new renewable wind generation that it is developing in New Mexico to the western terminus of the Project in Arizona. Petitioner states that this use is consistent with the principal purpose of the Project—i.e., to enable renewable resources in New Mexico to access western load centers. Petitioner adds that Shell currently intends to use 100 percent of its pro rata share of the Project for its own wind generation, but is also a potential customer who may purchase transmission service rights from one or more of the other SunZia Owners.³¹ Petitioner adds that the other SunZia Owners may also use some or all of their respective portions of the Project for affiliated generation (e.g., SW Power's Bowie power plant and ECP SunZia-affiliated generation projects in early-stage development located in the vicinity of the Project).³²

31. Petitioner states that SW Power, ECP SunZia and Shell have committed to file separate OATTs (to the extent that they do not already have one) to ensure that third parties will have comparable access to any unutilized capacity of the Project not used for affiliated generation.³³ Petitioner notes that it anticipates the availability of interruptible

²⁹ *Id.* at 18-19 (citing *Oxbow Geothermal Corp.*, 67 FERC ¶ 61,193 (1994); *Termoelectrica U.S. LLC. et al.*, 102 FERC ¶ 61,019 (2003); 18 C.F.R. § 292.101(b)(1) (2009); *Aero Energy LLC*, 115 FERC ¶ 61,128 (2006), *order granting modification*, 116 FERC ¶ 61,149 (2006), *final order directing interconnection and transmission service*, 118 FERC ¶ 61,204 (2007), *order denying reh'g*, 120 FERC ¶ 61,188 (2007)).

³⁰ 16 U.S.C. §§ 824i, 824j, 824k (2006).

³¹ Petition at 18.

³² *Id.* at 18 n.21.

³³ *Id.* at 19.

capacity over SW Power's, ECP SunZia's, and Shell's shares of the Project and potential extra capacity available to third parties while the affiliated generation is being built.³⁴

b. Commission Determination

32. The Commission considers Petitioner's requested approval to be two separate inquiries: (1) whether SW Power, ECP SunZia, and Shell may use up to 100 percent of their respective pro rata shares to serve affiliated generators and (2) if such use is permissible, will using their respective portions of the Project to serve affiliated generators that are QFs or eligible facilities of EWGs jeopardize the QF or EWG status of those affiliates. We address the latter question first.

33. Petitioner states that the Project should be characterized as a generator tieline if it is used exclusively by affiliated generators. Accordingly, Petitioner requests that the Commission extend its QF/EWG generator tieline precedent to cover use of the Project to transmit affiliated generation.

34. The Commission does not find the Project to be considered a generator tieline for the purpose of servicing SW Power's, ECP SunZia's, and Shell's affiliated generators.³⁵ Here, the Project will consist of two 500 kV transmission lines running 460-miles, and will have multiple points of interconnection.³⁶ Further, Petitioner has not explained how the Project can be viewed simultaneously as a generator tieline for some or all of SW Power's, ECP SunZia's, and Shell's capacity, as a network transmission facility for Tucson, and as a transmission line providing service to anchor customers under negotiated rate contracts to some or all customers of SW Power and ECP SunZia (as discussed below). The Commission finds such physical attributes and flexible use to be beyond those of a generator tieline.

35. With regard to the status of QFs or eligible facilities of EWGs that may obtain transmission service over the Project (through arrangements other than those denied above) we find that the QF status of any such facility would not be affected by its use of

³⁴ *Id.* at 19 n.24 (citing *Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149 (2009) (*Milford*)).

³⁵ See *NorthWestern Corporation*, 127 FERC ¶ 61,266 at P 27 (2009) (finding that "generator [tie]lines...consist of 'limited and discrete facilities' that do not form an integrated transmission grid, but instead connect at two points—a generating unit and a substation—without any electrical breaks between the two points").

³⁶ Petition at 3.

the Project. Moreover, given that we do not find the Project to be a generator tieline, it should not be included in any QF certification.

36. Petitioner also asks whether SW Power, ECP SunZia, and Shell may use up to 100 percent of their respective pro rata shares of transmission capacity to serve affiliated generators. We interpret this request as one to allow SW Power, ECP SunZia, and Shell to grant their affiliates priority over transmission capacity should third party customers seek service. As explained above, transmission providers are required under the Commission's open access policies to provide for open, transparent, non-discriminatory access to their transmission systems. Granting affiliates of SW Power, ECP SunZia, and Shell priority rights to 100 percent of the available capacity on these transmission owners' shares of the Project does not appear to allow non-affiliates open, transparent, and non-discriminatory access to their transmission systems.

