

131 FERC ¶ 61,281
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 MOTION FOR CLARIFICATION

(Issued June 29, 2010)

1. On April 16, 2010, Tres Amigas LLC (Tres Amigas) filed a motion for clarification of the Commission's March 18, 2010 order,¹ which conditionally authorized Tres Amigas to sell transmission services on its proposed Tres Amigas Superstation (Project) at negotiated rates. As discussed below, we grant the requested clarification of the March 18 Order, subject to conditions designed to ensure that Tres Amigas' initial capacity allocation is conducted in a fair, open and non-discriminatory manner.

I. Background

2. On December 8, 2009, Tres Amigas filed a request for authorization to charge negotiated rates for transmission rights on its proposed Project, as well as a request for waiver of certain Commission filing requirements. Tres Amigas described the Project as a three-way alternating current (AC)/direct current (DC) transmission superstation in eastern New Mexico that would be designed to eliminate the market separation between the three asynchronous interconnections in the continental United States.² The March 18 Order granted Tres Amigas' request for negotiated rate authority, subject to a number of conditions.

3. As relevant to the instant request, the March 18 Order approved Tres Amigas' request to allocate up to 50 percent of the Project's initial capacity to anchor customers via negotiated rate agreements, subject to the following conditions: Tres Amigas was required to offer "the same rate and terms as the anchor shipper received to any customer

¹ *Tres Amigas LLC*, 130 FERC ¶ 61,207 (2010) (March 18 Order).

² March 18 Order at P 4.

in an open season willing to commit to the same term, consistent with *Chinook*;³ and it was required to make a filing with the Commission describing the process used to identify the anchor customer as well as the details of the anchor customer agreement.⁴ The Commission explained that these conditions were imposed to prevent Tres Amigas from unduly favoring one customer over another when both are willing to commit to the same rate and terms.⁵ Moreover, the Commission stated that these conditions would provide a mechanism whereby customers could inform the Commission of any perceived undue discrimination in the assignment of transmission rights to anchor customers.⁶ Ultimately, the Commission determined that notwithstanding these conditions, Tres Amigas should retain 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.⁷

II. Summary of the Pleadings

4. On April 16, 2010, Tres Amigas filed a motion for clarification of the March 18 Order, requesting expedited consideration.⁸ Tres Amigas requests clarification of the following requirement in the March 18 Order: “[W]e 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*...”⁹ Tres Amigas asserts that the phrase “an open season” is ambiguous and could be construed as requiring it to offer the same rates, terms and

³ March 18 Order, 130 FERC ¶ 61,207 at P 88 (referencing *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (*Chinook*)).

⁴ *Id.* P 89. The March 18 Order also noted that the executed anchor shipper agreements must be filed with the Commission. *Id.* P 89 n.111.

⁵ *Id.* P 89.

⁶ *Id.* Additionally, the Commission imposed a post-open season reporting requirement to ensure the overall allocation of initial capacity was conducted in a fair, open and nondiscriminatory manner. *Id.* P 88.

⁷ *Id.* P 61.

⁸ Tres Amigas, April 16, 2010 Motion for Clarification. Also on April 19, 2010, Occidental filed a request for rehearing of the March 18 Order. The merits of that rehearing request will be addressed in a separate order.

⁹ *Id.* at 2 (quoting March 18 Order at P 88).

conditions that it provides to an anchor customer to other customers in each open season after the anchor customer agreement is executed. Tres Amigas argues that such a requirement would unfairly hamstring its efforts to negotiate an anchor customer agreement and goes further than needed to protect customers from undue discrimination. Tres Amigas therefore seeks authorization to offer other potential customers the same rates and terms as it may negotiate with the anchor customer on a one-time basis after the anchor customer agreement has been approved by the Commission.¹⁰

5. Tres Amigas explains that it is currently in discussions with a potential anchor customer, and the parties are considering an agreement that would include upfront payments to Tres Amigas prior to construction of the Project, negotiated rates once the Project is in service, and potentially other negotiated terms and conditions that differ from standard open season terms.¹¹ Tres Amigas states that if the current negotiations result in an agreement, it will offer the same rates and terms to other potential customers on a one-time basis, shortly after the Commission approves the anchor customer contract. Tres Amigas contends that it should not be required to offer the same rates and terms in each open season auction because the upfront payments would no longer be relevant at advanced stages of the Project's development. Moreover, Tres Amigas argues that the rates it will negotiate with its anchor customer will reflect the fact that the anchor customer is making upfront payments, and similar rates without these upfront payments would be discriminatory because later customers would not share the same development risks as the anchor customer.

