

130 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tres Amigas LLC

Docket No. ER10-396-000

ORDER ON APPLICATION FOR AUTHORIZATION TO SELL TRANSMISSION
SERVICES AT NEGOTIATED RATES

(Issued March 18, 2010)

1. On December 8, 2009, Tres Amigas LLC (Applicant) filed a request for authorization to charge negotiated rates for transmission rights on a proposed merchant transmission project,¹ as well as a request for waiver of certain Commission filing requirements.² As described in the application, the Tres Amigas Superstation (Project) would link the three asynchronous transmission interconnections in the coterminous United States, using an innovative technology and allowing significant amounts of power to be transmitted among the three interconnections for the first time. The Project has the potential to expand markets and to provide new and significant trading opportunities to location-constrained resources in a part of the country that is rich in potential for renewable energy development.

2. The Commission is committed to supporting the development of the 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. As discussed more fully below, the Commission finds Applicant's proposal to be an innovative solution that will advance these goals, and that Applicant has justified the requested rate authorization as conditioned below. Consequently, we

¹ Merchant transmission projects are distinguished from traditional public utilities in that the developers of merchant projects assume all of the market risk of a project and have no captive pool of customers from which to recoup the cost of the project.

² Also on December 8, 2009, Applicant filed a related petition for disclaimer of jurisdiction in Docket No. EL10-22-000, which is being acted on contemporaneously.

find that granting Applicant's request for negotiated rate authority, subject to conditions articulated herein, is just, reasonable, and not unduly discriminatory or preferential. The conditions we impose below will help to ensure that the goals of open access are protected and that rates for transmission service on the Project remain just and reasonable by limiting Applicant's ability to withhold the Project's capacity from the market. At the same time, these conditions are not so onerous as to stifle Applicant's ability to proceed with the development of the Project. In this way, our decision represents a balanced approach that recognizes the unique characteristics of the Project, Applicant's need for flexibility in advancing its Project through the early stages of development, and customers' need for open access to regional transmission service at rates that are just, reasonable, and not unduly discriminatory or preferential as required by the Federal Power Act (FPA). Therefore, we grant Applicant's request for negotiated rate authority and its request for waivers, subject to the conditions discussed below.

I. Background

A. Applicant

3. Applicant states that it is a start-up, limited liability company devoted exclusively to developing, owning and operating the Project. Applicant states that its owners are: two independent entrepreneurs whose interests in Applicant are owned by closely held companies they control; Alt Energy, LLC (Alt Energy), a private equity fund focused on alternative energy projects; and American Superconductor Corporation (American Superconductor), a publicly traded company that is the developer of the superconducting DC transmission cable technology that will be a component of the Project.³ Applicant notes that some of its owners have an interest in Green Energy Express, a proposed 70-mile alternating current (AC) transmission line under development in California.⁴

B. Description of the Project

4. Applicant proposes to build a three-way AC/direct current (DC) transmission substation in eastern New Mexico that will be designed to eliminate the market separation between the three asynchronous interconnections in the continental United States.⁵ Applicant explains that in the absence of a conversion of electricity from AC to

³ Tres Amigas, LLC, December 8, 2009 Application at 3 (Application).

⁴ Application at 4.

⁵ *Id.* at 4-5. Applicant explains that these three grids are the Western Electric Coordinating Council (WECC), the Electric Reliability Council of Texas (ERCOT), and the Eastern Interconnection.

DC and back to synchronized AC, electricity cannot be transferred from one asynchronous grid to another without causing substantial damage to facilities and equipment. Applicant asserts that the Project will help resolve this problem, permitting power sellers to schedule energy flows between the three interconnections.⁶

5. Applicant states that the Project design calls for multiple, high capacity AC/DC voltage source converters to be constructed at three interconnection points (or terminals) of WECC, ERCOT, and the Eastern Interconnection, which will allow Applicant to control the direction of real and reactive power flows independently at each terminal, such that the Project will act like a large generator stabilizing the system around it.⁷ Additionally, Applicant states that the use of voltage source converters will enable other entities to construct AC lines to the Project without having to provide voltage support, and it will support the transmission of large quantities of intermittent wind and solar generation. Applicant states that the number and size of the AC/DC converters at each terminal will depend on the demand for transmission service and the number and size of the interconnecting lines, but that initial plans include using 750 MW converters that can be installed as needed.⁸

6. Applicant states that the three interconnection points will be tied together with several miles of underground, superconducting DC transmission cable—a new technology developed by American Superconductor. Applicant states that initial plans are for the Project to handle approximately 5 GW of transfers between terminals, and be capable of expansion up to 30 GW.⁹ Applicant states that the use of underground, superconducting DC transmission cable will enable the transfer of large quantities of power within a manageable footprint, with minimal environmental impact, and virtually no losses or heat generation.

7. Additionally, Applicant states that it intends to use large-scale batteries to supply station power, ancillary services (such as balancing and regulation services), as well as a source for firming energy from intermittent resources. Applicant states that it does not

⁶ Further, Applicant states that it will establish and post available transmission capacities (ATC) for each of the scheduling pairs in accordance with the reliability standards of the affected NERC sub-regions.

⁷ Application at 6.

⁸ *Id.* at 7.

⁹ *Id.*

request approval of rates for ancillary services in this filing, but will do so in a later section 205 filing.¹⁰

8. Applicant states that it has acquired an option to lease property for the Project near Clovis, New Mexico, at a strategic location one mile from the Texas border that is accessible to the transmission systems in each of the three interconnections and adjacent to geographic areas with high potential for the development of renewable generation.¹¹ Applicant states that it is being designed with a transfer capability that exceeds the sum of all existing interconnections between ERCOT, WECC and the Eastern Interconnection. Applicant also states that the Project will operate as a balancing authority area within WECC.¹²

II. Details of Filing

9. In this filing, Applicant requests that the Commission grant it authorization to sell transmission services on the Project at negotiated rates. Applicant argues that traditional, cost-based transmission pricing is not realistic for the Project because it has no captive customers, there is no regional transmission organization (RTO) under which the costs of the Project can be recovered, the beneficiaries of the Project are spread throughout the three interconnections, and the risks associated with the Project exceed those associated with typical cost-based transmission projects.¹³

10. Applicant argues that the Project will advance the public interest in a number of important ways.¹⁴ First, Applicant states that the Project will facilitate the creation of a new power marketing hub in proximity to large amounts of existing and potential renewable generation, providing renewables developers expanded markets and favorable economics for their projects. Second, Applicant asserts that the Project will lead to the convergence of energy prices in the three interconnections, allowing energy to be supplied more efficiently.¹⁵ Third, Applicant points to opportunities to “firm up”

¹⁰ *Id.* at 7-8.

¹¹ *Id.* at 5.

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ *See id.* at 8-10.

¹⁵ Applicant notes a number of energy price differentials that exceeded \$50 per MWh in 2008: (1) between CAISO and ERCOT for more than 2,000 hours; (2) between ERCOT and the Palo Verde hub for more than 1,600 hours; (3) between Southwest

(continued...)

intermittent and variable energy resources by taking advantage of geographical diversity, creating additional opportunities to create energy storage, and using onsite batteries. Fourth, Applicant states that the value of regional transmission investments will be enhanced by the linkage of the three interconnections. Fifth, Applicant states that electric system reliability near the Project will be improved because the three interconnections will be linked via a robust station with back-up power and voltage source converters that will provide substantial, controllable reactive power to the system. Sixth, Applicant states that the Project will operate as an open access facility, offering service pursuant to an OATT on file with the Commission, thereby allowing the benefits to be shared with the industry.

11. Applicant points to support for the Project from both the public and private sectors.¹⁶ Applicant asserts that the Project will enhance the value of other planned merchant transmission projects in the Southwest, such as the SunZia Project and High Plains Express Transmission Project.¹⁷ Applicant further states that the Project will create opportunities to link load centers in the Southwest, renewable facilities throughout

Power Pool, Inc. (SPP) and CAISO for approximately 1,500 hours; (4) and between ERCOT and SPP for approximately 800 hours.

¹⁶ Application at 11-14.

¹⁷ SunZia Transmission, LLC (SunZia) is developing a project to build a 460-mile 500 kV transmission line to connect primarily renewable generation in New Mexico and Arizona to western Markets (SunZia Project). On January 29, 2010 SunZia filed a petition for declaratory order in Docket No. EL10-39-000, which is pending before the Commission. The High Plains Express Transmission Project is a plan for the expansion and reinforcement of the transmission grid in the states of Wyoming, Colorado, New Mexico and Arizona; it is currently in the planning stages. See High Plains Express Transmission Project, *Feasibility Study Report* (June 2008), available at http://www.rmao.com/wtpp/HPX_Studies.html.

SPP via the Extra High Voltage (EHV) Overlay,¹⁸ and renewable facilities throughout Texas in the Competitive Renewable Energy Zones (CREZ).¹⁹

A. Assumption of Market Risk

12. In support of its request for negotiated rate authority, Applicant states that it will bear all of the market risk associated with the Project, and that it cannot pass the costs of the Project onto any set of captive customers.²⁰ Applicant asserts that no entity will be required to purchase service from it, and that its ability to recover its costs will depend on the success of its transmission service sales using the negotiated rate authority sought in this filing.²¹

13. Applicant contends that rules designed to keep investment returns by merchant transmission developers to a level similar to a regulated return are neither fair nor appropriate in this instance.²² Applicant argues that the unique configuration and novel technologies of the Project result in a market risk that is high, and much greater than the risk that is traditionally assumed by projects utilizing cost-based pricing.²³ Applicant

¹⁸ SPP's EHV Overlay is a collection of 500+ kV transmission projects to be added to the existing transmission system to facilitate the economic transfer of power and reduce congestion across the grid. SPP's EHV Overlay is a concept that is currently being developed through SPP's transmission planning process. See Southwest Power Pool, Inc., *Draft 2008 SPP EHV Overlay Report* (last revised Dec. 26, 2008), available at <http://www.spp.org/section.asp?pageID=118>.

¹⁹ CREZs are areas considered optimal for wind generation that were identified by the Public Utility Commission of Texas (Texas Commission). The Texas Commission has provided for construction of EHV transmission facilities between the CREZs and the ERCOT grid.

²⁰ Application at 14.

²¹ Applicant notes that it may still need to attract additional investment equity in the Project as well.

²² Application at 15.

²³ Applicant explains that it will "employ cutting edge technologies, such as voltage source converters and underground superconducting DC transmission cable, in a unique and creative engineering configuration in order to remove barriers to the movement of power across the electric system." Application at 5.

states that it is relying on customers perceiving sufficient value in its Project to construct their own transmission lines to the Project. Applicant also contends that it is assuming the risk that other projects could be proposed in the future and/or that new technologies may emerge that reduce the value of the Project to the marketplace. In light of these risks, Applicant believes that pricing flexibility is needed to maximize the value of its investment and for Applicant to have a realistic opportunity to earn a return on its investment commensurate with its risk.