37. We recognize that the Commission has accepted proposals for transmission line owners to reserve capacity where the owners have specific plans to develop generation resources to be served by the line. In *Aero Energy LLC*³⁷ and *Milford Wind Corridor*,³⁸ the Commission found that, because the transmission owners had pre-existing specific plans with milestones for construction of generation and had made material progress toward meeting those milestones, they may have firm priority rights on their lines.³⁹ Here, Petitioner does not describe any specific plans or milestones that SW Power, ECP SunZia and Shell may have as transmission owners/providers of their respective portions of the Project. Moreover, in accepting the proposals in *Aero* and *Milford*, the Commission determined that the developers as transmission owners would be required to offer service on their transmission lines until they were ready to use their firm capacity. Transmission owners/providers may not provide priority use of transmission capacity that

³⁷ 116 FERC ¶ 61,149 (2006) (*Aero*).

³⁸ 129 FERC ¶ 61,149 (2009) (*Milford*). We note that, in *Milford*, the pre-existing development plans of the transmission tieline owner included the future transfer of ownership interests in the line to affiliates developing their own generation projects. Affiliates that become transmission owners can obtain firm priority rights to the extent they use the line to serve their own load, or demonstrate specific plans with milestones to use the line in the future, provided they offer open access in the meantime. In contrast, Petitioners here seek authorization to retain ownership of the transmission line while providing priority use to affiliated third parties. *Id.* P 5.

³⁹ See *Milford*, 129 FERC ¶ 61,149 at P 22; *Aero*, 116 FERC ¶ 61,149 at P 28. This is not dissimilar to the Commission's precedent regarding traditional public utilities' rights to reserve transmission capacity needed for reasonably forecasted native load needs. See, e.g., *Nevada Power Co.*, 97 FERC ¶ 61,324, at 62,492 (2001).

is inconsistent with the Commission's open access policies, whether to affiliated or unaffiliated third parties.

3. Request for Negotiated Rate Authority

38. As discussed above, the Commission has demonstrated a commitment to fostering the development of merchant transmission projects where reasonable and meaningful protections are in place to preserve open access principles and to ensure that the resulting rates for transmission service are just and reasonable. The Commission, in recognizing the financing realities faced by merchant transmission developers and the customer-protection mandates of the FPA, has recently refined its approach on how it determines whether or not to grant negotiated rates.⁴⁰ Specifically, the Commission has focused on the following four areas of concern: (1) the justness and reasonableness of rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements.⁴¹ This approach allows the Commission to use a consistent analytical framework to evaluate requests for negotiated rate authority from a wide range of merchant projects that can differ substantially from one project to the next.⁴² As discussed below, Petitioner's plans that SW Power and ECP SunZia be allowed to offer transmission service over the Project under negotiated rate authority, as proposed currently, does not address these four concerns.

a. Just and Reasonable Rates

i. Petitioner's Position

39. Petitioner states that SW Power and ECP SunZia meet the Commission's definition of merchant transmission owners because they are both assuming all market risk associated with the development and construction of their respective shares of the project with no current opportunity to recoup such costs unless and until the Project achieves commercial operation and the capacity of the Project is subscribed.⁴³ Petitioner notes that transmission and renewable generation developers have experienced financing difficulties over the past 12 to 18 months and that from September 2008, the economy

⁴⁰ See *Chinook*, 126 FERC ¶ 61,134.

⁴¹ *Id.* P 37.

⁴² *Tres Amigas*, 130 FERC ¶ 61,207 at P 38.

⁴³ Petition at 21. Petitioner notes that SW Power or ECP SunZia may seek reservation payments or similar arrangements from renewable developers to help mitigate this investment risk, through arm's-length negotiations. *Id.* at n.28.

has been in a severe global recession, with credit markets seeing marked deterioration and the risks of financing increasing dramatically.⁴⁴ Petitioner argues that under these circumstances, SW Power and ECP SunZia must be able to enter into pre-subscribed contract arrangements to offset the risks of their merchant investment in the Project.