6. Tres Amigas argues that its proposed "one-time offer" of the rates, terms and conditions of the agreement it negotiates with its anchor customer will ensure that it cannot discriminate against third parties and that all parties have an opportunity to participate as a customer on the same basis as the anchor customer. Tres Amigas asserts that the Commission should grant the clarification in order to afford Tres Amigas the flexibility it needs to negotiate an anchor customer agreement and attain the early financial support for its Project that the Commission found to be beneficial in *Chinook*.¹²

7. On April 26, 2010, Occidental Permian, Ltd., Occidental Chemical Corporation and Occidental Power Marketing, L.P. (collectively, Occidental) filed an answer to Tres Amigas' motion.¹³ Occidental asserts that the Commission should deny Tres Amigas'

¹⁰ *Id.* at 2.

¹¹ *Id.* at 3.

¹² *Id.* at 4 (citing *Chinook*, 126 FERC ¶ 61,134 at P 44).

¹³ Occidental, April 26, 2010 Answer.

motion as premature, without prejudice to Tres Amigas raising the issue in the section 205 filing in which Tres Amigas files its anchor customer agreement with the Commission. Occidental argues that there is no ambiguity in the March 18 Order to support Tres Amigas' request, and that the motion should be denied for that reason alone.¹⁴

8. Occidental next describes a number of issues that it believes are left unclear by Tres Amigas' motion. For example, Occidental states that Tres Amigas does not explain how the March 18 Order hamstrings its negotiations with an anchor customer or how an upfront payment would become irrelevant in subsequent stages of the open season.¹⁵ Occidental contends that Tres Amigas has provided no information about its open season process and that it fails to explain how the *Chinook* condition, rather than its own open season proposal, would hamstring negotiations. Occidental also argues that it is unclear when Tres Amigas would make the one-time offer and whether it would be during the open season process at all. Occidental also argues that it is unclear to whom Tres Amigas intends to make the one-time offer.

9. Additionally, Occidental contends that it is unclear whether Tres Amigas views the one-time offer of the initial anchor customer's rates and terms as absolving it of an obligation to make the rates and terms of any subsequent anchor customer agreement (executed at some later stage in the development process) generally available.¹⁶ Occidental argues that the value of the *Chinook* condition would be undermined if Tres Amigas did not have to offer the terms of subsequent anchor customer agreements to open season customers. Occidental notes that in *Chinook* the merchant transmission developers proposed to hold only one open season auction, during which they would offer the anchor customer rates and terms to other potential customers. Therefore, Occidental argues, there was no issue in that proceeding regarding how the *Chinook* condition would be applied in subsequent open seasons. Occidental concludes that in *Chinook*, the Commission took comfort in the fact that the transparent conditions of an open season would apply to the offering.¹⁷

10. Accordingly, Occidental argues that the motion should be denied at this time, without prejudice to Tres Amigas raising the issue when it files its anchor customer agreement. Occidental states that Tres Amigas has not shown that its concerns cannot be

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 3-4.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 6-7.

addressed in such a future section 205 filing. Moreover, Occidental contends that at that time, Tres Amigas should be required to provide more specific information about the agreement, the Project, and the timing and process of its open season auctions.¹⁸

III. Commission Determination

11. For the reasons set forth below, we grant Tres Amigas' motion for clarification as discussed herein. In the March 18 Order, the Commission granted Tres Amigas negotiated rate authority, and accepted its proposal to allocate up to 50 percent of the Project's initial capacity to an anchor customer, on the condition that it provide "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*."¹⁹ Here, we clarify this requirement in light of the facts of the instant proposal, in which the developer may hold more than one auction for capacity in its open season process.

12. In *Chinook*, the Commission accepted two merchant transmission developers' proposals to allocate 50 percent of their respective projects' initial capacity to anchor customers, subject to their commitments to offer the same rate and terms to open season customers willing to commit to the same term of service as the anchor customers.²⁰ This commitment was important to the Commission's determination that the merchant developers' requests to allocate initial capacity to anchor customers, outside of the open season process, would not pose a risk of undue discrimination.²¹ At its core, the commitment to offer the same rate and terms served to provide non-anchor customers a meaningful, open and non-discriminatory opportunity to acquire capacity at the same rate as the anchor customer (so long as they agreed to the same term of service). In this way, the substance of the anchor customer agreements would be made generally available, and all potential customers would have a fair opportunity to acquire capacity on the same terms. The Commission has viewed such similar treatment of similarly situated entities as a hallmark of fair and not unduly discriminatory behavior.²²

¹⁸ *Id.* at 7-8.