B. Market Power

14. Applicant states that neither it, nor its owners, have captive customers²⁴ or control any other generation or transmission assets that could be used to exercise market power or limit entry by others. Applicant also states that aside from the land on which it has acquired a lease option for the Project, neither it nor its owners own or control any land within several hundred miles that could be used to build bulk power facilities.

15. Applicant notes, however, that some of its owners have an interest in Green Energy Express, a proposed 70-mile alternating current (AC) transmission line under development in California.²⁵ Applicant indicates that once complete, operational control of Green Energy Express will be turned over to the CAISO, and that transmission service will be sold at cost-based rates through the CAISO Open Access Transmission Tariff (OATT). Applicant also notes that Alt Energy has a non-controlling interest in a wind development company that owns property in Iowa.²⁶ Applicant states that with these exceptions, its owners do not have an equity interest in any other generation or transmission facilities in the three electricity grids that would be linked by the Project.²⁷ Applicant further states that American Superconductor has not acquired, nor does it

²⁴ Applicant explains that references to itself and its owners include all of the shareholders of Applicant, any affiliates of Applicant, and any affiliates of Applicant's owners.

²⁵ Application at 4.

²⁶ *Id.*

²⁷ We note that the two individual entrepreneurs that have ownership interests in Applicant have also been hired to provide technical and engineering expertise to Western Grid Development (WGD), with respect to WGD's request for transmission rate incentives for energy storage projects. *See Western Grid Development, LLC*, 130 FERC ¶ 61,056 (2010).

presently intend to acquire, corporate control over the use of facilities constructed with its technology.

16. Furthermore, Applicant argues that it will not have market power because no customer will be obligated to purchase its transmission service in order to serve load, and it cannot stand in the way of competitive entry by others. Applicant contends that the price that any market participant would pay for service would be “limited by the differences in energy prices between the three interconnections.”²⁸ Applicant further argues that the Project will create competitive alternatives that do not exist today without limiting existing options to buy, sell or transmit electricity. Applicant states that existing competitive alternatives will discipline the price of service on the Project.²⁹

17. Applicant argues that by increasing the geographic scope of the wholesale market, the Project will improve the efficiency of existing markets by eliminating a physical barrier that prevents marginal prices from moving closer together.³⁰ Applicant states that it will not be able to cause prices to rise above competitive levels because customers will not purchase its transmission service unless to do so would reduce costs compared to the alternatives. Moreover, Applicant argues that in the longer term, it faces potential competitive entry by other transmission developers, either through construction of a new facility or upgrade of existing AC/DC interties.

C. Commitment to Expand Tres Amigas

18. Applicant commits to expand the Project voluntarily upon request when it cannot meet a request for service with existing capacity, which it states will provide additional assurance that it cannot raise prices by constraining the supply of transmission. Accordingly, Applicant makes a two-part commitment to expand. First, Applicant will include a commitment in its OATT to expand the AC/DC terminals and/or the DC lines between the three terminals in response to a request for firm transmission service that exceeds the available capacity at the time of the request. Applicant commits to making this expansion either at negotiated rates or, if the Applicant believes the market will not support such an expansion, it will expand its facility on a cost-of-service basis for any

²⁸ Application at 17-18.

²⁹ *Id.* at 18-19. For example, Applicant states that potential customers of the Project will retain the option of buying and selling power in their own balancing areas and to neighboring systems in their own interconnections.

³⁰ *Id.* at 20.

creditworthy entity that agrees to pay for the expansion.³¹ Second, Applicant states that it will expand the AC side of the Project to accommodate additional interconnections by any creditworthy entity that wishes to interconnect its transmission facilities and is willing to bear the cost of the interconnection.³² Moreover, Applicant states that it will not enter into any agreement with a third party to construct and own substation facilities on the AC side of the Project that does not include a commitment for that entity to expand (or permit expansion of) those facilities.

D. Description of Transmission Rights

19. Applicant states that it will offer transmission service that is in many ways comparable to the services offered by other merchant transmission owners. Applicant asserts that although the points at which power is injected and withdrawn will be in close geographic proximity, the value of service across the Project will be based on the difference in the price of power within each of the three interconnections.³³ Applicant notes that the Project is different from long-haul merchant lines insofar as it is expected to operate more like a power marketing hub. Therefore, Applicant states that it expects that the demand for its transmission services to be most effectively met by a variety of short, intermediate and long-term services, rather than from commitments to buy long-term transmission rights.³⁴ Accordingly, Applicant seeks pricing flexibility beyond what has been sought in prior applications for merchant transmission projects.

20. Applicant explains that it will offer point-to-point transmission rights from one scheduling point to either of the other two scheduling points, consistent with the *pro forma* OATT.³⁵ Applicant states that the service will also include the right to redirect schedules to an alternate delivery or receipt point on a firm or non-firm basis and the right to resell the service in the secondary market. Applicant commits to establishing an Open Access Same-time Information System (OASIS) site by the time it makes its first sale of transmission rights to facilitate the re-selling of transmission rights in the secondary market.³⁶ Applicant does not plan to offer network integration service

³¹ *Id.* at 22-23.

³² *Id.* at 23.

³³ *Id.* at 24.

³⁴ *Id.*

³⁵ *Id.* at 25.

³⁶ *Id.* Applicant notes that at some point in the future, it hopes to develop a market

(continued...)

initially; however, if a third party requests network integration service, Applicant explains that it will either make a section 205 filing for such service or it will ask the Commission for a waiver of providing that service.³⁷

E. Open Season Auction Process

21. Applicant seeks approval for the following open season process at this time, and commits to including a more detailed description of its open season process when it files its OATT, which will take place prior to the first open season auction.³⁸ Applicant anticipates holding successive auctions for transmission rights prior to commercial operation of its facility. Applicant states that a yet-to-be-determined amount of capacity for each delivery and receipt point pairing will be made available during an initial auction, which will take place before the Project is constructed. Applicant further explains that the initial and subsequent open season auctions will be designed to offer transmission rights in time blocks, with some capacity sold on a 20-year, 10-year, 5-year, 1-year, and/or monthly basis. Applicant states that it anticipates holding one or more subsequent auctions before the Project enters commercial operation. Applicant explains that in these subsequent auctions, it may vary the time blocks of transmission service from those offered in the initial auction.³⁹

22. Applicant states that by the time it enters commercial operation, it will make no less than 80 percent of the Project's initial capacity at each terminal available for sale in a pre-commercial open season auction. It proposes to retain up to 20 percent of the capacity at each terminal for sale either in short-term open season auctions to be held after the Project enters commercial operation or pursuant to requests for transmission service under its OATT.⁴⁰ Applicant supports this proposal by noting that the Commission has used 20 percent as a safe-harbor threshold for determining whether a seller can exercise market power in the market-based rate context for generation.⁴¹

mechanism, such as hourly price bids to establish scheduling priorities, to manage congestion.

³⁷ *Id.* at 26.

³⁸ *Id.* at 30.

³⁹ *Id.* at 27-28.

⁴⁰ *Id.* at 28.

⁴¹ *Id.* (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252,

(continued...)

Applicant asserts that it will at no time withhold capacity from the market and that once the Project is operational, all available capacity at each scheduling point will be offered for sale in one form or another. Applicant commits that it will sell transmission service in every instance on a non-discriminatory basis to the highest creditworthy bidder, and notes that credit requirements will be set forth in its OATT.

F. Bilateral Sales to Anchor Customers

23. Applicant states that it currently plans to sell all transmission rights on the Project through the above-described open season processes. However, Applicant explains that while it is not its preference, it may be necessary for the Applicant to sell some transmission rights to the Project to unaffiliated third parties pursuant to bilaterally negotiated agreements. Applicant therefore seeks the authority to sell up to 50 percent of the capacity at each scheduling point through bilateral agreements.⁴² Applicant states that it will not enter into any bilateral contract with an anchor customer without first making an informational filing with the Commission describing the process used to enter into such contract, the identity of any buyer under a bilateral agreement, and a description of the material terms. Applicant explains that it will not enter into any bilateral agreements with its owners or affiliates without first obtaining Commission approval.⁴³

G. Request for Waivers

24. Applicant requests that the Commission grant it waivers of the same filing requirements that the Commission granted the merchant transmission providers in *Chinook*.⁴⁴ Specifically, Applicant requests waivers of the filing requirements in Parts B and C of Part 35 of the Commission's regulations, except for sections 35.12(a), 35.13(b), 35.15 and 35.16, plus waiver of the requirement to file an annual FERC Form 1.

clarified, 121 FERC ¶ 61,260, at P 89 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *order on reh'g and clarification*, 124 FERC ¶ 61,055, at P 37 (2008), *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008); *order on reh'g*, Order No. 697-C, 74 FR30924 (June 29, 2009), FERC Stats & Regs. ¶ 31,291 (2009).

⁴² *Id.* at 31.

⁴³ *Id.* at 32.

⁴⁴ *Id.* at 39-40 (citing *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P 68-69 (2009) (*Chinook*)).

III. Notices and Interventions

25. Notice of Applicant's filing was published in the *Federal Register*, 74 Fed. Reg. 66635 (2009), with interventions and protests due on or before December 29, 2009. On December 29, 2009, the Texas Commission and the Electric Reliability Council of Texas, Inc. (ERCOT) filed requests for extension of the comment due date to January 19, 2010. On December 30, 2009, the Commission granted the requests.

26. The following entities filed notices of intervention or motions to intervene: Bonneville Power Administration; Electric Power Supply Association; Centerpoint Energy Houston Electric, LLC; Public Service Gas and Electric Company; Oncor Electric Delivery Company; New Mexico Cooperatives; National Rural Electric Cooperative Association; California Municipal Utilities Association; Arkansas Electric Cooperative Corporation; NRG Energy, Inc., NRG Power Marketing LLC, and NRG Texas Power LLC; ITC Grid Development, LLC; Texas-New Mexico Power Company; Pattern Transmission LP; South Texas Electric Cooperative; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; Southern California Edison Company, Arkansas Public Service Commission; Iberdrola Renewables, Inc.; Southwest Power Pool, Inc.; Sunflower Electric Power Corporation and Mid-Kansas Electric Company, LLC; East Texas Cooperatives; Westar Energy, Inc.; and ERCOT.