40. Additionally, Petitioner states that both SW Power and ECP SunZia are new entrants in New Mexico and Arizona and have no affiliates that own transmission in the area and have no captive customers. Further, Petitioner argues that neither SW Power nor ECP SunZia controls barriers to entry or has other incentives to withhold capacity on the Project. Petitioner states that both SW Power and ECP SunZia have agreed to provide non-discriminatory transmission service pursuant to the Commission's OATT requirements, including the provision of firm tradable secondary transmission rights to all of their customers, including the pre-subscribing customers. Petitioner states the SW Power, ECP SunZia, and Shell themselves will have OATTs that contain expansion obligations. Petitioner states that those OATTs will provide for participant funding for such expansions. Petitioner also states that both SW Power and ECP SunZia (with Shell) will use a single OASIS (and OASIS administrator) for customers to request transmission service over unutilized capacity and to purchase and sell their firm tradable secondary transmission rights.

41. Petitioner argues that customers will not be required to purchase service from SW Power or ECP SunZia, and will have the option of purchasing service on a neighboring public utility under cost of service rates. Further, Petitioner states that there are potentially competing transmission projects being considered in the area and the price that transmission customers are willing to pay will be disciplined by the difference in market price for generation at either end of the Project.

ii. Commission Determination

42. The Commission has looked at a number of safeguards to determine whether negotiated rates would be appropriate for a merchant transmission provider, including: whether it has assumed the full market risk of the project; whether it is building within the footprint of its own (or an affiliate's) traditionally regulated transmission system with captive customers; whether the merchant transmission owner or affiliate already owns transmission facilities in the particular region of the project; whether it has committed to a fair, open and transparent open season for the initial allocation of capacity; what alternative the customers have; whether any barriers to entry among competitors exist that would allow the merchant transmission provider to exercise market power for an excessive period of time; and whether the merchant transmission provider has the ability

⁴⁴ *Id.*

to withhold capacity.⁴⁵ Additionally, the Commission requires merchant transmission owners retaining control of their projects to create firm tradable secondary transmission rights and to create and maintain an OASIS for customers to purchase and sell these rights.⁴⁶ For the reasons discussed below, the Commission finds that Petitioner's proposal does not fully address the "just and reasonable rates" concerns under the Commission's precedent authorizing negotiated rates for firm transmission service.

43. With regard to the Commission's concern as to whether merchant transmission owners have affiliates with traditionally regulated transmission systems with ability to pass on costs to captive customers, SW Power and ECP SunZia satisfy this concern, because neither has any such affiliates. Further, regarding alternatives customers may have to a merchant transmission project, pursuant to their OATTs, public utilities have an obligation to expand their transmission capacity, upon request, at cost-based rates.⁴⁷ The Project as proposed is expected to interconnect with or near public utilities, from which customers may secure service under cost-based rates. Therefore, the potential for expansion on neighboring public utilities' systems and the cost-based rates associated with such expansion provides some alternatives to the Project and downward pressure on the negotiated rates SW Power and ECP SunZia could charge.⁴⁸ In the case where a third party requests capacity on the Project beyond the available initial capacity, the SunZia Owners have an obligation to expand to fulfill that request. Furthermore, transmission customers on either end of the Project would not be required to purchase transmission service from either SW Power or ECP SunZia, and will presumably do so only if it is cost effective.⁴⁹

44. Petitioner states in some parts of the Petition that neither SW Power nor ECP SunZia has affiliates that own transmission in New Mexico and Arizona. However, in other parts of the Petition it is claimed that the Project will link generation in New Mexico and Arizona with other Western markets, including those in California. As noted in the Petition, ECP SunZia's affiliate has a membership interest in the Green Energy

⁴⁵ *Tres Amigas LLC*, 130 FERC ¶ 61,207 at P 44. *See also Chinook*, 126 FERC ¶ 61,134 at P 38; *Montana Alberta Tie., Ltd.*, 116 FERC ¶ 61,071, at P 53-54 (2006) (*MATL*).

⁴⁶ *Chinook*, 126 FERC ¶ 61,134 at P 39.

⁴⁷ *Id.* P 58 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 814).

⁴⁸ *Id.*

⁴⁹ *Id.* P 57.