¹⁹ March 18 Order, 130 FERC ¶ 61,207 at P 88 (citing *Chinook*, 126 FERC ¶ 61,134 at P 61).

²⁰ *Chinook*, 126 FERC ¶ 61,134 at P 61.

²¹ *Id.*

²² *See El Paso Natural Gas Co.*, 104 FERC ¶ 61,045, at P 115 (2003) ("Discrimination is undue when there is a difference in rates or services among similarly situated customers that is not justified by some legitimate factor.").

13. In requiring Tres Amigas to abide by the same “*Chinook*” condition with respect to its anchor customer agreements, the Commission sought to ensure that Tres Amigas will allocate capacity in a fair, open and non-discriminatory manner, and that customers willing to make the same commitment as the anchor customer are treated in a similar manner (i.e., are afforded the same rates and terms). We do not read Tres Amigas’ motion as questioning this fundamental principle. Rather, Tres Amigas seeks clarification as to whether the one-time offer proposal set forth in its motion satisfies this principle in light of the unique aspects of its open season process, which, unlike *Chinook*, may involve a number of auctions for capacity.²³ Because the March 18 Order did not expressly discuss how the *Chinook* condition should be implemented over the course of multiple auctions, it is appropriate to clarify the matter at this time. Resolving this ambiguity will provide Tres Amigas, as well as its potential customers, with the regulatory certainty necessary to determine how to proceed at the early stages of the Project’s development.

14. We find that Tres Amigas’ proposal to offer its anchor customer agreement on a one-time-only basis satisfies the Commission’s policy that initial merchant transmission line capacity be allocated in a fair, open and non-discriminatory manner. We further clarify that to satisfy our requirement that anchor customer agreements be available on an open, fair and non-discriminatory basis, Tres Amigas’ one-time offer must be carried out in an open and transparent manner consistent with the open season requirements in Tres Amigas’ Commission-approved open access transmission tariff, which Tres Amigas has committed to file before an open season is held.²⁴ Further, Tres Amigas’ one-time offer will take place after the Commission approves the anchor customer agreement, as committed to by Tres Amigas,²⁵ and fundamentally the one-time offer must provide public notice of the relevant rates, terms and conditions and a fair opportunity for potential customers to respond. By offering the anchor customer rates and terms in an open and transparent manner after the Commission approves the anchor customer agreement, Tres Amigas will afford other potential customers an opportunity to acquire capacity on the same terms. In this way, the requested clarification is consistent with the non-discrimination principles that served as the foundation for the Commission’s reasoning in *Chinook*. Furthermore, we clarify that Tres Amigas’ obligation to offer the anchor customer rates and terms need not be open-ended and can be offered on a one-time basis provided that one-time offer satisfies our fair, open and non-discriminatory requirements.

²³ March 18 Order, 130 FERC ¶ 61,207 at P 61.

²⁴ *Id.* P 21, 45, 56.

²⁵ Tres Amigas, April 16, 2010 Motion for Clarification at 2.

15. Occidental argues that the Commission should deny Tres Amigas' request for clarification of the March 18 Order because the details of this "one-time offer" are not fully known and because Tres Amigas may implement this offer in what amounts to a discriminatory manner. We find that Occidental's concern in this regard is satisfied by our clarification that safeguards must be in place to provide all potential customers with a meaningful opportunity to acquire capacity on the same terms as any anchor customer.²⁶

16. Finally, with respect to Occidental's concern as to the effect of the one-time offer proposal on subsequent customer agreements (i.e., executed after the anchor customer agreement contemplated by Tres Amigas' motion), we find that such circumstance is not before the Commission at this time, and we therefore will not address this hypothetical situation here. The Commission will carefully consider any specific claims of undue discrimination as to the rates, terms and conditions of service offered by Tres Amigas under its negotiated rate authority if and when those specific concerns arise. Accordingly, we grant Tres Amigas' request for clarification of the March 18 Order, subject to Tres Amigas conducting its one-time offering in a fair, open and non-discriminatory manner, consistent with the principles set forth above and in the March 18 Order.

The Commission orders:

Tres Amigas' motion for clarification of the March 18 Order is hereby granted as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁶ We also note that any customers who believe they have been unfairly or discriminatorily treated in that one-time offer, despite these safeguards, may raise their concerns in the post-open season report proceeding. *See* March 18 Order, 130 FERC ¶ 61,207 at P 80, 88.