27. The following entities filed notices of intervention or motions to intervene and comments or protests: Scandia Wind Southwest, LLC (Scandia); Public Service Company of New Mexico; American Wind Energy Association and Solar Energy Industries Association; Golden Spread Electric Cooperative (Golden Spread); Texas Industrial Energy Consumers (Industrial Consumers); Occidental Permian, Ltd., Occidental Chemical Corporation, and Occidental Power Marketing, L.P. (collectively, Occidental); Xcel Energy Services Inc. (Xcel); American Public Power Association (APPA); and Texas Commission.

28. The following entities filed comments only: Brad Tubin of Tubin International, Inc.; Greater Sedan Area Energy Resources, LLC; City of Hereford, Deaf Smith County, Texas; Tom Simons, Deaf Smith County Judge; Hereford Economic Development Corporation; Hereford Independent School District; Dr. Bill McLaughlin, Superintendent, Walcott Independent School District; Daniel Esquivel, Executive Director, Amarillo College Hereford Campus; Bootleg Energy; Herbert Vogel, Manager, Deaf Smith County Wind Farm LLC; Pat Smith, Deaf Smith County Commissioner; Tom Timberlake; Tognetti Wind Group; Blackline Energy; Fort Sumner Community Development Corporation; Coalition of Renewable Energy Landowner Associations, Inc.; Yeso Renewable Energy Association, LLC; Curry County Manager Lance A. Pyle; Forrest/Ragland Energy Association, LLC; Eastern Plains Council of Governments; Tri Global Energy, LLC; Class 4 Winds, Inc.; Wilson & Company, Inc., Engineers & Architects; Wave Wind LLC; Dr. John Neibling; IMA Wind Energy Association; Curry County Commissioner Caleb Chandler; Mr. Gene Hendrick; Tom M Phelps of Clovis

New Mexico; New Mexico State Senator Clinton D Harden; New Mexico State Representative Anna Crook; Eastern New Mexico Economic Development Alliance; City of Tucumcari, New Mexico; Greater Tucumcari Economic Development Corporation; Frio Ridge Energy Development Association, LLC; Mr. Charles Lee Malloy of Clovis Industrial Development Corporation; New Mexico Renewable Energy Transmission Authority; Bill Richardson, Governor of New Mexico; Crosby County Wind Farm, LLC; CottonWind Farms, LLC; Lakeview Wind Farms, LLC; Randy Neugebauer (TX-19), Member of Congress; Field Community Wind Farm, LLC; Farwell Wind Farm, LLC; Big Five Renewable Energy Project, LLC; and Eastern New Mexico Energy, LLC.

29. Answers to comments/protests were filed by: Applicant; Scandia; Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC (collectively, PSEG Companies). Additionally, Occidental filed an answer to Applicant's answer.

30. We note that some of the above notices of intervention, motions to intervene, comments, and protests were filed jointly in both this proceeding and the petition for disclaimer of jurisdiction, in Docket No. EL10-22-000. Issues raised in such filings regarding the disclaimer of jurisdiction will be addressed in the Docket No. EL10-22-000 order only.

31. In addition to the concerns discussed below, many commentors express general support for the Project, noting that it will offer local and national benefits. These commentors highlight potential economic benefits of the Project, contending that it will lower costs to ratepayers nationwide by bringing the three interconnections closer together in pricing. These commentors also state that the Project will create jobs in the region. These commentors also note that the Project will have associated environmental benefits, because it is expected to increase the development of renewable and sustainable sources of energy and "firm up" intermittent renewable energy across a wide geographic region. Finally, many commentors contend that the Project will provide reliability benefits to the bulk power system.

IV. Discussion

A. Procedural Matters

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

33. 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 and answer, unless otherwise ordered by the decisional authority. We will accept the above-mentioned answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters**1. Requests for Additional Procedures****a. Positions of the Parties**

34. Industrial Consumers argue that Applicant's request for negotiated rate authority is contingent upon the Commission finding that the project will not change the jurisdictional status of ERCOT utilities and ERCOT transactions. Industrial Consumers and Occidental argue that discovery and hearing procedures are necessary to explore the claimed benefits of the Project prior to any grant of negotiated rate authority.

35. Texas Commission contends that Applicant has not demonstrated that robust transmission planning and careful consideration of legal issues and economic interests have occurred, nor has it laid out a process for doing so in a way that allows all interested parties to participate. Texas Commission suggests that before acting on the application, the Commission should order Applicant to lead an open stakeholder planning process, and the Commission should hold workshops in the region to explore such issues as: (1) the Project's impact on renewable energy development, reliability, and power prices in the southwestern United States; (2) whether the project is consistent with other efforts to plan and build transmission facilities; and (3) the total cost of the Project and related transmission.

36. Applicant objects to these additional procedures, arguing that commentors' complaints are either outside the scope of the proceeding, easily resolvable under existing policy or precedent, or constitute attempts to impose new standards for negotiated rate authority that no applicant would be able to satisfy. Scandia⁴⁵ agrees, stating that requests from Industrial Consumers and Occidental for discovery or an evidentiary hearing should be denied and that the Commission has sufficient information to evaluate Applicant's request as is. Scandia also contends that commentors raise issues for hearing that are outside the scope of the current proceeding, such as the impact on Texas Commission's CREZ process, which is within the jurisdiction of the Texas Commission.

b. Discussion

37. As discussed below, we find that we are able to address the merits of Applicant's request for negotiated rate authority on the record before us, and that no additional procedures are necessary. Protestors seek formal hearing procedures that have not been

⁴⁵ Scandia is the developer of the Mariah Wind Project, a 5,000 MW wind project under development in the Texas Panhandle.

required of previous merchant transmission providers seeking negotiated rate authority, nor have they been shown to be necessary here. For instance, protestors seek a full examination of the costs and benefits of the proposed facility and argue that Applicant should be required to show that the benefits outweigh the costs of the proposal. However, we generally do not require a cost-benefit analysis in support of a rate application, even if it is cost-based. Moreover, in the merchant transmission context, the developer is under no obligation to build the initial project, it will do so only where a market exists for the project, it assumes the full risk associated with the project, and there are no captive customers to be protected from costs they cannot avoid.⁴⁶ Accordingly, we reject protestors' requests for additional proceedings, and we address the merits of Applicant's request below.

2. Negotiated Rate Authority

38. The Commission has addressed a number of requests for negotiated rate authority from merchant transmission providers in the past 10 years. In doing so, the Commission has demonstrated a commitment to fostering the development of such 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.⁴⁷ Recently, the Commission refined its approach toward negotiated rate applications.⁴⁸ This approach simultaneously acknowledges the financing realities faced by merchant transmission developers and the customer-protection mandates of the FPA by focusing on 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.⁴⁹ Moreover, this approach allows the Commission to use a consistent analytical framework

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

⁴⁷ See, e.g., *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,838-39 (2000) (*TransEnergie*) (accepting a request to charge negotiated rates on a merchant transmission project, subject to conditions addressing, among other things, the merchant's open season proposal); *Mountain States Transmission Intertie, LLC and NorthWestern Corporation*, 127 FERC ¶ 61,270 (2009) (*MSTI*) (denying a request to charge negotiated rates on a merchant transmission project because, among other things, sufficient protections did not exist to ensure that rates for service would be just and reasonable).

⁴⁸ *Chinook*, 126 FERC ¶ 61,134 at P 37.

⁴⁹ *Id.*

to evaluate requests for negotiated rate authority from a wide range of merchant projects that can differ substantially from one project to the next.

39. This is true in the instant case, where the project before us is both significant in scope and novel in its function, i.e., creating a link between the three asynchronous interconnections in the coterminous United States, which Applicant describes will operate more as a power marketing hub than a long-haul transmission line. Notwithstanding the differences between the Project at issue here and the long-haul transmission lines evaluated in cases such as *Chinook*⁵⁰ and *MSTI*,⁵¹ the four-factor approach adopted in *Chinook* is sufficiently flexible to account for any physical and/or operational differences between the projects. Accordingly, we will evaluate whether Applicant has satisfied the four areas of concern articulated in the *Chinook* order, with due consideration of the unique aspects of the Project before us and the arguments raised by the commentors in this proceeding.

a. Just and Reasonable Rates

i. Positions of the Parties

40. Applicant asserts that it meets the standards set forth by the Commission for determining whether negotiated rate authority would lead to just and reasonable rates. Specifically, Applicant explains that it is assuming all of the market risk of the Project, including risks that do not exist for other merchant transmission projects. Applicant further states that neither it, nor its affiliates, are regulated utilities with their own service territory or captive customers. Accordingly, Applicant asserts that it will recover its costs only if it is able to find willing customers to purchase transmission service. Applicant also states that neither it, its owners, nor its affiliates, own or have an equity interest in any other generation or transmission facilities within several hundred miles of the Project, and what interests they do have in isolated facilities will not enable Applicant to restrict access, raise prices above competitive levels, restrict competitive entry into the market place, or otherwise exert market power.

41. Applicant states that it has no incentive or ability to withhold transmission capacity from the market and commits to making all capacity available at all times once the Project enters commercial operation. Applicant also asserts that its commitment to expand goes beyond commitments assumed by prior merchant transmission owners, and that such a commitment should further ensure that Applicant will not be able to raise

⁵⁰ *Id.*

⁵¹ *MSTI*, 127 FERC ¶ 61,270.

prices by withholding capacity. Applicant states that it has shown that it will have no market power over any potential customer and that all potential customers have numerous other opportunities to buy and sell power in their respective markets. Applicant contends that the Project will enhance efficiency by creating opportunities that do not exist today to trade among the three asynchronous grids. Finally, Applicant highlights its commitment to making all transmission rights available for sale by customers in the secondary market and to creating an OASIS site in order to facilitate such sales.

42. As described in greater detail below, protestors (including, Occidental, APPA, and Golden Spread) generally argue that Applicant should not be granted negotiated rate authority because, as the sole provider of transmission services connecting the three asynchronous grids, it will have market power over customers in the region. Protestors state that Applicant has not shown that sufficient competitive alternatives will be in place to ensure that rates for its service are just and reasonable. Protestors also contend that the difference in the price of power among the three interconnections will provide no discipline to the rates that Applicant would be able to charge customers; instead, they argue that Applicant would be expected to attempt to maximize its own profits by raising the price of its transmission services to fully reflect the differences in energy prices among interconnected markets. Protestors also argue that because the Project is dependent on public utilities' building interconnection facilities to the Project, the Applicant is not bearing the full risk of the project but is instead shifting a portion of the risk to captive customers of interconnecting utilities, and that these customers will ultimately subsidize Applicant's ability to earn supra-competitive rates.