Express,⁵⁰ which is expected to serve as a transmission outlet for up to 2,000 MW of renewable resources in eastern Riverside County, California for delivery to load zones in southern California.⁵¹ Accordingly, by Petitioner's own admission, it is possible that ECP SunZia and its affiliate, through its membership interests in the Green Energy Express project, may serve the same markets in California. Before the Commission grants negotiated rate authority to ECP SunZia, Petitioner would need to address the extent to which ECP SunZia and its affiliate serve the same market and what are the barriers to entry and competitive impacts associated with that affiliation.

45. In addition, as noted above, SW Power and ECP SunZia have not demonstrated that they will hold a fair, open and transparent open season for the initial allocation of their shares of capacity on the Project as required to meet the "just and reasonable rates" prong of the four-factor analysis. Petitioner requests that SW Power and ECP SunZia be authorized to allocate up to 100 percent of their respective shares of the Project's capacity to anchor customers through negotiated rate agreements. Thus, under Petitioner's proposals no initial capacity will be made available to interested customers in an open season. Accordingly, the Commission finds that the proposal does not fully meet the first prong of the four-factor test. However, this finding is without prejudice to Petitioner providing additional information and revising its proposal to address the concerns identified here.

b. Undue Discrimination

i. Petitioner's Position

46. Petitioner states that the process for securing pre-subscribed customers for SW Power and ECP SunZia has been and will be fair and transparent. In addition, potential customers will be able to avail themselves of the Commission's complaint procedures if necessary, and both SW Power and ECP SunZia will commit to non-discriminatory OATT provisions.

47. Petitioner argues that while the Commission approved the 50 percent anchor customer arrangement in *Chinook*, the Commission stated that it will evaluate any proposal to allocate all or a portion of the Project's initial capacity outside of an open season on a case-by-case basis to ensure that merchant transmission developers do not act in an unduly discriminatory manner in allocating initial capacity. Petitioner also states that as "discussed by the Commissioners during [the Commission's] open meeting on this order, approval of the Chinook/Zephyr proposals was only the first step in the evolution

⁵⁰ See Petition at 14 n.17.

⁵¹ *Green Energy Express*, 129 FERC ¶ 61,165 at P 3.

of [Commission] precedent on merchant transmission lines, and the 50 [percent] anchor [customer] arrangement approved was not intended to establish a bright line standard for future cases.”⁵²

48. Petitioner asserts that the processes that SW Power and ECP SunZia will use to secure pre-subscribed contracts will be open, transparent, and non-discriminatory. Petitioner also argues the following: (1) the Project has had a history of participation in local and regional forums (such as SWAT and WECC); (2) the Project has been widely publicized through notices of permitting review, scoping meetings associated with the Project’s environmental impact statement, and other public meetings; (3) SW Power and ECP SunZia intend to further publicize the availability of pre-subscribed contract arrangements through public notices in local and area newspapers and postings on various constituencies’ web sites, and plan to hold public informational meetings; (4) SW Power and ECP SunZia commit to report to the Commission the results (i.e., customer identification and amount of capacity committed) of their pre-subscription contracting process; (5) aside from the price and term, the terms and conditions of each of the pre-subscribed contract arrangements are expected to be materially the same; and (6) the Commission’s complaint procedures remain available to any potential customer that claims that either SW Power or ECP SunZia has unduly discriminated against it.⁵³

49. Petitioner also states that the SunZia Owners commit to the following: (1) their books and records will comply with the Commission’s Uniform System of Accounts and will be subject to examination as required by Part 41 of the Commission’s regulations,⁵⁴ (2) they will file financial statements and reports in accordance with Part 141 of the Commission’s regulations; and (3) their books and records will be audited by independent auditors. Petitioner notes that the SunZia Owners that use 100 percent of their shares of the Project as generator tielines may petition the Commission for waiver of some or all of these requirements.⁵⁵

50. Petitioner adds that prior to the commencement of service, SW Power, ECP SunZia and Shell will file OATTs that adhere to Order No. 890, except to the extent that the Commission has accepted deviations for other merchant transmission owners.

⁵² Petition at 25.

⁵³ *Id.* at 26-27.

⁵⁴ 18 C.F.R. Part 141 (2009).

⁵⁵ Petition at 27, n.34.

