

132 FERC ¶ 61,233
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tres Amigas LLC

Docket No. ER10-396-001

ORDER DENYING REHEARING

(Issued September 16, 2010)

1. On April 19, 2010, Occidental Permian, Ltd., Occidental Chemical Corporation, and Occidental Power Marketing, L.P. (collectively, Occidental) filed a request for rehearing of the Commission's March 18, 2010 order, which conditionally authorized Tres Amigas LLC (Tres Amigas) to sell transmission services on its proposed Tres Amigas Superstation (Project) at negotiated rates.¹ As discussed below, Occidental's request for rehearing is denied.

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 that would be designed to eliminate the market separation between the three asynchronous interconnections in the continental United States.² Tres Amigas stated that it would

¹ *Tres Amigas LLC*, 130 FERC ¶ 61,207 (2010) (March 18 Order). At the same time, the Commission addressed a related petition for disclaimer of jurisdiction over prospective transmission facilities and over entities that would interconnect the Electric Reliability Council of Texas (ERCOT) grid with the Project. *Tres Amigas LLC*, 130 FERC ¶ 61,205 (2010). A request for rehearing of that order is being acted on contemporaneously with the instant order.

² March 18 Order at P 4. These three interconnections are the Western Electric Coordinating Council (WECC), ERCOT, and the Eastern Interconnection.

locate 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 areas with high potential for the development of renewable generation. Tres Amigas explained that the Project will operate as a balancing authority area within WECC.

3. Tres Amigas explained that the Project would provide transfer capability that exceeds the sum of all existing interconnections between ERCOT, WECC and the Eastern Interconnection, and that it would be designed to support the transmission of large quantities of intermittent wind and solar generation. Tres Amigas explained that the Project itself would be composed of multiple, high capacity AC/DC voltage source converters, which would be constructed at interconnection points with WECC, ERCOT, and the Eastern Interconnection. Tres Amigas stated that the number and size of the AC/DC converters was not certain, but that initial plans include using 750 MW converters that can be installed as needed.³ Additionally, Tres Amigas stated that the three interconnection points would be tied together with several miles of underground, superconducting DC transmission cable—a new technology developed by American Superconductor Corporation (American Superconductor). Tres Amigas explained that it initially plans for the Project to be capable of handling approximately 5 GW of transfers between terminals, with the possibility of expansion up to 30 GW.⁴

II. The Commission's March 18 Order and June 29 Clarification Order⁵ on Tres Amigas's Request for Negotiated Rate Authority

4. In the March 18 Order, the Commission granted Tres Amigas's request to sell transmission service on the Project at negotiated rates, subject to a number of conditions designed to ensure that the goals of open access are protected and that rates for transmission service on the Project remain just and reasonable.⁶ The Commission emphasized its commitment to supporting the development of the new transmission infrastructure that is essential to providing location-constrained resources with access to markets and to meeting our nation's current and future energy needs.⁷ The Commission

³ March 18 Order at P 5.

⁴ *Id.* P 6.

⁵ *Tres Amigas LLC*, 131 FERC ¶ 61,281 (2010) (June 29 Clarification Order).

⁶ March 18 Order at P 2.

⁷ *Id.*

also explained that its determination sought to balance a number of policy objectives that recognized the unique characteristics of the Project, the developer'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.⁸

5. The March 18 Order evaluated Tres Amigas's request for negotiated rate authority pursuant to the approach explained in detail in *Chinook*.⁹ In *Chinook*, the Commission refined and clarified its methodology for evaluating merchant transmission provider requests for negotiated rate authority to focus on the following four areas of concern: (1) the justness and reasonableness of rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements.¹⁰

6. Evaluating Tres Amigas's request under the *Chinook* framework, the Commission found that Tres Amigas had demonstrated that it met the criteria necessary for approval of negotiated rate authority, subject to Tres Amigas abiding by the commitments made in its pleadings in this proceeding,¹¹ as well as the conditions imposed by the Commission

⁸ *Id.*

⁹ *Id.* P 38-39 (citing *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P 37 (2009) (*Chinook*)).

¹⁰ *Chinook*, 126 FERC ¶ 61,134 at P 37 (explaining that while this reformulated approach was reflective of the policy concerns underlying the Commission's merchant transmission precedents, it was designed to be less rigid, broadly applicable to projects inside and outside of regional transmission organizations (RTO) and independent system operators (ISOs), and more attuned to the financing realities faced by developers).

¹¹ For example, in its initial filing, Tres Amigas made a number of express commitments to seek the following authorizations (where relevant) in subsequent filings under section 205 of the Federal Power Act (FPA): (1) Tres Amigas will file an Open Access Transmission Tariff (OATT) (setting forth the terms of the open season and including terms such as such as the right of customers to re-sell transmission rights on the secondary market) and establish an OASIS prior to holding its first open season; (2) Tres Amigas and its owners and affiliates will not sell power that is delivered through the Project without first obtaining the Commission's approval; and (3) Tres Amigas 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 Tres Amigas. March 18 Order at P 45.

in the March 18 Order.¹² The Commission also granted Tres Amigas's request to allocate 50 percent of its initial capacity to anchor customers. However, in granting Tres Amigas's request for negotiated rate authority and anchor customers, the Commission imposed a number of conditions. For example, the Commission approved Tres Amigas's request to allocate transmission capacity to anchor customers so long as it did 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).¹³ The Commission also required Tres Amigas to seek Commission authorization for the anchor customer transaction in a subsequent section 205 filing, in which Tres Amigas must file the anchor customer agreement and describe the relevant facts and circumstances leading to it.¹⁴ Furthermore, the Commission prohibited Tres Amigas from withholding 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.¹⁵ The Commission also prohibited Tres Amigas from withholding 20 percent of its initial capacity for subsequent sale.¹⁶