43. Protestors also object to the way in which Applicant intends to allocate initial capacity, arguing that the proposal to hold back 20 percent of the Project's capacity for short-term sale would provide Applicant with the ability and the incentive to raise rates during times of supply scarcity in any of the three interconnections. Protestors argue that this would be especially true if Applicant was also permitted to sell firming energy and ancillary services at market-based rates. Protestors also express general concerns that Applicant will be able to erect barriers to entry through strategic partnerships, a strategic location, and/or its ability to expand at a lower cost than a new entrant.

ii. Discussion

44. In determining whether negotiated rate authority would result in just and reasonable rates, the Commission looks at a number of different characteristics of the merchant transmission provider and the market in which it would provide service, including: whether the merchant transmission provider 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 an 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 alternatives customers have; whether the

merchant transmission provider will have the ability to erect any barriers to entry among competitors; and whether the merchant transmission provider has the ability to withhold capacity.⁵²

45. Evaluating Applicant's request for negotiated rate authority in light of these considerations, we find that such authority is appropriate, subject to Applicant abiding by the commitments made in its pleadings in this proceeding,⁵³ as well as the conditions discussed below. We express no opinion, however, on issues that may arise in the future, but for which Applicant does not seek authorization here. For example, Applicant expressly commits to seek approval under section 205 of the FPA for the following authorizations (where relevant) at some point in the future: (1) Applicant will file an OATT (setting forth the terms of the open season) and establish an OASIS prior to holding its first open season;⁵⁴ (2) Applicant and its owners and affiliates will not sell power that is delivered through the Project without first obtaining the Commission's approval;⁵⁵ and (3) Applicant will seek Commission authorization before permitting purchasers of transmission service on the Project or any utility with captive customers to acquire an equity interest in Applicant.⁵⁶ We accept and rely on Applicant's commitment to seek the above-mentioned authorizations at the appropriate time in the future, at which point we will address their merits based on the facts and circumstances in existence at the time.

46. Additionally, although Applicant states that it plans to build and own large-scale batteries with which to sell either a firming energy product or ancillary services, it does not seek the authority to make energy or ancillary services sales at this time; instead Applicant commits to seeking the appropriate rate authority from the Commission before making any such sales in the future. Accordingly, our analysis of Applicant's request for negotiated rate authority does not consider the possibility of energy sales sometime in the

⁵² *Chinook*, 126 FERC ¶ 61,134 at P 38. See also *Montana Alberta Tie., Ltd.*, 116 FERC ¶ 61,071, at P 53-54 (2006) (*MATL*).

⁵³ For example, Applicant makes a number of commitments (described above) addressing such things as terms to be set forth in its OATT (such as the right to re-sell transmission rights on the secondary market), and its intention to comply with all relevant planning and reliability processes.

⁵⁴ Application at 25-26.

⁵⁵ *Id.* at 37.

⁵⁶ Applicant, January 13, 2010 Answer at 32-33 (Applicant Answer).

future. In this respect, we do not address here the issue of whether any battery storage facilities are transmission assets subject to the negotiated rate authority granted in this order. Therefore, our approval of negotiated rate authority does not encompass sales of energy or ancillary services. To the extent Applicant seeks to make any such sales, it must first make a section 205 filing seeking authorization and explaining its proposed rates, terms and conditions for doing so.

47. Going forward, Applicant will remain subject to the statutory requirement that rates for service on the Project must remain just and reasonable at all times. Thus, we remind Applicant that the Commission will consider carefully any concerns that may be raised subsequently pursuant to section 206 of the FPA that Applicant has obtained market power and is utilizing such market power to charge unjust and unreasonable rates.

(a) Market Risk and Captive Customers

48. Under the analysis set forth in *Chinook*, we first look to whether the Applicant has assumed the full market risk of the project, and whether it is building within the footprint of its own (or an affiliate's) traditionally regulated transmission system with captive customers.⁵⁷

49. Occidental argues that because public utilities must build transmission facilities necessary to interconnect to and obtain service on the Project, Applicant is not bearing the full risk of the Project. Occidental contends that such a project design increases the risk to captive customers because issues such as the length, complexity, and costs of the interconnecting transmission facilities are not yet known.⁵⁸ Further, Occidental asserts that Applicant does not address the possibility that one or more utilities with cost-based rates might attempt to purchase capacity from Applicant at negotiated rates and roll the costs into their cost-of-service formula rates, which Occidental argues would result in captive customers bearing the costs of the Project.

50. Applicant argues that it has assumed the full risk of its project, and that its risk is in fact increased because the project design assumes that neighboring utilities will see sufficient value in the Project to build to it. Moreover, Applicant argues that the investment decisions of third parties do not pertain to the level of risk borne by the Applicant for the purpose of its request for negotiated rate authority. Applicant explains that if developers with cost-of-service rates propose to interconnect with the Project, they will have to support such proposals in the relevant planning processes, and in filings

⁵⁷ *Chinook*, 126 FERC ¶ 61,134 at P 38.

⁵⁸ Occidental, December 29, 2009 Protest at 36-37 (Occidental Protest).

made with applicable regulators, in which the costs and benefits of such facilities would be addressed.

51. We find that Applicant's proposed facility will be a new entrant in the regional market for transmission service, as neither it, its owners, nor its affiliates, currently have a presence in the region. Moreover, Applicant will also not have captive customers upon which it can recover the costs of the Project. The Commission has found merchant transmission providers to assume the full risk of the project if costs are recovered only from entities purchasing transmission rights on the project, no entity is required to purchase transmission rights on the project, and the project does not result in any mandatory grid use or system benefits charges.⁵⁹ Applicant meets these criteria.

52. While the design of the Project is somewhat different from merchant transmission projects previously considered by the Commission (e.g., it is designed in a way that requires interconnecting utilities to build transmission lines to it), such a design does not shift a portion of the risk of the Project onto these utilities. Neighboring utilities are under no obligation to connect to or purchase service from Applicant, and they will only do so if it provides sufficient value to justify the new construction. Accordingly, we find that the Project does not shift the market risk to any other entity.⁶⁰ Moreover, Applicant will remain subject to the ongoing risk that its Project will be sufficiently utilized in order to recover its costs, because it will have no captive customer base to ensure cost recovery. Thus, we find that Applicant has assumed the full market risk of its project.

(b) Initial Capacity Allocation

53. The Commission has consistently required the use of a transparent, fair and non-discriminatory open season to allocate initial transmission rights on a merchant transmission facility.⁶¹ Among other things, open seasons help to ensure that the initial rates for transmission service on a merchant transmission project are just and reasonable

⁵⁹ *MATL*, 116 FERC ¶ 61,071 at P 28; *see also Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147, at 61,634 (2001) (*Neptune*) (rejecting a proposed mandatory system benefits charge for a merchant transmission project).

⁶⁰ Although Occidental argues that we should address how potential customers of the Applicant treat the costs of purchasing capacity on the Project (especially where such customers have captive customers themselves), we find such issues to be speculative at this point as well as beyond the scope of this proceeding.

⁶¹ *See, e.g., TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,839 (2000) (*TransEnergie*); *MATL*, 116 FERC ¶ 61,071 at P 53.

by protecting against physical and economic withholding.⁶² Open seasons also gauge the extent of interest in a project, which in turn enables the merchant transmission developer to determine the appropriate size project to fit the market.⁶³ In *Chinook*, the Commission stated that it will evaluate proposals to allocate initial capacity outside the open season process on a case-by-case basis.⁶⁴ In that case, the Commission accepted a proposal by merchant transmission developers to enter into bilateral agreements with anchor customers for 50 percent of the projects' capacity rights outside of the open season process.⁶⁵ That decision was based on a recognition of the financing and cost recovery concerns faced by merchant transmission developers,⁶⁶ as well as other factors, such as commitments made by the merchant developers and the lack of protests filed in opposition to the agreements.⁶⁷

54. Here, Applicant's proposal to allocate initial project capacity contains a number of features that deviate from a traditional open season auction in which all capacity is made available to the market. Specifically, Applicant anticipates restricting the amount of capacity offered in the initial auction and thereafter holding additional auctions prior to commercial operation of the Project. Furthermore, during the initial and any subsequent auctions, Applicant plans to offer capacity on a 20-year, 10-year, 5-year, 1-year and/or monthly basis, and states that it may vary the time blocks offered in subsequent auctions. As described above, Applicant also seeks to retain up to 20 percent of the capacity at each terminal for sale subsequent to the commercial operation date.⁶⁸ Applicant argues

⁶² *MATL*, 116 FERC ¶ 61,071 at P 53; *see also Chinook*, 126 FERC ¶ 61,134 at P 59.

⁶³ *Chinook*, 126 FERC ¶ 61,134 at P 41.

⁶⁴ *Id.* P 42.

⁶⁵ *Id.*

⁶⁶ *Id.* P 46.

⁶⁷ *Id.* P 61 (noting the merchant developers' commitments to giving the same deal (i.e., rates, terms and conditions) to any customer willing to make the same time commitment (25 years) as the anchor customer and to exploring expansion upon request).

⁶⁸ Applicant supports this proposal by noting that the Commission has used 20 percent as a safe-harbor threshold for determining whether a seller can exercise market power in the market-based rate context for generation. Application at 28 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 89).

that such an arrangement does not result in withholding of capacity from the market because “all of the available capacity at each terminal will be offered for sale at all times when [the Project] is in commercial operation.”⁶⁹ In addition to this open season proposal, Applicant seeks authorization to enter into anchor customer agreements for up to 50 percent of the capacity at each scheduling point.

55. Protestors object to a number of aspects of the manner in which Applicant proposes to allocate initial capacity. Occidental argues that Applicant fails to provide the following information: (1) the specified amount of capacity for the superstation; (2) the timing of when that capacity is likely to be available; (3) the specific capacity of other market participants selling a comparable service; and (4) the specific amount, duration and timing of the transmission service or capacity to be offered in a pre-subscription or open season bidding process. Occidental argues that although Applicant commits to offer at least 80 percent of the Project’s initial capacity in the pre-commercial open season auction, its failure to identify the amount of initial capacity renders this commitment meaningless. Occidental further argues that Applicant’s proposal to hold back 20 percent of the transmission capacity for short-term sales, coupled with the plan to sell firming energy and ancillary services, gives Applicant the incentive and the ability to raise transmission rates during periods of supply scarcity in any of the three interconnections.

56. Applicant responds that although the Commission has not required merchant transmission owners to submit the details of their open season processes ahead of time, Applicant commits to setting forth the proposed structure of its open season process in its OATT, which it will file with the Commission before the first open season offering. Applicant also states that it will file a report with the Commission after each open season, consistent with Commission requirements. Further, Applicant asserts that it will have its open season results reviewed by an independent auditor, if the Commission believes it should do so.