51. Petitioner states that SW Power, ECP SunZia, and Shell will commit to having common OATT provisions regarding allocation and pricing of unutilized capacity on the Project and expansion, and they will use a single OASIS and OASIS administrator. Finally, Petitioner notes that SW Power, ECP SunZia, and Shell do not have the means to provide generation-based ancillary services so they do not intend to provide network or ancillary services under their OATTs.

ii. Commission Determination

52. In order to prevent undue discrimination when granting negotiated rate authority to a merchant transmission developer, the Commission primarily looks to two things: (1) the terms and conditions of a merchant transmission developer's open season; and (2) its OATT commitments (or in the regional transmission organizations (RTO)/independent system operators (ISO) context, its commitment to turn operational control over to the RTO or ISO).⁵⁶

53. Our evaluation of the Petition reveals that there is potential for undue discrimination, because SW Power and ECP SunZia seek to allocate up to 100 percent of their shares of capacity on the Project to serve anchor customers—including, potentially, 100 percent to affiliates—without any initial capacity being made available for allocation in an open manner, as discussed further below.

54. Petitioner describes the OATT-related commitments SW Power and ECP SunZia will make and the processes SW Power and ECP SunZia will use to secure pre-subscribed contracts to ensure that allocation of capacity on the shares of the Project owned by SW Power and ECP SunZia will be open, transparent and non-discriminatory. However, the Commission is concerned that, under Petitioner's proposal an open season, or other mechanism to ensure open, transparent, and non-discriminatory access to the Project's initial capacity, may not take place if anchor customers utilize all of SW Power's and ECP SunZia's available capacity on the Project.

55. Petitioner describes the process SW Power and ECP SunZia plan to use to solicit anchor customers for negotiated rate contracts.⁵⁷ Under the proposal, SW Power and ECP SunZia may allocate up to 100 percent of their respective shares of the Project's capacity to anchor shippers through negotiated rate contracts and only offer to non-anchor customers capacity that is unutilized by anchor customers.⁵⁸ Petitioner does not

⁵⁶ *Chinook*, 126 FERC ¶ 61,134 at P 40. Here, like in *Chinook*, there is no RTO or ISO to which SW Power and ECP SunZia can turn over operational control.

⁵⁷ *See supra* P 48.

⁵⁸ *See* Petition at 23.

address if and how SW Power and ECP SunZia will conduct an open season process for initial capacity as required by the Commission's open access policies. For example, in accepting the proposal in *Chinook* for 50 percent anchor shippers, the Commission found that the merchant transmission providers had committed to conducting open seasons for the remaining 50 percent and offering the same rates, terms, and conditions to customers under the open season as offered to anchor customers. Here, no capacity may be available initially to non-anchor customers and the Petition does not provide sufficient justification to support allocating 100 percent of SW Power's and ECP SunZia's initial capacity to anchor customers.

56. We also find that Petitioner's application is inconsistent with Commission precedent to the extent that any initial capacity of SW Power or ECP SunZia would be available after anchor customer arrangements are made, because SW Power and ECP SunZia do not commit to giving the same deal (i.e., rates, terms and conditions of service) to any customer willing to commit to the same deal as the anchor customer.⁵⁹ Our findings here ensure that the Petitioner must plan the Project to allow open access to transmission service rights under the Project without withholding transmission capacity from the market.

57. With regard to Tonbridge's request for expansion of the Commission's anchor customer policy enunciated in *Chinook*, we find that this request has not been justified in the instant proceeding. As the Commission has stated, we evaluate proposals to allocate initial capacity outside of an open season on a case-by-case basis.⁶⁰ Accordingly, we will not address whether the proposal approved in *Chinook*, in which we found a 50 percent pre-subscription amount to be reasonable in light of the circumstances of that case, should be considered as a ceiling on the amount of capacity that may be pre-subscribed by anchor customers in future negotiated rate authority applications. Further, as discussed above, Petitioner's request for approval to negotiate anchor customer agreements cannot be granted based on the facts provided in the Petition. Thus, no finding as to the amount of capacity that could be committed to anchor customers for this Project need be made here and such findings will continue to be made on a case-by-case basis.

58. Assuming Petitioner provides additional information and revises its proposal to address our concerns identified elsewhere in this order, we would also require SW Power and ECP SunZia, when and if they seek to enter into negotiated rate contracts, to make a filing with the Commission describing the process used to identify anchor customers as

⁵⁹ See *Tres Amigas*, 130 FERC ¶ 61,207 at P 88.