7. Subsequent to the March 18 Order, on April 16, 2010, Tres Amigas filed a request for clarification of the Commission's condition that Tres Amigas must provide the same rate and terms afforded to an anchor customer to any customer in an open season willing to commit to the same term, consistent with *Chinook*.¹⁷ In light of the possibility that it may hold more than one open season, Tres Amigas sought confirmation that this condition would be satisfied by Tres Amigas offering other potential customers the same rates and terms as it negotiates with the anchor customer on a one-time basis after the anchor customer agreement has been approved by the Commission.¹⁸ On June 29, 2010,

¹² *Id.* P 45.

¹³ *Id.* P 61 (citing *Chinook*, 126 FERC ¶ 61,134 at P 61).

¹⁴ *Id.*

¹⁵ *Id.* (requiring Tres Amigas to set forth the amount of initial capacity it will offer to the market prior to commencement of its open season process, and requiring that any subsequent capacity additions or availability be allocated pursuant to Tres Amigas's OATT).

¹⁶ *Id.*

¹⁷ June 29 Clarification Order, 131 FERC ¶ 61,281 at P 4.

¹⁸ *Id.* P 4.

the Commission granted this clarification, finding that Tres Amigas's proposal to offer its anchor customer agreement on a one-time-only basis satisfies the Commission's policy that initial merchant transmission line capacity must be allocated in a fair, open and non-discriminatory manner.¹⁹ The Commission required this one-time offer to be carried out in a transparent manner with sufficient public notice of the offer, and to be conducted in a manner that is consistent with the open season requirements in Tres Amigas's Commission-approved OATT.²⁰

III. Occidental's Request for Rehearing and Subsequent Pleadings

8. On April 19, 2010, Occidental filed a timely request for rehearing of the March 18 Order. In its request for rehearing, Occidental alleges that the March 18 Order erred in three ways. First, Occidental contends that the Commission erred in concluding that Tres Amigas had assumed the full market risk of its project. Occidental argues that Tres Amigas artificially defines its Project to include only the superstation itself, where the three interconnections will meet, while excluding the major transmission lines that will need to be constructed in order to connect the Project with the adjoining grids. Occidental contends that these transmission lines will likely be constructed by adjoining utilities with captive customers, with the result being that these captive customers are forced to subsidize the Project. In this way, Occidental asserts that Tres Amigas has not assumed the full risk of its Project.

9. Second, Occidental argues that the Commission erred in finding that there are sufficient checks on the potential for Tres Amigas to develop and exercise market power to justify the requested negotiated rate authority. Occidental contends that the Commission failed to address expert evidence showing that Tres Amigas would be able to develop market power, and that the Commission departed from its practice of requiring a rigorous market power analysis before granting market-based rates.

10. Third, Occidental argues that the Commission erred in shifting the burden of proof from Tres Amigas to intervenors, in contravention of section 205 of the FPA.²¹ Occidental reiterates arguments that the Commission failed to address its expert's assertions that Tres Amigas might be able to exercise market power at some point in the future. Occidental also objects to what it characterizes as the Commission's finding that

¹⁹ *Id.* P 14.

²⁰ *Id.*

²¹ 16 U.S.C. § 824d (2006).

it can address market power concerns in the future pursuant to section 206 of the FPA.²² Occidental believes that these findings inappropriately shift the burden of proof from Tres Amigas to aggrieved parties.

11. On May 4, 2010, Tres Amigas filed an answer to Occidental's request for rehearing. On May 17, 2010, Occidental filed an answer to Tres Amigas's answer. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2010), prohibits answers to requests for rehearing. We are not persuaded to accept the answers filed by Tres Amigas and Occidental and will, therefore, reject them.

IV. Discussion

A. Assumption of Full Market Risk

1. March 18 Order

12. The March 18 Order explained that under the *Chinook* analysis, the Commission first looks to whether the merchant transmission developer has assumed the full market risk of its project, and whether it is building within the footprint of its own (or an affiliate's) traditionally regulated transmission system with captive customers.²³ The Commission further explained the manner in which it decides whether a merchant transmission developer has assumed the full market risk of its project—pointing to such factors as whether the 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.²⁴

13. The Commission determined that Tres Amigas would be a new entrant in the regional market for transmission service, as neither it, nor its owners or affiliates, currently has a presence (or captive customers) in the region.²⁵ The Commission acknowledged Occidental's argument that the Project is different from other merchant transmission proposals because, as it is currently designed, it does not extend to a point

²² *Id.* § 824e.

²³ March 18 Order at P 48 (citing *Chinook*, 126 FERC ¶ 61,134 at P 38).

²⁴ *Id.* P 51 (citing *Montana Alberta Tie., Ltd.*, 116 FERC ¶ 61,071, at P 28 (2006) (*MATL*); see also *Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147, at 61,634 (2001) (*Neptune*)).