57. As noted above, when evaluating requests for negotiated rate authority, the Commission begins from the premise that initial capacity should be allocated through a transparent, fair and non-discriminatory open season, which enables developers to determine the most efficient size project to fit the market demand and, at the same time, helps ensure that the rates for initial capacity are just and reasonable. In the past, however, the Commission has generally afforded merchant transmission developers flexibility with respect to the details of individual open season processes. For example, in *Conjunction*, the Commission accepted a four-phase open season process in which all capacity would ultimately be made available within one year of the first auction;⁷⁰ and in

⁶⁹ Application at 29.

⁷⁰ *Conjunction, LLC*, 103 FERC ¶ 61,198, at P 12-16 (2003) (*Conjunction*).

Neptune, the Commission accepted a proposal to allocate 80 percent of initial capacity on a long-term basis, reserving 20 percent for shorter-term sales, administered by the RTO controlling the project.⁷¹ More recently, in *Chinook*, the Commission allowed for the allocation of 50 percent of initial capacity to an anchor customer.

58. While the Commission has been flexible in responding to requests for variations on open season processes, such flexibility has not been without its limits. For instance, in *Neptune*, the subsequent short-term auctions, used to allocate 20 percent of the capacity initially held back by the merchant transmission developer, were to be conducted by an independent RTO, not the merchant transmission developer.⁷² Additionally, in that case, the Commission rejected a concurrent request to allocate a portion of the project's initial capacity to an anchor customer through a bilateral agreement.⁷³ Furthermore, in *Chinook*, the Commission's acceptance of an anchor customer proposal was premised on the merchant developer's commitment to make the rest of the initial capacity available through an open season, give the same rate and terms to open season participants willing to make the same term commitment as the anchor customer, and the lack of protests to the arrangement.⁷⁴ Thus, as these cases illustrate, the Commission has consistently evaluated variations on the open season process on a case-by-case basis, with due consideration to the relevant facts and circumstances of individual proposals, so as to appropriately balance merchant transmission providers' financing needs with the important consumer protections effectuated through fair, transparent and non-discriminatory open season processes.

59. Here, Applicant's proposed method of allocating initial capacity includes a number of features that have the potential to limit the amount of capacity that would be made available through an open season auction. Among the ways Applicant's proposal has the potential to limit access to capacity in the initial allocation are: (1) it offers only a portion of the Project's capacity in an initial auction while withholding a portion for sale in subsequent auctions prior to commercial operations; (2) it creates different tranches of capacity offerings (e.g., 20-year, 10-year), potentially limiting the amount of each tranche offered at auction; (3) it withholds up to 20 percent of the initial capacity for sale once the project commences operation; and (4) it seeks pre-approval to enter into anchor customer agreements for up to 50 percent of the capacity at each scheduling point.

⁷¹ *Neptune*, 96 FERC at 61,630-31 & 61,634.

⁷² *Id.* at 61,633.

⁷³ *Id.* at 61,634.

⁷⁴ *Chinook*, 126 FERC ¶ 61,134 at P 61.

60. We find that Applicant's proposed method of initial capacity allocation incorporates a number of features that, when combined, appear insufficient to ensure that capacity is allocated in a fair and open manner at rates subject to competitive price discipline. Although as discussed more fully below we accept Applicant's proposal to enter into anchor customer agreements for up to 50 percent of the capacity, we cannot accept all of the other proposals on how to provide access to the remaining portion of the Project's initial capacity. As demonstrated above, while we believe it is important for merchant transmission developers to have a certain degree of flexibility in structuring the way they allocate initial capacity rights, such flexibility is not without limits.⁷⁵ While the Commission has approved these capacity allocation features individually in past merchant transmission orders, Applicant's proposal to combine such features runs too great a risk that it could limit the amount of capacity offered in an initial auction so as to unreasonably create an artificial level of scarcity in the amount and form of transmission rights available at any given time. We are concerned with Applicant's proposals to offer limited amounts of different tranches of capacity rights and to hold back up to 20 percent of the initial capacity in conjunction with the grant of anchor customer rights. By artificially limiting the individual capacity offerings in all of the ways proposed by Applicant, Applicant's proposal would enable it to create scarcity in the supply of transmission rights that is not reflective of the Project's capability. Accordingly, we cannot accept the aspects of Applicant's proposal that would allow Applicant to restrict the amount of initial capacity offered through the open season. Furthermore, to the extent that scarcity in the initial allocation of transmission rights is created through the combination of methods proposed, Applicant has not shown that sufficient protections are in place to ensure that these rates are just and reasonable.

61. Nonetheless, in recognition of the financing realities facing the Applicant and the Commission's longstanding policy of affording merchant transmission developers a level of flexibility in the design of their open season processes, we find that Applicant's open season process would satisfy our requirements for a fair, transparent open season so long as Applicant makes all of the Project's initial capacity not purchased by an anchor customer, if any, available for sale at all times during the open season process. Accordingly, Applicant would be allowed to offer products of varying terms in the open season, and it would be allowed to hold multiple open seasons, so long as Applicant does not restrict the overall amount of capacity or the amount of any individual capacity product at any time it is offering to the market. In addition, consistent with *Chinook*, we will accept Applicant's proposal to allocate up to 50 percent of the Project's initial capacity to anchor customers. Our acceptance of Applicant's initial capacity allocation proposal is also conditioned on the following: (1) to the extent Applicant enters into an

⁷⁵ See, e.g., *Neptune*, 96 FERC at 61,634.

anchor customer agreement, it must do so on the same terms as were articulated in *Chinook* (i.e., it must offer the same rate given to an anchor customer to an open season customer that agrees to the same terms),⁷⁶ and it must make a section 205 filing with the Commission seeking authorization for the anchor customer transaction in which it describes the relevant facts and circumstances leading to the agreement;⁷⁷ and (2) Applicant may not withhold any capacity that is not committed to an anchor customer during the open season process, either through the creation of tranches of capacity or by offering less than the full amount of available capacity in any auction.⁷⁸ Accordingly, we deny Applicant's request to withhold 20 percent of its capacity. Additionally, we will require Applicant's open season process to be audited by an independent auditor, consistent with Applicant's offer to do so.⁷⁹ We believe that Applicant retains sufficient flexibility to structure its anchor customer agreements and open season process in a manner sufficient to attract the financing necessary to advance the Project while at the same time ensuring that meaningful consumer protections are in place.

(c) **Competitive Alternatives and Long-term Market Power Issues**

62. When looking at the rates for transmission service beyond the time of the initial capacity allocation, the Commission has previously looked to the alternatives that customers would have to the merchant project. To this end, the Commission has explained the following:

[N]egotiated rates may be appropriate when the service on a neighboring public utility under cost-of-service rates—essentially capped at the utility's cost of expansion—can provide a reasonable alternative. A further check on the negotiated rates could exist where the price customers are willing to pay for transmission service is disciplined by the

⁷⁶ *Chinook*, 126 FERC ¶ 61,134 at P 61.

⁷⁷ We note that any executed anchor shipper agreements must be filed with the Commission.

⁷⁸ Applicant must set forth the amount of initial capacity it will offer to the market prior to commencement of its open season process. Any subsequent capacity additions or availability will be allocated pursuant to the OATT.

⁷⁹ Applicant Answer at 32.

difference in generation prices at the ends of the line (i.e., the market price of generation on either side of the line).⁸⁰

In situations like *Chinook* and *MATL*, the Commission found that rates would be constrained by the cost of service on neighboring utilities providing a similar service, capped at the cost to expansion of those facilities.⁸¹ In other situations, such as *TransEnergie*, the Commission has looked to the difference in the price of generation on either side of the transmission facility to discipline the rates that a new entrant merchant transmission developer would be able to charge customers.⁸²

63. Occidental objects to arguments that the price for transmission service on the Project will be disciplined by the differences in energy prices between the three interconnections.⁸³ Occidental asserts that the above-quoted statement in *Chinook* regarding the ability of differences in generation prices on either side of the merchant facility to discipline rates is inapplicable here because the Project will operate more like a power marketing hub between three asynchronous interconnections than a long-haul transmission line within an interconnection.⁸⁴ Occidental distinguishes *Chinook* by arguing that here the energy price differential between the three interconnections is the entire market demand for the Project's services and that no other service provider offers a comparable link between the three interconnections. Moreover, Occidental notes that in *TransEnergie* the Commission's willingness to rely on the energy price differential between two markets to discipline rates was underpinned by the understanding that such rates should be capped at the cost of expanding the transmission system.⁸⁵ Occidental suggests that there is no such cap here. Industrial Consumers assert that Applicant will be able to arbitrage price differentials among these markets to its advantage,⁸⁶ and that once those price differentials are resolved, no other market participant would be able to rely on the differentials to justify building a competitive alternative to the Project.

⁸⁰ *Chinook*, 126 FERC ¶ 61,134 at P 38 & n.26.

⁸¹ *MATL*, 116 FERC ¶ 61,071 at P 54.

⁸² *TransEnergie*, 91 FERC at 61,838-39.

⁸³ Occidental Protest at 24 (referencing Application at 17-18).

⁸⁴ *Id.* at 25 (referencing Application at 24).

⁸⁵ *TransEnergie*, 91 FERC at 61,838; *see also, e.g., MATL*, 116 FERC ¶ 61,071 at P 51.

⁸⁶ Application at Attachment C at 3.

Occidental points out that if granted negotiated rate authority, Applicant would be expected to attempt to maximize its profits by raising the price of its transmission services to fully reflect the differences in energy prices among interconnected markets.⁸⁷ Thus, Occidental argues that customers will not gain any of the benefits from the increased trading opportunities afforded by the Project.

64. Applicant responds that in prior cases, the Commission has recognized that charges for service over merchant transmission lines reflects a share of the price differential between markets at either end of the lines and that such market prices for power effectively place a cap on rates for transmission service.⁸⁸ Applicant also notes that in *TransEnergie*, the Commission found that the merchant transmission provider would acquire a share of the price differential (but no more) between two separated markets.⁸⁹

65. Additionally, Applicant objects to the contention that any evaluation of market power should define the Project itself as the relevant market for the purposes of determining whether it would be able to exercise market power. Applicant argues that the analysis should be broader, focusing on whether there are sufficient alternatives buyers and sellers in the wholesale power markets that may be affected by the merchant facility. Furthermore, Applicant asserts that the Project will enhance regional markets by eliminating physical barriers.⁹⁰

66. Occidental, Industrial Consumers, APPA and Golden Spread comment on the potential for Applicant to exercise market power. Protestors argue that the Project will be a one-of-a-kind facility at a strategic location offering unique cross-grid services not obtainable anywhere else.⁹¹ Because the Project will have no competitive alternatives, they assert that Applicant will be able to exercise market power in providing transmission service between the three interconnections. Protestors argue that this characteristic sets the instant Project apart from other merchant transmission projects. Additionally,

⁸⁷ Occidental, January 19, 2010 Supplemental Protest at Attachment 1 at 16, P 35 (Occidental Supplemental Protest).