⁶⁰ *Chinook*, 126 FERC ¶ 61,134 at P 42.

well as the details of the associated agreement.⁶¹ Such a filing would allow customers to inform the Commission if they believe that there was undue discrimination or undue preference involved in the assignment of transmission rights through such an agreement,⁶² while also allowing SW Power and ECP SunZia the flexibility to negotiate such agreements to meet their financing needs. Furthermore, the condition set forth above—requiring SW Power and ECP SunZia to give the same rate, terms, and conditions to customers that agree to the same time commitment (i.e., term of service)—would prevent SW Power and ECP SunZia from unduly favoring one type of customer (e.g., an affiliated or anchor customer) over another when both types of customers seek to commit to the same deal.⁶³ Furthermore, if anchor customers are identified in the future, SW Power and ECP SunZia would be required to make a FPA section 205 filing with the Commission seeking authorization for the anchor customer transaction describing the relevant facts and circumstances leading to the agreement.⁶⁴

59. In addition, Petitioner states that SW Power, ECP SunZia and Shell do not intend to provide ancillary services. Under the Commission's policies, transmission providers must provide ancillary services under their OATTs.⁶⁵ However, the Commission has recognized that this may not be practical in some instances such as when a merchant transmission developer does not own generation and therefore lack the means to provide generation-based ancillary services.⁶⁶ Thus, the Commission has found that to the extent a merchant transmission developer is not in a position to provide ancillary services, it

⁶¹ We note that any executed anchor shipper agreements must be filed with the Commission. *Id.* P 61 n.77.

⁶² *Id.* P 89.

⁶³ *Id.* P 88. This commitment was important to the Commission's finding in *Chinook* that the grant of negotiated rate authority and pre-subscriptions to anchor customers should not lead to undue discrimination. *Chinook*, 126 FERC ¶ 61,134 at P 61.

⁶⁴ *See Tres Amigas*, 130 FERC ¶ 61,207 at P 61.

⁶⁵ *See* Order No. 890 FERC Stats. & Regs. ¶ 31,241 at *pro forma* OATT section 3 (Ancillary Services) (providing that transmission providers are required to provide (or offer to arrange with the local control area operator), and the transmission customer is required to purchase, the following ancillary services: (i) scheduling, system control and dispatch, and (ii) reactive supply and voltage control from generation or other sources).

⁶⁶ *See Chinook*, 126 FERC ¶ 61,134 at P 64.

should negotiate in the transmission service agreements it enters into with its customers as to how ancillary services for the project will be provided.⁶⁷

60. Further, SW Power's and ECP SunZia's OATTs must adhere to the Order No. 890 *pro forma* OATT. Any deviations from the *pro forma* OATT must be supported as consistent with or superior to the Order No. 890 *pro forma* OATT to ensure that SW Power and ECP SunZia will provide open and non-discriminatory service on their portions of the Project.

61. In summary, the Commission finds that the proposal does not meet the second prong of the four-factor test. However, this finding is without prejudice to Petitioner providing additional information and revising its proposal to address the concerns identified here.

c. Undue Preference and Affiliate Concerns

i. Petitioner's Position

62. Petitioner states that neither SW Power nor ECP SunZia has any affiliate that currently plans to or has proposed to secure a pre-subscribed contract arrangement with them. Petitioner notes that Shell may seek pre-subscribed contract arrangements with either SW Power or ECP SunZia through the same pre-subscription process that will be applicable to all prospective pre-subscribing customers on the Project. Additionally, Petitioner states that if any affiliate of SW Power and ECP SunZia does pre-subscribe capacity on the Project, separate books and records will be maintained and SW Power and ECP SunZia will comply with the Commission's Standards of Conduct, other affiliate rules, and filing requirements. Petitioner also states that there are no cross-subsidization concerns because neither SW Power nor ECP SunZia has any affiliate with captive customers.

ii. Commission Determination

63. In order to ensure that service on merchant transmission projects will not result in any undue preference to any particular entity, the Commission examines carefully situations where the merchant transmission developer is affiliated with the anchor customer, the open season participants, and/or customers that subsequently take service on the merchant line.⁶⁸

⁶⁷ *Id.*

⁶⁸ *Tres Amigas*, 130 FERC ¶ 61,207 at P 91; *Chinook*, 126 FERC ¶ 61,134 at P 48.