²⁵ *Id.* P 51.

on the existing transmission grid.²⁶ However, the Commission found that this fact is not relevant to whether Tres Amigas has assumed the full risk of its Project. The Commission explained that neighboring utilities are under no obligation to connect to or purchase service from Tres Amigas, and they will only do so if it provides sufficient value to justify the new construction.²⁷ Accordingly, the Commission found that Tres Amigas had shown that it is assuming the full market risk of the Project.²⁸

2. Request for Rehearing

14. In its request for rehearing, Occidental contends that the Commission erred in concluding that Tres Amigas has assumed the full market risk of its project.²⁹ Occidental argues that prior developers accepted full market risk for costs of constructing to and interconnecting with the grid by constructing projects that interconnected directly with existing transmission facilities.³⁰

15. Occidental asserts that Tres Amigas's Project is fundamentally different from and inconsistent with the basic concept of a "transmission project," because it will not interconnect with existing points on the transmission system, and therefore it will be unable to transmit power from one point on the electric transmission system to another.³¹ Occidental argues that for the Project to proceed, neighboring utilities will be required to construct significant interconnecting transmission lines and obtain cost recovery for such facilities. Occidental contends that these interconnecting lines are essential components of the Project, and that Tres Amigas should bear their costs, rather than shifting the costs to the captive customers of these neighboring utilities.

16. Occidental argues that the mere fact that neighboring utilities are under no obligation to connect to or purchase service from Tres Amigas does not mean that captive customers are free from the risk of building the interconnecting transmission facilities.³²

²⁶ *Id.* P 52.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Occidental, Rehearing Request at 4.

³⁰ *Id.* at 5.

³¹ *Id.*

³² *Id.* at 7 (citing March 18 Order at P 52).

Occidental argues that because there is no way to know the extent of the risk of building the facilities needed to interconnect with the Project, captive customers of the utilities constructing them will ultimately bear some risk. In this way, Occidental contends that Tres Amigas will have effectively shifted some of its risks to captive customers.³³ Moreover, Occidental submits that Tres Amigas will have the opportunity to mitigate its risks by selling capacity in advance of committing to construct the Project.³⁴

17. Occidental argues that it is inappropriate for captive customers of neighboring utilities to pay for service on interconnecting lines at cost-based rates while Tres Amigas is allowed to charge negotiated rates for service on the Project, which Occidental contends will allow Tres Amigas to earn supra-competitive profits.³⁵ Occidental argues that this would result in captive customers inappropriately cross-subsidizing the Project. Occidental further argues that Tres Amigas's proposal would allow it to enjoy a return that reflects the difference in power prices between the three interconnections without paying for the full costs of providing the transmission service for which it is being paid. Occidental contends that this is the result that the Commission sought to avoid by adopting the first prong of the *Chinook* analysis—i.e., requiring merchant developers to assume the full risk of their projects.³⁶

3. Commission Determination

18. In evaluating whether a merchant transmission developer has assumed the full risk of its project, the Commission looks to whether the transmission provider is recovering its costs only from customers who *voluntarily agree* to take transmission service.³⁷ Illustrating this point, the Commission has denied a request for negotiated rate

³³ *Id.* at 8.

³⁴ *Id.*

³⁵ *Id.* at 10 (citing DeRamus Aff. at ¶ 38-43).

³⁶ *Id.* at 11 (citing March 18 Order at P 52).

³⁷ March 18 Order at P 51 (explaining that for merchant transmission providers to assume the full risk of their project, their costs may only be recovered from entities purchasing transmission rights on the project, no entity can be required to purchase transmission rights on the project, and the project may not result in any mandatory grid use or system benefits charges).

authority where a merchant transmission provider was building within the footprint of its affiliate's traditionally-regulated transmission system.³⁸

19. As the Commission found in the March 18 Order, neither Tres Amigas nor its owners or affiliates have a presence in this region.³⁹ As a new entrant in the regional market for transmission service, Tres Amigas will not have customers from which it can be guaranteed to recover the costs of the Project through cost-based rates.⁴⁰ The March 18 Order further explained that neighboring utilities are not obligated to build to the Project, and the Project will not result in any mandatory grid use or systems benefit charge.⁴¹ Thus, the Commission found that Tres Amigas demonstrated it has assumed the full market risk of its Project.⁴²

20. Occidental urges the Commission to apply a different standard to Tres Amigas and incorporate adjacent transmission facilities that may be built and owned by neighboring utilities within the scope of the Project for the purposes of determining whether Tres Amigas has assumed the full market risk of the Project as defined by Occidental. The Commission addressed this argument in the March 18 Order, finding that neighboring utilities are under no obligation to construct transmission facilities to Tres Amigas, and they will only do so if they see sufficient opportunity in the Project to justify the cost of doing so.⁴³

21. Nothing in Occidental's request for rehearing would justify changing this determination. The fact that the Project is designed in a way that would rely on other utilities to construct transmission facilities to interconnect with it has no bearing on whether Tres Amigas bears the full market risk of its Project. If and when the Project is constructed and placed in service, the authority granted to Tres Amigas in the March 18

³⁸ See *Mountain States Transmission Intertie, LLC*, 127 FERC ¶ 61,270, at P 60 (2009) (*MSTI*) (finding that a developer seeking negotiated rate authority failed to establish that it had assumed the full market risk of its proposed merchant transmission project because it would be constructed, in large part, within the footprint of the merchant developer's affiliate's traditionally-regulated transmission system).

³⁹ March 18 Order at P 51.

⁴⁰ *Id.*

⁴¹ *Id.* P 51-52.

⁴² *Id.*

⁴³ *Id.*

Order will allow it to negotiate rates with its customers only for service on the Project—not on any other facilities. Neighboring transmission facilities owned and operated by distinct, unaffiliated transmission providers, whether already in existence or planned for future construction, fall outside the scope of a merchant project for the purpose of determining whether the merchant transmission developer has assumed the full risk of its project.