⁸⁸ Applicant Answer at 13.

⁸⁹ *Id.* at 13-14.

⁹⁰ *Id.* at 15.

⁹¹ APPA, December 23, 2009 Comments at 5 and Industrial Consumers, December 29, 2009 Protest at 12-13 (Industrial Consumers Protest).

Occidental contends that the market power protections to which Applicant commits are not aimed at addressing its unique sources of market power, and some of them, such as Applicant's commitment to expand, may exacerbate its ability to exercise market power.

67. Occidental and Industrial Consumers contend that, while certain ties already exist individually between each of the three interconnections, no interties currently perform the function proposed by Applicant, i.e., connecting all three interconnections at the same location. Moreover, Occidental argues that the sizes of the existing AC/DC interties are modest relative to the size of the proposed Project. Occidental estimates that once the Project is operational, Applicant will have 100 percent of the transfer capacity between ERCOT and WECC, 86 percent of the capacity between ERCOT and the Eastern Interconnection, and 79 percent of the capacity between the Eastern Interconnection and WECC.⁹²

68. Occidental states that Applicant fails to offer any competitive alternatives that will discipline the prices for service on Tres Amigas.⁹³ Occidental argues that because neighboring transmission providers that build to the Project will incorporate the cost of Tres Amigas' capacity (sold at negotiated rates), they would not provide any discipline on the prices Applicant could charge for transmission.⁹⁴ Moreover, Occidental argues that Applicant fails to provide evidence that a market exists that could support more than one entrant or that competitive entry is feasible. Occidental also argues that given the Project's potential for expansion, Applicant would be in a position to expand the size of its facility to capture any market headroom that exists before a would-be-competitor could construct its own facilities. Occidental points to alternative projects cited in

⁹² Occidental Supplemental Protest at Attachment 1 at 9, P 19. Occidental states that these figures are conservative because they assume that the existing connections between the grid are fully unsubscribed (which is not the case), and because they assume that all of the ties can provide a reasonable economic alternative to the Project, which is unlikely due to their electrically distant location from the Project.

⁹³ *Id.* at 16.

⁹⁴ In support of this contention, Occidental cites a similar principle with respect to the sale of ancillary services, arguing that the Commission prohibited transmission providers from purchasing ancillary services at market-based rates to meet their on-system ancillary services needs. Occidental Protest at 31 (citing *Avista Corp.*, 89 FERC ¶ 61,136, 61,391-92 (1999)). Occidental states that *Avista* found that the pricing discipline of a cost-based alternative to third-party ancillary services sales at market rates "would be thwarted if the transmission provider could substitute purchases under non-cost-based rates for its mandatory service obligation." *Id.*

previous merchant transmission cases such as *Chinook*,⁹⁵ *Neptune*, and *TransEnergie*,⁹⁶ and argues that unlike in those instances, Applicant fails to identify any realistic alternatives that either exist or are in the planning process. Additionally, Industrial Consumers note the differences in the price of generation among the three interconnections and argue that Applicant will be able to arbitrage these price differentials to its advantage. They contend that if price differentials are resolved, no other market participant would be able to rely on the differentials to justify a new facility to compete with the Project.

69. Occidental and Industrial Consumers contrast this Project with the merchant projects in *Chinook*, in which neighboring systems subject to the Commission's jurisdiction provided cost-based alternatives, which included an obligation to expand pursuant to the OATT. Occidental argues that Applicant fails to show that a similar obligation exists for neighboring utilities in this case, noting that Applicant failed to cite cases in which either ERCOT or Commission jurisdictional providers have been forced to build a new AC/DC tie across asynchronous interconnections.

70. Applicant responds that its proposal is not distinguishable from other merchant transmission projects insofar as it seeks to resolve a transmission constraint in which there is currently inadequate transfer capability. Applicant contends that previous Commission-approved merchant transmission projects were also unique and built to connect markets that were previously separated or insufficiently connected. Applicant notes that in such cases, the Commission relied on open access requirements and the obligation to build transmission at cost-based rates in response to requests for firm transmission service as rate disciplining mechanisms.⁹⁷ However, Applicant contends

⁹⁵ Occidental points to *Chinook*, in which the Commission stated that "other merchant transmission projects are currently being proposed for development in the same general region as the Chinook and Zephyr projects" and concluded that the "existence of other merchant transmission projects will enhance competition among transmission providers in the region." *Chinook*, 126 FERC ¶ 61,134 at P 57.

⁹⁶ Occidental states that in *Neptune* the Commission cited to a previously approved merchant "undersea high-voltage direct current cable" located "in the same general region" as the Neptune project (*TransEnergie*). Occidental acknowledges, however, that in *Neptune* the Commission did not explicitly address whether "it was practically or economically feasible for another underwater cable to be constructed." Occidental, January 19, 2010 Answer at 10 (citing *Neptune*, 96 FERC ¶ 61,147; *TransEnergie*, 91 FERC ¶ 61,230; and *Chinook*, 126 FERC ¶ 61,134 at P 57).

⁹⁷ Applicant Answer at 8.

that the feasibility of constructing transmission alternatives has never been one of the Commission's criteria when reviewing merchant transmission cases.⁹⁸

71. Moreover, Applicant states that the alternatives to the Project are not limited to other identical facilities; instead, competitors could expand existing AC/DC interties or construct new ones, which Applicant asserts could be required pursuant to utilities' OATTs. In addition, Applicant points to numerous alternatives that buyers and sellers currently have in their own interconnections, over which Applicant will have no control, and which will remain available whether or not the Project is built. Applicant also refutes Occidental's assertion that its commitment to expand is anti-competitive, arguing that market power is exercised by withholding supply, not expanding it.⁹⁹ Applicant argues that if it can expand its capacity at a lower cost than a competitor building an alternative new facility, then it is in the public interest for Applicant to do so.

72. We find that, at this preliminary stage, sufficient long-term checks are in place to ensure that negotiated rates for transmission service on the Project will be just and reasonable. Additionally, the conditions that we are placing on the manner in which Applicant will allocate initial capacity rights discussed above, in addition to the long-term market disciplining characteristics discussed below, strikes the appropriate balance between concerns over long-term market power and the financing realities faced by the Applicant. Fundamentally, rates for transmission service on the Project should remain disciplined by a number of factors, including: competition from capacity owners' secondary transmission rights; options to purchase capacity on existing AC/DC interties (capped at the cost of expanding these interties); the cost of a new entrant constructing an alternative AC/DC intertie between any or all of the three interconnections; the difference in the price of generation in the markets connected by the Project; and once the Project's capacity is fully utilized, the cost of expanding the Project at cost-of-service rates (which Applicant commits to do if expansion pursuant to negotiated rates is not feasible). Furthermore, to the extent market power concerns actually do arise at some point in the future, parties always retain the right to file a complaint, or the Commission may institute an investigation, pursuant to section 206 of the FPA to determine if Applicant's negotiated rate authority has become unjust, unreasonable, and/or unduly discriminatory.

73. We note that many of the arguments raised by commentors concern the Applicant's potential to exercise market power at some point in the future, under varying sets of assumptions.¹⁰⁰ Many such arguments, however, are speculative at this point and

⁹⁸ *Id.* at 9.

⁹⁹ *Id.* at 16.

¹⁰⁰ For example, protestors argue that a threat of expansion by the Applicant, once

impossible to address at this preliminary stage of the Project's development, when commencement of commercial operations is years away and the set of assumptions upon which the objections are based may or may not come to fruition. For this reason, when initially analyzing whether negotiated rate authority would lead to just and reasonable rates, the Commission has looked broadly at the long-term implications of granting negotiated rate authority to a merchant transmission provider, and has focused on the merchant's incentive and ability to exercise market power at some point in the future. Accordingly, we will address commentors' more speculative arguments to the extent possible on the record before us.

74. First, although protestors would define the market for service on the Project as limited to the Tres Amigas facility itself, or, in the alternative, to transactions that cross from one of the asynchronous grids to another, we find that such a view of the relevant market fails to consider a number of other viable alternatives that customers seeking transmission service on the Tres Amigas facility would have. Such alternatives include all of the existing opportunities that potential customers currently have in their interconnections. In the Eastern Interconnection, these opportunities include buying and selling power in organized markets such as those operated by SPP or the Midwest Independent System Operator (ISO). In WECC, these opportunities include bilateral transactions with other market participants in WECC, and in ERCOT, customers will retain the option to continue purchasing and selling power within the market regulated by the Texas Commission. Moreover, potential customers would also have opportunities to purchase capacity on existing interties (to the extent such capacity is available). Occidental contends that to be a legitimate alternative to Applicant's project, a facility would have to link all three interconnections. We disagree. Much of the capacity on the Project will be used to transmit power between two interconnections, rather than all three.¹⁰¹ Therefore, any project that could link just two of the interconnections would be a viable competitor to the Project. Thus, it would be unreasonable to require Applicant to show that alternatives would exist that are functionally identical to the Project.

75. Moreover, as a new market entrant in the area with no captive customers, Applicant will expand the existing opportunities customers have to buy or sell energy by connecting markets that previously operated in a manner largely isolated from each other. With no captive pool of customers from which Applicant can recover its costs, the only

operational, would hamper the ability of a would-be competitor to enter the market, and that Applicant will become an essential facility in a unique market, in which it will be the sole service provider.

¹⁰¹ See Application at 5-6 (indicating that the Project will allow power sellers to schedule power between any two of the three interconnections).

way in which it will attract customers is to provide a service that has some economic value to market participants. If Applicant does not offer some benefit to prospective customers, it will not be able to recover the investment for which it has assumed the risk. Therefore, from a practical standpoint, we believe that rates for service on the Project will be disciplined by the fact that customers will retain all of the opportunities they currently have to purchase or sell energy. In addition to the existing market opportunities disciplining the Project's rates and consistent with prior requests for negotiated rate authority, Applicant has committed to providing tradable secondary transmission rights. These rights will compete against any subsequent transmission rights that Applicant offers for sale, and they will serve as a means of disciplining the rates for that service.