64. As discussed above, SunZia states that Shell intends to use 100 percent of its share of the Project to transmit power generated by new renewable wind generation that it is developing in New Mexico to the western terminus of the Project in Arizona and is a potential customer for transfer capacity rights from one or more of the other SunZia Owners.⁶⁹ Here, Shell, which is also an owner of the Project, may be an anchor customer of SW Power or ECP SunZia. It also appears that Shell, ECP SunZia, and SW Power are considering the possibility that they may make all of their capacity available for use by affiliated generation in the region. Because of these multiple different scenarios, none of which is certain, we find that Petitioner has not provided enough information as to how SW Power and ECP SunZia will use their shares of the Project's capacity or how any affiliate concerns will be mitigated to satisfy the Commission's undue preference and affiliate concerns criteria for negotiated rate authority. Petitioner states that some or all of SW Power's and ECP SunZia's portion of capacity may be committed to anchor customers; however, the Commission's determination on such a proposal would be affected by whether or not such anchor customers are affiliates of the transmission providers, as could be the case here. Therefore, lacking sufficient information, we conclude that the Petitioner's proposal may be unduly preferential, and thus it does not meet the third prong of the four-factor test. However, this finding is without prejudice to Petitioner providing additional information and revising its proposal to address the concerns identified here.

d. Regional Reliability and Operational Efficiency

i. Petitioner's Position

65. Petitioner states that the Project will comply with regional reliability requirements and that operation of the Project will be coordinated through a single O&M manager and coordinated OASIS administrators. Petitioner also states that the Project has been included in the WECC Regional Planning Project Review and Project Rating Process. Petitioner further commits to comply with all applicable North American Electric Reliability Corporation (NERC) and WECC reliability requirements. Petitioner asserts that the Project will be fully integrated into the Southwestern transmission grid, and should raise no reliability concerns. Additionally, Petitioner states that the Project Sponsors intend to contract with a single O&M manager, and SW Power, ECP SunZia, and Shell intend to use a single OASIS administrator. Petitioner also states that the Project will be fully coordinated and efficient because the Project operator will be responsible for communicating outage or curtailment information to all of the Project's OASIS administrators.

⁶⁹ Petition at 18.

ii. **Commission Determination**

66. The Commission has previously found that in order to ensure regional reliability and operational efficiency, it expects that any merchant transmission projects connected to an RTO or ISO turn over operational control to the RTO/ISO;⁷⁰ however, in this case there is no RTO or ISO for the Project to connect to, as proposed. The Commission has also stated that while separate reliability requirements are no longer necessary for merchant transmission projects in light of the development of mandatory reliability requirements, the Commission has noted that merchant developers must comply with all applicable requirements of NERC and any regional reliability council.⁷¹

67. Here, Petitioner states that the Project has been and continues to be evaluated and integrated into the coordinated regional planning processes conducted by WECC and SWAT. Petitioner also commits to comply with all applicable NERC and WECC reliability requirements and procedures. Petitioner states that it will contract with a single O&M manager, such as one of the local utilities in the area, to operate the Project and that such operator will be selected from among existing transmission providers/operators through a competitive solicitation process. If granted negotiated rate authority, SW Power and ECP SunZia would also participate in the Order No. 890 planning processes, for reliability purposes, with the utility systems the Project may interconnect with, consistent with Commission precedent.⁷² Given Petitioner's commitments, the Commission finds that the Project as detailed in the Petition would meet the regional reliability and operational efficiency requirements under the fourth prong of the Commission's negotiated rate authority analysis.

68. As discussed above, while Petitioner's proposal has much to commend it regarding the provision of needed additional transmission capacity in the West, it does not satisfy the first three prongs of the Commission's four prong test for negotiated rate authority. Therefore, we deny Petitioner's request for SW Power and ECP SunZia to allocate up to 100 percent of their share of Project capacity to anchor customers, as well as Petitioner's request for these entities to have negotiated rate authority, without prejudice to Petitioner conforming its proposal to Commission precedent and policies, or providing appropriate justification as to how the proposal fulfills Commission precedent and policies.

⁷⁰ *Tres Amigas*, 130 FERC ¶ 61,207 at P 95.

⁷¹ *Id.* P 95.

⁷² Petition at 28.

The Commission orders:

Petitioner's requests are hereby denied, as discussed in the body of this order, without prejudice to Petitioner filing a revised proposal that conforms to Commission precedent and policies.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.