22. The purpose of the Commission’s inquiry into whether a transmission provider seeking negotiated rate authority has assumed the full risk of its project is to protect customers from inappropriately cross-subsidizing the merchant project. This goal is not achieved by extending the inquiry to unaffiliated transmission providers that may *voluntarily* build transmission facilities to the Project. To the extent that neighboring transmission providers decide to construct transmission facilities to interconnect with the Project, their customers are protected by independent review of those transmission investments and the rates for service on those facilities must be shown to be just and reasonable.

23. The same logic applies where a merchant transmission provider enters into transmission service agreements ahead of construction in order to secure financing and mitigate its development risk going forward. So long as the customer was under no obligation to take transmission service from the merchant transmission provider, that customer’s voluntary decision to purchase transmission service in advance of construction has no bearing on whether the merchant transmission provider has, in the first instance, assumed the full risk of the project consistent with Commission policy. In fact, the Commission’s acceptance of anchor customer agreements (which Occidental does not object to in its request for rehearing) is designed to enable developers to mitigate some development risk in order to attain the financing needed to advance their projects.⁴⁴

24. Finally, we note that even Occidental’s expert witness acknowledges that no direct cross-subsidization issues are raised by the Tres Amigas proposal (i.e., among affiliated companies),⁴⁵ and instead posits a theory of indirect cross-subsidization among different, unaffiliated companies. The Commission finds that utilities that voluntarily decide to construct transmission facilities to the Project (and are subject to independent review) do

⁴⁴ See *Chinook*, 126 FERC ¶ 61,134 at P 44 (explaining that anchor customer agreements are an important means by which a merchant developer can receive early financial commitments that are crucial to achieving the critical mass necessary for a large transmission project to be developed).

⁴⁵ DeRamus Aff. at P 40 (“Tres Amigas is correct in noting that there can be no direct affiliate abuse at issue.”).

not result in the cross-subsidization of the Project any more than neighboring facilities that currently exist would subsidize the cost of a merchant transmission project.⁴⁶ Thus, we reiterate that Tres Amigas's proposal is consistent with the Commission's assumption of market risk criteria and affirm the March 18 Order's determination that Tres Amigas will assume the full market risk of the Project.⁴⁷ Occidental's request for hearing of this issue is therefore denied.

B. Checks on Tres Amigas's Ability to Develop and Exercise Market Power

1. March 18 Order

25. In the March 18 Order, the Commission determined that it was just and reasonable to grant Tres Amigas negotiated rate authority, subject to a number of conditions.⁴⁸ The Commission's determination was based on the characteristics of the Project and the commitments made by Tres Amigas in its pleadings.⁴⁹ For example, the Commission relied on Tres Amigas's commitment to expand its facilities at cost-based rates (if the market will not support an upgrade on a merchant basis),⁵⁰ and required Tres Amigas to seek approval of its open season (through the filing of an independently audited post-open season report) and any anchor customer transactions.⁵¹

26. In granting Tres Amigas's request for negotiated rate authority, the Commission employed the analysis consistently used to evaluate merchant transmission developers' requests for such authority.⁵² With respect to Occidental's allegations that Tres Amigas

⁴⁶ See, e.g., *Chinook*, 126 FERC ¶ 61,134 at P 55, 58.

⁴⁷ March 18 Order at P 52.

⁴⁸ *Id.* P 45.

⁴⁹ *Id.* (such as commitments to file an OATT setting forth the terms of its open season and establish an OASIS, as well as seeking Commission authorizations prior to selling capacity to Project owners or affiliates or selling an equity interest in Tres Amigas to a utility with captive customers).

⁵⁰ *Id.* P 76.

⁵¹ *Id.* P 61.

⁵² *Id.* P 44 (citing *Chinook*, 126 FERC ¶ 61,134 at P 38; *MATL*, 116 FERC ¶ 61,071 at P 53-54).

would be able to develop and exercise market power in the future, the Commission found that sufficient long-term checks were in place to ensure that negotiated rates for transmission service on the Project would be just and reasonable.⁵³ The Commission listed numerous conditions and characteristics that would impose long-term price discipline on Tres Amigas, finding that these conditions and characteristics struck the appropriate balance between concerns over long-term market power and the financing realities faced by Tres Amigas.⁵⁴

27. The Commission also found that many of the arguments raised by protestors dealing with the potential for Tres Amigas to exercise market power at some point in the future were speculative and based on a set of assumptions that may or may not come to fruition.⁵⁵ For that reason, the Commission explained that it would address such arguments to the extent possible on the existing record, while noting that its primary objective in evaluating this issue is to look broadly at the long-term implications of granting Tres Amigas negotiated rate authority.⁵⁶

2. Request for Rehearing on Market Power Issues

28. In its request for rehearing, Occidental argues that the Commission erred in finding that there are sufficient checks on the potential for Tres Amigas to develop and exercise market power to grant the negotiated rate authority requested. Occidental contends that neither the characteristics of the Project, nor the conditions imposed on Tres Amigas by the March 18 Order, provide sufficient checks to preclude Tres Amigas from exercising market power. Because Occidental objects to a number of specific findings made in the March 18 Order, we will address Occidental's objections individually.

⁵³ *Id.* P 72.

⁵⁴ *Id.* (noting that 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 Tres Amigas commits to do if expansion pursuant to negotiated rates is not feasible)).

⁵⁵ *Id.* P 73.