76. Additionally, Applicant has committed to expand its facility on a merchant basis, or if the market will not support the upgrade, on a cost-of-service basis. Despite the arguments of some protestors to the contrary, this commitment to expand on a cost-of-service basis should further discipline rates for service on the Project. In situations where a request for service exceeds the available capacity on the Project, Applicant's commitment affords customers the option either to negotiate a rate for the expansion or to obtain service at a cost-based rate. In this way, at the point where capacity on the Project is exhausted, Applicant's expansion commitment establishes an upper bound on the rates a subsequent customer would pay for service at the cost of expanding the system. Similarly, although protestors argue that Applicant would be in a position to under-bid a potential competitor seeking to construct a similar cross-grid project by expanding its Project, this does not raise a legitimate concern that rates for service on the Project would be unjust and unreasonable (at least at this early stage). To the contrary, it shows that like other merchant facilities, the rates for service on the Project will be capped at the cost of expansion of a neighboring facility because only if it is less expensive to take service on an expanded Tres Amigas facility would customers choose that option over a potential competitor.

77. In addition, we do not accept protestors' arguments that it would be unjust and unreasonable for Applicant to charge rates for transmission service approximating the difference in the price of power between interconnections. To the contrary, these commodity price differentials can be expected to serve as a cap on Applicant's ability to charge, and customers' willingness to pay, for transmission service on the Project. The Commission has accepted such methods of price discipline since it first accepted a merchant transmission developer's request for negotiated rate authority in *TransEnergie*. There, the Commission conditionally approved a merchant developer's proposal to provide transmission service at negotiated rates, finding that the developer's pricing proposal represented a form of opportunity cost pricing,¹⁰² which was the logical

¹⁰² *TransEnergie*, 91 FERC at 61,838 (finding that the relevant opportunity costs

extension of prior policy.¹⁰³ The Commission concluded that the developer's negotiated rate proposal enhanced competition and market integration by expanding capacity and trading opportunities between two markets.¹⁰⁴ We reach a similar conclusion here.

78. Protestors object to the likelihood that once the Project is constructed, Applicant will capture the margin that exists between the prices of generation within each interconnection. However, the contention that Applicant may attempt to price its transmission service in a way that reflects the differential in the cost of generation between interconnections actually supports the notion that such differentials serve as a cap on the rates customers would be willing to pay, consistent with longstanding Commission policy. Industrial Consumers object to the request for negotiated rate authority because of its perceived impact on ratepayers in Texas specifically. However, Industrial Consumers have not provided evidence to show that Applicant's market entrance as a supplier of transmission service to ERCOT would harm ratepayers or, more importantly, explained why such a showing would warrant rejection of negotiated rates otherwise justified by the types of considerations cited above.

79. Furthermore, it is likely that Applicant's neighboring utilities will be some of its customers. Because such utilities would have to build transmission to reach and interconnect with the Project, these utilities (as transmission service customers of Applicant) may have leverage when negotiating rates for service on the Project. Further, Applicant will have an incentive to negotiate acceptable rates and terms with neighboring utilities for service on the Project to, in turn, get the transmission built that the Project will need to interconnect to the surrounding systems and provide service.

80. Accordingly, we find that there are sufficient checks on the potential for Applicant to develop and exercise market power to grant the negotiated rate authority requested. Regarding allegations that Applicant may develop market power in the future, we note that conditions will be in place to detect and respond to the exercise of market power, should that occur. To that end, Applicant commits to filing a post-open season report,

at issue in the case of the merchant developer (as opposed to a traditional public utility that provided generation and transmission service) were reflected by either the generation savings of customers utilizing the line or by other alternatives, i.e., new generation).

¹⁰³ The Commission has also made similar findings with respect to natural gas transportation rates of interstate pipelines, permitting the use of gas commodity basis differentials in negotiated rate transactions. *See Natural Gas Pipeline Negotiated Rate Policies and Practices*, 114 FERC ¶ 61,042 (2006).

¹⁰⁴ *TransEnergie*, 91 FERC at 61,838.

after which parties that believe they have been unfairly treated will have the opportunity to file a complaint. Additionally, once the lines are operational, the Commission's open access requirements will ensure that Applicant will not be able to construct barriers to entry in the relevant markets. Moreover, Applicant will provide non-discriminatory service pursuant to the OATT requirements in Order No. 890,¹⁰⁵ it will post ATCs, it will have an obligation to expand where a request for capacity exceeds its available capacity, and it will allow for firm tradable secondary transmission rights, establishing an OASIS to facilitate the trading of these secondary transmission rights. In the end, Applicant's negotiated rate authority is premised on it abiding by the Commission's open access requirements, and we emphasize that Applicant's negotiated rate authority is based on the facts and circumstances represented in its pleadings in this proceedings. Applicant will remain subject to ongoing oversight under section 206 of the FPA.

(d) **Barriers to entry**

81. Occidental argues that Applicant has not shown that other locations exist in which it would be economically feasible and equally strategic in relation to the three interconnections to construct a competing facility providing the same services into all three interconnections. Occidental points to Applicant's option to lease a site near Clovis, New Mexico, as a potential barrier to entry to competitors seeking to build a competing alternative. Occidental also argues that once neighboring utilities build facilities to interconnect to the Project, state commissions and regional planning authorities will likely be averse to authorizing construction of duplicative facilities, especially where service can be obtained over the existing facilities. Occidental believes that in this way, Applicant will lock-in a significant market advantage that will prevent competitors from building new facilities to compete with the Project. Additionally, Occidental points to Applicant's relationship with American Superconductor as potentially establishing a barrier to others seeking to access that company's cable technology. Occidental warns that American Superconductor may have the incentive to not sell the technology used in the Project to competitors.

82. We find this argument to be unpersuasive. We have never required merchant transmission developers to seek out and describe alternative site locations to show that they lack the ability to establish barriers to entry. Nor will we do so here. Furthermore,

¹⁰⁵ *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).

Occidental's argument ignores the fact that facilities that interconnect two of the nation's three interconnections will provide meaningful competition to the Applicant's Project. Because such facilities could exist in many parts of the country where two of the interconnections approach each other, Applicant's option to lease land near Clovis, New Mexico, does not unfairly deny competitors the ability construct a competitive facility. Additionally, we do not believe that American Superconductor's interest in the Project somehow creates a barrier to competitors seeking to construct an alternative to the Project, at least at this preliminary stage of the Project's development. Even if we were to accept the unsupported assertion that the company would be reluctant to share its superconducting DC technology with a competitor, Occidental has not shown that there is an absence of other companies that manufacture and sell DC cable technology. American Superconductor is not the only supplier of DC transmission cable, and competitive alternatives need not be identical in every respect to provide an alternative to the merchant project at issue.

b. Undue Discrimination

83. In order to prevent undue discrimination when granting negotiated rate authority to a merchant transmission developer, the Commission explained in *Chinook* that it primarily looks to two things: (1) the terms and conditions of a merchant transmission developer's open season; and (2) its OATT commitments (or in the RTO/ISO context, its commitment to turn operational control over to the RTO or ISO).¹⁰⁶

i. Positions of the Parties

84. Applicant states that the open season procedures set forth above ensure that its open season process and OATT commitments will ensure that no undue discrimination will occur. Applicant argues that it will have no incentive or ability to favor any one customer over another and that all capacity will be sold to the highest bidder on a non-discriminatory basis. Moreover, Applicant states that it will file a post-open season report with the Commission describing the details of its open seasons and offers to have such reports independently audited if so required by the Commission.

85. Applicant also states that it may be necessary for it to sell some transmission rights to unaffiliated third parties pursuant to bilaterally negotiated agreements and seeks authorization to do so here. Applicant states that if it enters into any such anchor customer agreement, it will first make a filing with the Commission describing the process used to enter into such contract. Applicant commits to filing the identity of any anchor customer along with a description of all the material terms of sale. However,

¹⁰⁶ *Chinook*, 126 FERC ¶ 61,134 at P 40.

Applicant states that these arrangements would not constrain its ability to later sell transmission services at auction or on a shorter term basis under its OATT at different prices based on market conditions at the time of sale.

86. Occidental argues that Applicant's proposal precludes the Commission from determining whether it will act in an unduly discriminatory manner in allocating capacity to an anchor customer, because unlike the developers in *Chinook*, it requests authorization to seek out anchor customers in the future, and merely commits to provide the Commission with an informational filing after the fact. Moreover, Occidental notes that in *Chinook*, the developers committed to providing the same rate and terms as the anchor customer received to any customer in an open season willing to commit to the same 25-year term.¹⁰⁷ Occidental contrasts this commitment with that of Applicant here, which would permit Applicant to later sell transmission services at auction or on a shorter term basis under its OATT at different prices based on market conditions at the time of sale.¹⁰⁸ Occidental argues that under this framework, Applicant could entice anchor customers, including strategic allies, with significantly better rates or terms for the same length commitment than those granted to customers through an open season.

87. Applicant responds that its request to sell transmission rights pursuant to different terms and conditions to anchor customers is justified because it reflects differing values of service at different times. Applicant notes that its post-open season report will set forth the quantity and term of transmission service sold in the auction, the prices obtained, and the number and identity of the parties purchasing transmission services.

ii. Discussion

88. We agree with Occidental that Applicant could act in an unduly discriminatory way if Applicant were allowed to execute anchor shipper agreements, but not be obligated to offer the same rate and terms to customers that are willing to commit to the same deal during the open season. Thus, we have conditioned Applicant's negotiated rate authority on it providing the same rate and terms as the anchor shipper received to any customer in an open season willing to commit to the same term, consistent with *Chinook*, as pointed to above by Occidental. In total, we find that the open season processes, as modified by the conditions above, along with Applicant's future filing of an independently audited post-open season report, will ensure that no undue discrimination occurs. The requirements set forth above are designed to ensure that the Applicant does not withhold certain amounts of transmission rights from the marketplace and that all

¹⁰⁷ Occidental Protest at 42 (citing *Chinook*, 126 FERC ¶ 61,134 at P 13).

¹⁰⁸ *Id.* (referencing Application at 30-31).

potential customers have the same level of access to rights for service on the Project, while still allowing Applicant the flexibility to offer various product terms and negotiated rates, through multiple auctions if capacity remains after the initial auction.¹⁰⁹ We note that at the time Applicant files its post-open season report, customers will have an opportunity to determine whether their bids for service were unreasonably denied, and if so, to make a filing with the Commission asserting as much.¹¹⁰

89. With regard to Applicant's request for authorization to enter into bilateral agreements with anchor customers, we will require Applicant, when and if it seeks to enter into such agreements, to make a filing with the Commission describing the process used to identify the anchor customer as well as the details of the agreement.¹¹¹ Such a filing will 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, while also allowing Applicant the flexibility to negotiate such agreements to meet its financing needs. Furthermore, the condition set forth above requiring Applicant to give the same rate and terms to open season customers that agree to the same term of service will prevent Applicant from unduly favoring one customer over another when both seek to commit to the same deal. In *Chinook*, the Commission found that the financial commitments made by anchor customers provide crucial early support and certainty to merchant transmission developers.¹¹² However, in *Chinook* the applicants committed to giving the same deal (i.e., rates, terms and conditions) to any customer willing to make the same time commitment as the anchor customer.¹¹³ This commitment was important to the Commission's finding in *Chinook* that allowing an anchor customer when granting negotiated rate authority should not lead to undue discrimination. Similar to *Chinook*, Applicant's request to enter into bilateral agreements for up to 50 percent of its initial capacity is granted, subject to Applicant making a filing with the Commission seeking authorization for the specific agreement and to Applicant

¹⁰⁹ Nothing in our decision would prevent Applicant from charging different rates for different terms of service, so long as all capacity is allocated on a non-discriminatory basis.