⁵⁶ *Id.*

29. As an initial matter, we find that Tres Amigas has met the requirements set forth in prior Commission orders addressing merchant transmission provider requests for negotiated rate authority. Throughout the last decade, the Commission has developed a negotiated rate policy for transmission that is tailored to the particular circumstances involved with transmission provider requests for negotiated rate authority.⁵⁷ It is well-established that the just and reasonable standard accords the Commission broad ratemaking authority and does not compel the Commission to use any single pricing formula.⁵⁸ The Commission has exercised this discretion in crafting a policy for negotiated rate authority for the sale of transmission services, which addresses a number of policy goals, including the protection of consumers from excessive rates for transmission service,⁵⁹ the expansion of competitive generation options for consumers,⁶⁰ the enhancement of market integration,⁶¹ and the integration of location-constrained resources.⁶² Indeed, merchant transmission projects may serve a very important purpose where, as here, they provide a new or enlarged interconnection between regions that previously had been isolated or connected with only a limited amount of transmission capacity.⁶³ The merchant transmission model, in which a developer assumes the full risk of its project, enables projects to move forward outside of the complicated process of inter-regional cost allocation—a problem the Commission is currently addressing in another proceeding.⁶⁴ Accordingly, the Commission’s transmission negotiated rate

⁵⁷ See, e.g., *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230 (2000) (*TransEnergie*); *MATL*, 116 FERC ¶ 61,071; *Chinook*, 126 FERC ¶ 61,134.

⁵⁸ *Mobil Oil Exploration v. United Distribution Co.*, 498 U.S. 21, 244 (1991); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

⁵⁹ *Chinook*, 126 FERC ¶ 61,134 at 33-37; *MSTI*, 127 FERC ¶ 61,270 at P 58.

⁶⁰ *TransEnergie*, 91 FERC ¶ 61,230 at 61,838.

⁶¹ *Id.*

⁶² *MSTI*, 127 FERC ¶ 61,270, at P 58.

⁶³ See Gert Brunekreeft & David Newbery, *Should Merchant Transmission Investment be Subject to a Mustoffer Provision?* (Aug. 2005) at 3-4 (explaining the utility of profit-motivated merchant transmission development to correct the problem of under-investment in transmission, particularly between independent transmission systems).

⁶⁴ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 131 FERC ¶ 61,253 (2010).

policy has been developed to address a number of policy goals specific to the transmission setting, and this policy is therefore different from the policy involving merchant generation.

30. The Commission has emphasized this distinction since first approving a merchant transmission provider's request for negotiated rate authority more than ten years ago. In *TransEnergie*, the Commission distinguished requests for market-based rate authority from generators and negotiated rate authority from transmission providers, and declined to evaluate a merchant transmission developer's request for negotiated rate authority under the generation market-based rate regime.⁶⁵ In that case, the Commission relied on its policy of allowing transmission-owning utilities to charge the "higher of" embedded cost pricing or opportunity cost pricing for service on their transmission facilities, with opportunity costs being capped at the cost of expanding the transmission system.⁶⁶ The Commission explained that the relevant opportunity costs at issue in the case of the merchant transmission 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.⁶⁷

31. Since that time, the Commission has continued to evaluate merchant transmission provider requests for negotiated rate authority under the opportunity cost pricing principles espoused in *TransEnergie*, and it has never employed the explicit market power tests cited by Occidental in the context of negotiated rate authority for generation.⁶⁸ Instead, the Commission developed and refined a number of specific criteria based on existing transmission pricing methodologies that, if met, provide

⁶⁵ *TransEnergie*, 91 FERC ¶ 61,230, at 61,838 ("While TransEnergie proposes that the Commission approve its proposal as a market-based rate because [its project] is more analogous to a new merchant generation plant than to a traditional transmission investment, we need not, and do not, decide whether market-based pricing for transmission is appropriate. Rather, the Commission finds that it can approve TransEnergie's proposal to provide service under negotiated rates on grounds that are consistent with existing pricing methodologies.").

⁶⁶ *Id.* (citing *Pennsylvania Electric Co.*, 58 FERC ¶ 61,278, *reh'g denied*, 60 FERC ¶ 61,034, *reh'g dismissed*, 60 FERC ¶ 61,244 (1992), *aff'd*, *Pennsylvania Electric Co. v. FERC*, 11 F.3d 207 (D.C. Cir. 1993)).

⁶⁷ *Id.*

⁶⁸ *See, e.g.*, Occidental, Rehearing Request at 13, 16.

sufficient assurance that granting a request for negotiated rate authority would result in just and reasonable rates under the Commission's "higher of" pricing methodology.⁶⁹

32. The March 18 Order evaluated Tres Amigas's proposal according to these criteria and fully addressed Occidental's concerns regarding the potential for Tres Amigas to develop and exercise market power. The March 18 Order found that sufficient long-term checks are in place to ensure that negotiated rates for transmission service on the Project will be just and reasonable, consistent with the Commission's merchant transmission policy.⁷⁰ As discussed below, we affirm that finding and emphasize that we are doing so pursuant to the Commission's transmission negotiated rate policy—not the generation market-based rate policy repeatedly cited by Occidental in its rehearing request. Furthermore, we address Occidental's arguments related to each of the individual long-term price disciplining characteristics that the Commission found, in the aggregate, to be sufficient to support a finding that negotiated rate authority was just and reasonable.

a. Concerns Regarding Tres Amigas's Market Share and Competitive Alternatives

i. Request for Rehearing

33. Occidental objects to the Commission's finding that "facilities that interconnect two of the three nation's interconnections will provide meaningful competition to [Tres Amigas's] Project."⁷¹ Occidental contends that the Commission failed to address evidence it provided showing that even with its proposed initial capacity of 5 GW, Tres Amigas would have an enormous market share between any two interconnections, citing what it describes as conservative estimates by its expert that Tres Amigas would have 100 percent of the market share between WECC and ERCOT, 86 percent of the market share between ERCOT and the Eastern Interconnection, and 79 percent of the market share between the Eastern Interconnection and WECC. Occidental argues that such market shares result in highly concentrated markets under the Commission's merger

⁶⁹ See, e.g., *TransEnergie*, 91 FERC ¶ 61,230 at 61,838; *Conjunction, LLC*, 103 FERC ¶ 61,198 (2003); *Sea Breeze Pacific Juan de Fuca Cable, LP*, 112 FERC ¶ 61,295 (2005); *MATL*, 116 FERC ¶ 61,071; *Linden VFT, LLC*, 119 FERC ¶ 61,066 (2007); *Wyoming-Colorado Intertie, LLC*, 127 FERC ¶ 61,125 (2009); *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006, at P 51 (2010) (*Champlain Hudson*).

⁷⁰ March 18 Order at P 72.

⁷¹ Occidental, Rehearing Request at P 12 (quoting March 18 Order at P 82).

policy guidelines,⁷² as well as creating a rebuttable presumption of market power under the Commission's policy addressing market-based rates for generation.⁷³

34. Occidental further argues that in light of this "significant market share," Tres Amigas's position as a new entrant in the market is insufficient to settle market power concerns. Occidental objects to the Commission's finding that as a new entrant with no captive customers, Tres Amigas will expand existing customer opportunities to buy and sell power.⁷⁴ Occidental contends that the March 18 Order failed to address the impact of Tres Amigas's large initial market share and argues that the conclusion that a market participant with overwhelming market share cannot exercise market power because it is a new entrant is contrary to precedent, and is arbitrary and capricious.⁷⁵

35. Occidental also asserts that its expert witness showed that Tres Amigas may have "durable" market power because of significant barriers to entry and an alleged lack of competition that is timely, likely, or sufficient to curb Tres Amigas's potential market power.⁷⁶ Occidental also contends that its expert demonstrated how Tres Amigas could stage capacity expansion timed to market demand, thereby foreclosing competition by new rivals.⁷⁷ Occidental asserts that entrance deterrence through preemptive capacity expansion has been recognized by the courts as a method of excluding competition.⁷⁸

⁷² *Id.* at 13 (citing *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act; Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,129 (1996) ("Merger Policy Statement"), *recons. denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997)).

⁷³ *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, at P 44, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008) ("A seller with a market share of 20 percent or more in the relevant market for any season will have a rebuttable presumption of market power . . .").

⁷⁴ *Id.* at 18 (citing March 18 Order at P 75).

⁷⁵ *Id.* at 18-19.

⁷⁶ *Id.* at 13-14.

⁷⁷ *Id.* 14 (citing *DeRamus Aff.* at P 52-56).

⁷⁸ *Id.* (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430-31 (2d Cir. 1945), *aff'd*, *Am. Tobacco Co. v. United States*, 328 U.S. 781, 814 (1946)).

Occidental argues that the Commission's conclusion that Tres Amigas's rates would be disciplined by the cost of a new entrant is unsupported and fails to acknowledge Occidental's point that Tres Amigas's ability to deter new entry would result in an absence of potential competitors.

ii. Commission Determination

36. As explained above, in evaluating whether negotiated rate authority would be just and reasonable, the Commission looks broadly at the characteristics of the proposed merchant transmission project in order to determine 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.⁷⁹ The March 18 Order explained how the Commission evaluates whether customers would have alternatives to the proposed merchant project, stating:

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

37. The March 18 Order determined that a number of alternatives would discipline the potential for Tres Amigas to develop and exercise market power, citing as examples, 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

⁷⁹ March 18 Order at P 44 (citing *Chinook*, 126 FERC ¶ 61,134 at P 38).

⁸⁰ *Id.* P 62 (citing *Chinook*, 126 FERC ¶ 61,134 at P 38 & n.26).

at cost-of-service rates (which Applicant commits to do if expansion pursuant to negotiated rates is not feasible).⁸¹

38. As the March 18 Order made clear, customers' "options to purchase capacity on existing AC/DC interties (capped at the cost of expanding these interties)" was but one of many alternatives identified by the Commission in finding that sufficient long-term checks were in place to ensure that Tres Amigas's negotiated rate authority would remain just and reasonable.⁸² Occidental attempts to narrow the Commission's examination of "reasonable alternatives" to only transmission facilities that provide service between interconnections, concentrating on Tres Amigas's share of the market between any two interconnections. However, in the March 18 Order, the Commission explicitly considered and rejected this narrow definition, finding that "such a view of the relevant market fails to consider a number of other viable alternatives."⁸³ Specifically, the Commission found that potential customers will retain all of the opportunities that exist in their interconnections, such as opportunities to buy and sell power in organized markets in the Eastern Interconnection and ERCOT and through bilateral transactions in WECC.⁸⁴ As in the March 18 Order, we acknowledge that the Project, when and if constructed, may hold a significant share of the market for transmission capacity between the individual interconnections.⁸⁵ However, intertie capacity is one of many "reasonable alternatives" a potential customer may have. We continue to disagree with Occidental's narrow definition of the relevant market and its contention that Tres Amigas's potentially high intertie market shares require the Commission to find that Tres Amigas would be able to exercise market power.