¹¹⁰ See *Chinook*, 126 FERC ¶ 61,134 at P 43.

¹¹¹ As noted above, executed anchor shipper agreements must be filed with the Commission.

¹¹² *Chinook*, 126 FERC ¶ 61,134 at P 44.

¹¹³ *Id.* P 61.

offering all customers the same deal as any anchor customer agreement, if such customer is willing to agree to the same terms.

90. Once the Project has commenced operation, we also determine that Applicant must file the same information that the Commission required in *Chinook*, specifically: (1) books and records in compliance with the Uniform System of Accounts in Part 101 of the Commission's regulations,¹¹⁴ subject to examination as required in Part 41 of the regulations;¹¹⁵ (2) financial statements and reports in accordance with Part 141 of the Commission's regulations;¹¹⁶ and (3) Applicant's books and records must be audited by an independent auditor.¹¹⁷ These commitments will assist the Commission in carrying out its oversight role. Applicant must also file an OATT that adheres to the *pro forma* OATT in Order No. 890 prior to the commencement of service. Any deviations from the *pro forma* OATT must be supported and will be evaluated by the Commission when they are submitted so that the Commission can be sure Applicant will provide open and non-discriminatory service on its Project.¹¹⁸

c. Undue Preference and Affiliate Concerns

91. In the context of merchant transmission, our concerns regarding the potential for affiliate abuse arise in situations where the merchant transmission owner is affiliated with either the anchor customer, participants in the open season, and/or customers that subsequently take service on the merchant line.¹¹⁹ While the Commission has not barred such affiliate transactions outright, it has indicated that additional safeguards must be in place to ensure that affiliates are not afforded an undue preference when taking service on the merchant project.¹²⁰

¹¹⁴ 18 C.F.R. Part 101 (2009).

¹¹⁵ *Id.* Part 41.

¹¹⁶ *Id.* Part 141.

¹¹⁷ *Chinook*, 126 FERC ¶ 61,134 at P 62.

¹¹⁸ *Id.* P 63.

¹¹⁹ *Id.* P 48.

¹²⁰ *Id.* P 49-51.

i. Positions of the Parties

92. Here, Applicant contends that no affiliate abuse can occur because it does not intend to enter into any transactions with its owners or affiliates relating to the Project—either as an anchor customer, open season participant, or secondary market transmission service purchaser—without requesting specific authority to do so from the Commission prior to executing any such agreements.

93. Occidental argues that certain “strategic alliances” between Applicant and other entities, such as American Superconductor, could pose a significant risk of undue preference by Applicant. Applicant responds that it has no agreements with parties that have been identified as “strategic alliances” that it has not disclosed in the instant application. Further, Applicant states that its contract with American Superconductor does not contain any provision limiting American Superconductor’s right to sell its technology to a third party. Additionally, Occidental argues that the Commission should prohibit purchasers of transmission service, as well as any utility with captive customers, from acquiring an equity interest in the Project. Applicant responds that in lieu of such a sweeping *ex ante* prohibition, it proposes that the Commission impose a prohibition on these classes of entities gaining an equity stake in the project without prior Commission approval.

ii. Discussion

94. In light of Applicant’s commitments to seek authorization for any affiliate transaction prior to its execution and to seek authorization prior to the above-mentioned entities’ acquiring an equity interest in the Project, we find that Applicant adequately addresses any affiliate concerns present at this early stage of the Project. At its core, our concern over undue preference arises in situations where the merchant transmission developer has a clear incentive to give one customer a more favorable deal than others. Such an incentive occurs when the merchant transmission developer enters into a service agreement with an affiliate. However, we have not prohibited such arrangements outright and we will not do so here. Instead, we believe that the filing requirements will shed the necessary light on any of these arrangements, such that the Commission, customers, and competitors will have an opportunity to comment on these agreements before they go into effect, and any additional safeguards to ensure that the affiliate transactions are not unduly preferential can be put in place as needed. Accordingly, we will hold Applicant to the commitments made herein.

d. Regional Reliability and Operational Efficiency

95. In order to ensure regional reliability and operational efficiency, the Commission expects that any merchant transmission projects connected to an RTO or ISO turn over operational control to the RTO/ISO.¹²¹ Further, while separate reliability requirements are no longer necessary for merchant transmission projects in light of the development of mandatory reliability requirements, we note that merchant developers must comply with all applicable requirements of NERC and any regional reliability council.¹²²

i. Positions of the Parties

96. Applicant states that it will not be located within any RTO, and it does not propose to become an RTO or ISO. Applicant intends to operate as a NERC- and WECC-approved balancing authority area. Applicant contends that it will satisfy all reliability standards and requirements associated with being a transmission owner and operator. If requested by the Commission, Applicant commits to submit written confirmation of its compliance with these requirements prior to commercial operation.

97. Applicant also commits to participating in all Order No. 890 regional planning processes that are applicable to the reliable operation of the Project—not, however, on the basis of economic benefits. Applicant asserts that as a merchant developer that is assuming the full risk of the Project, it would be inappropriate to require it to go through the same economic benefits scrutiny as a cost-based project that will be paid for by captive customers. In addition, Applicant proposes to commence its own regional planning process to discuss and facilitate the integration of the Project with the electric systems in the region, and potential expansion of the Project.

98. A few commentors raised reliability concerns about the Project in general and its risks to the safe planning and operation of the electric grids that are interconnected with it. Moreover, these commentors argue that the Project would create a new first contingency that is larger than any existing contingency. Occidental and Xcel also contend that significant levels of transmission build-out may be needed to ensure grid stability once the Project comes online.

99. Occidental and Xcel warn that the Project may affect the planning processes of WECC, SPP and ERCOT. In addition, Xcel notes planning and operational concerns will not come to pass until a third party proposes to interconnect the Project with one or more

¹²¹ *Id.* P 52.

¹²² *Id.* P 53.

of the existing grids. Xcel and Texas Commission contend that Applicant should be required to comply with the planning processes for interconnecting utilities and RTOs.¹²³ Xcel requests that the Commission condition its approval on such compliance and adds that any entity that intends to interconnect with the Project should also participate in the Order No. 890 planning processes.¹²⁴

100. Occidental and Texas Commission contend that Applicant has not provided details on how the Project will be operated, or that it will not impair system reliability. Texas Commission contends that, if the Commission approves negotiated rates in this proceeding, it should make clear what further reviews and approvals are required before the project may begin operating.

101. Applicant responds to concerns about the potential for it to represent a new first contingency, stating that the Project is being designed to limit the single largest contingency to the loss of one of the AC/DC convertors, which represents only a 750 MW contingency. Notwithstanding, Applicant argues that the analysis of reliability in this proceeding is premature, because the reliability impacts will be considered in the applicable planning processes to ensure compliance with NERC standards. Applicant agrees that it would be appropriate for it to participate in the Order No. 890 planning processes for the utility systems that propose to interconnect with it. However, it clarifies that it should only be reviewed in the planning processes for reliability purposes, not as a project that must be otherwise approved or included in any queue.

ii. Discussion

102. We find that the specific reliability issues raised by commentors are adequately addressed here by Applicant's commitments or are otherwise outside the scope of the current proceeding and would be best addressed when the applicant applies for certification with NERC. For example, we accept Applicant's commitment to participate

¹²³ Texas Commission also expresses concern that any interconnection between the Project and the ERCOT transmission system not result in Texas Commission's loss of jurisdiction over utilities in Texas, and that the Commission should also make it clear in this proceeding that it is not ordering an electric utility or transmitting utility to interconnect with the Project pursuant to sections 210 or 211 of the FPA. We find that Texas Commission's concerns regarding the jurisdictional status of Texas utilities are misplaced here, as they are being addressed in response to Applicant's request for a declaratory order in Docket No. EL10-22-000.

¹²⁴ Xcel, December 29, 2009 Comments at 9-10. *See also, Chinook*, 126 FERC ¶ 61,134 at P 53.

in the Order No. 890 planning processes, for reliability purposes, with the utility systems that propose to interconnect to it. We note that such participation does not require Applicant to be subject to any queues or economic approvals that could otherwise be required by planning processes. Additionally, because the Project will be located within WECC, we will hold Applicant to its commitment to satisfy WECC requirements, which includes participation in the WECC transmission planning process. However, as stated in *Chinook*, “[b]ecause merchant transmission is subject to mandatory reliability requirements, separate reliability requirements no longer seem necessary.”¹²⁵ Thus, we will not address additional reliability concerns at this preliminary stage of the Project beyond requiring Applicant to comply with all relevant reliability requirements going forward. We expect that Applicant will work cooperatively with the relevant regional entities and NERC to timely complete all necessary registrations and certifications. Furthermore, we will require Applicant to file a description of its own regional planning process in its OATT, which Applicant states it will commence in order to facilitate the integration of the Project with the electric systems in the region, and potential expansion of the Project.

3. Waiver Requests

103. As discussed above, Applicant requests waiver of certain filing requirements, which it contends are not applicable to it as a merchant transmission developer. Similar to *Chinook*, because Applicant is proposing to charge negotiated rates, the regulations requiring the filing of cost-based data are not applicable. Therefore, consistent with *Chinook*,¹²⁶ and for good cause shown, we will waive the filing requirements of Subparts B and C of Part 35 of the Commission’s regulations, except for sections 35.12(a), 35.13(b), 35.15 and 35.16. We will also grant Applicant’s request for waiver of the Form No. 1 filing requirement, because Applicant has no captive customers and consistent with the Commission’s reasoning in *Chinook*.¹²⁷

¹²⁵ *Chinook*, 126 FERC ¶ 61,134 at P 53 (citing *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006)).

¹²⁶ *Id.* P 68-69.

¹²⁷ *Id.* P 69.

The Commission orders:

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

(B) Applicant is hereby directed to file its OATT in compliance with this order prior to the beginning of its open season.

(C) Applicant is hereby directed to file a report of the open season results with the Commission within 30 days of the close of the open season.

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

(E) The Commission grants Applicant's request for waiver of the Form No. 1 filing requirement, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.