39. Moreover, we disagree with Occidental's contention that Tres Amigas would have market power through an ability to create barriers to entry and deter potential new entry by competitors. Occidental's argument presumes that the relevant market for transmission service is limited to competition between interconnections, and that Tres

⁸¹ *Id.* P 72. The Commission also explained that, notwithstanding these checks on the potential for Tres Amigas to develop market power, if market power concerns actually do arise in the future, the Commission and customers retained rights under section 206 of the FPA to remedy that situation. *Id.*

⁸² *Id.*

⁸³ *Id.* P 74.

⁸⁴ *Id.* P 74.

⁸⁵ *Id.* P 67.

Amigas's ability to expand its system to meet market demand will foreclose new entry to that market. As discussed above, this argument fails to consider additional sources of competition that exist within each of the three interconnections. No expansion, or threat of expansion, by Tres Amigas would affect these already existing alternatives, nor will it affect nearby expansions of transmission capacity that are wholly within one of the three existing interconnections.

40. Occidental's argument also fails to consider Tres Amigas's commitment to expand its facility at cost-based rates if there is insufficient existing capacity and where the market will not support an expansion at negotiated rates. As explained in the March 18 Order, this commitment—a key consideration upon which the Commission based its approval of Tres Amigas's negotiated rate authority—provides additional rate discipline because, at the point where capacity on the Project is exhausted, “it establishes an upper bound on the rates a subsequent customer would pay for service at the cost of expanding the system.”⁸⁶

41. We affirm this holding here. Where a merchant transmission provider's negotiated rate authority is effectively disciplined by a commitment to expand at cost-of-service rates, the Commission can be satisfied that such rate authority is just and reasonable, consistent with the Commission's “higher of” pricing policy.⁸⁷ In *MATL* and *Chinook*, that cap was effectuated by the cost-based rates on neighboring systems.⁸⁸ While the same is true here, Tres Amigas has committed to expand its facility at cost-based rates where the market will not support an expansion at negotiated rates. Thus, a transmission customer seeking an expansion of the Project will have the option of paying no more than the Commission-approved cost of service of an expanded Tres Amigas facility, the cost of expansion of a neighboring utility, or the cost of new entry. To the extent that Tres Amigas can effectuate the transmission expansion at the lowest overall cost, ratepayers ultimately benefit from an expanded Tres Amigas facility. Thus, Tres Amigas's commitment to expand its system at cost-based rates adequately addresses any concerns regarding the potential for Tres Amigas to exercise market power. It also ensures that Tres Amigas's negotiated rate authority remains just and reasonable, consistent with the Commission's “higher of” pricing policy.

⁸⁶ *Id.* P 76.

⁸⁷ *TransEnergie*, 91 FERC ¶ 61,230, at 61,838.

⁸⁸ *MATL*, 116 FERC ¶ 61,071 at P 54; *Chinook*, 126 FERC ¶ 61,134 at P 58.

b. Tres Amigas's Initial Capacity Allocation

i. Request for Rehearing

42. Occidental next argues that Tres Amigas's initial capacity allocation, as conditioned by the March 18 Order, as well as its requirement to file an OATT do not substitute for a rigorous initial review of market power.⁸⁹ Occidental cites the market power tests that the Commission employs in the context of generator requests for market-based rate authorization and contends that the Commission did not employ such market power analysis in the March 18 Order. Occidental also argues that the March 18 Order fails to show how an open season process mitigates the market power it alleges Tres Amigas will have as a result of high market shares, a lack of cost-based alternatives, and Tres Amigas's ability to foreclose new entry through component expansion. Occidental also argues that unlike in the context of generation, the Commission has not required any further review of Tres Amigas's ability to exercise market power once negotiated rate authority is granted. Therefore, Occidental contends that the Commission inappropriately relied on the conditions imposed on Tres Amigas's initial capacity allocation to preclude the exercise of market power.

ii. Commission Determination

43. As discussed above, Occidental's contention that the Commission failed to employ the market power tests used in the wholly separate context of generator requests for market-based rate authority is irrelevant to our analysis of whether negotiated rate authority should be granted to a merchant transmission provider. Contrary to Occidental's assertions, the March 18 Order did not find that Tres Amigas's initial capacity allocation process would mitigate market power. Instead, the Commission found that the initial capacity allocation process was one of a number of considerations that, in the aggregate, supported a conclusion that negotiated rate authority was just and reasonable.⁹⁰ To this end, the Commission imposed several significant conditions on Tres Amigas's open season process that are designed to prevent Tres Amigas from creating a level of artificial scarcity through its initial capacity allocation and to ensure that capacity is allocated in a competitive manner.⁹¹

⁸⁹ Occidental, Rehearing Request at 17.

⁹⁰ March 18 Order at P 72.

⁹¹ *Id.* P 61 (prohibiting Tres Amigas from withholding capacity that is not committed to an anchor customer during the open season process, requiring it to set forth the amount of initial capacity it will offer to the market prior to commencement of its

(continued ...)

44. We also reject Occidental's contention that there is no further review of a merchant transmission provider's potential to exercise market power after an initial grant of negotiated rate authority. First, we note that Tres Amigas must make a number of additional filings pursuant to section 205 of the Federal Power Act. Specifically, the March 18 Order required Tres Amigas to seek approval under section 205 of the FPA of its OATT (setting forth the terms of the open season),⁹² and any anchor customer transactions.⁹³ Throughout these section 205 filings, Tres Amigas will continue to bear the burden of showing that its negotiated rate authority remains just and reasonable in light of the facts and circumstances reflected by these individual filings. Moreover, in addition to the recourse afforded by section 206 of the FPA,⁹⁴ Tres Amigas remains subject to ongoing reporting requirements, which will assist both customers and the Commission in ensuring that Tres Amigas's negotiated rate authority remains just and reasonable.⁹⁵ Accordingly, we reject as unfounded Occidental's contention that there is no further review of Tres Amigas's negotiated rate authority.

open season process, and requiring the open season process to be audited by an independent auditor).

⁹² March 18 Order at P 45.

⁹³ *Id.* at P 61.

⁹⁴ *Sacramento Municipal Utility Dist. v. FERC*, No. 07-1208, *et al.*, slip op. at 41 (D.C. Cir. July 23, 2010).

⁹⁵ *See Champlain Hudson*, 132 FERC ¶ 61,006 at P 51 (citing 18 C.F.R. § 35.10b; *see also Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 817, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, at P 394 (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). Pursuant to these reporting requirements, Tres Amigas must summarize service agreement data in Electric Quarterly Reports (EQR), which must be submitted using the Commission's EQR software available on the Commission's website. Such reports filed by merchant transmission providers contain similar information (*e.g.*, contract term, parties, type of service) as EQRs required in the generation context. Additionally, Tres Amigas remains subject to audit by the Commission for compliance with its OATT and other Commission regulations.

c. **Impact of Transmission Customer's Secondary Transmission Rights**

i. **Request for Rehearing**

45. In response to the March 18 Order's finding that rates for transmission service on the Project should remain disciplined by, among other things, competition from capacity owners' secondary transmission rights, Occidental argues that this competitive effect is only true of long-term contracts for capacity, where, the customer may sell some of its capacity at a price lower than Tres Amigas capacity merely to recoup some of its costs. Occidental notes that there also must be a sufficient quantity of long-term Project capacity sold to create a secondary market that could effectively constrain Tres Amigas's ability to exercise market power.⁹⁶ Occidental contends that because the March 18 Order granted Tres Amigas flexibility to offer products of varying terms, through multiple open seasons, there is no guarantee that sufficient long-term capacity will be sold to compete with Tres Amigas via secondary sales. Occidental emphasizes that the Commission did not require any assurance that Tres Amigas will sell any capacity under long-term contract. Accordingly, Occidental concludes that there may not be a secondary market to discipline Tres Amigas's alleged market power, and that the Commission cannot rely on a secondary market alone to prevent the exercise of market power by Tres Amigas.⁹⁷

ii. **Commission Determination**

46. We will deny Occidental's rehearing request on this issue for three reasons. First, as noted in the March 18 Order, competition from capacity owners' secondary transmission rights was just one of many checks on Tres Amigas's negotiated rate authority. Second, we have never required a merchant transmission provider to make a showing that it will sell capacity on a long-term basis as a prerequisite for granting negotiated rate authority, and we are not persuaded to do so here. Finally, Occidental's concerns may be better addressed in the upcoming filing of Tres Amigas's open season report, as well as through the complaint process under section 206, as discussed below.

47. In the March 18 Order, the Commission noted that competition from capacity owners' secondary transmission rights was one of many long-term checks in place to ensure that Tres Amigas's negotiated rate authority would remain just and reasonable.⁹⁸

⁹⁶ Occidental, Rehearing Request at 17.

⁹⁷ *Id.* at 18.

⁹⁸ March 18 Order at P 72.

Contrary to Occidental's assertion, this was not the only form of price discipline that the Commission found will ensure that Tres Amigas's negotiated rate authority remains just and reasonable. The Commission simultaneously pointed to a number of other factors that will discipline prices.⁹⁹ Moreover, Occidental acknowledges that secondary transmission rights will compete with Tres Amigas's primary capacity sales in certain instances, such as where customers hold long-term contracts for capacity. While Occidental argues that there is no guarantee that such long-term contracts will be signed, we note that Tres Amigas expressly stated that it will allocate initial capacity on a twenty-year, ten-year, five-year, and one-year basis.¹⁰⁰ Thus, we find that even by Occidental's terms, the secondary capacity rights held by customers agreeing to these multi-year service agreements should provide meaningful competition to Project capacity allocated by Tres Amigas.

48. Furthermore, in no prior instance have we preconditioned negotiated rate approval on a merchant transmission provider's agreement to sell capacity on a long-term basis.¹⁰¹ Notwithstanding the possibility that Tres Amigas's initial capacity allocation procedures may result in a greater percentage of short-term capacity sales than has been the case on other merchant transmission projects, Occidental's suggestion that Tres Amigas may not sell any capacity on a long-term basis is unrealistic and unsupported by the record. Long-term contracts are a critical component in financing merchant transmission projects such as Tres Amigas.¹⁰² Moreover, in light of Tres Amigas's commitment to selling a portion of its capacity for terms greater than one year and its intention to secure an anchor customer (agreements typically extending for significant lengths of time) we find that secondary capacity is likely to be available, which will help ensure that rates on Tres Amigas remain just and reasonable.¹⁰³

⁹⁹ *Id.*

¹⁰⁰ *Id.* P 21.

¹⁰¹ *See, e.g., TransEnergie*, 91 FERC ¶ 61,230, at 61,839-40.

¹⁰² *See* Tres Amigas, December 8, 2009 Application at 30-32 (explaining that Tres Amigas will seek anchor customers only if necessary to obtain financing).

¹⁰³ We also note that the Commission currently has an ongoing rulemaking proceeding that is designed to promote the development of a market for capacity reassignments, which among other things will serve as a competitive alternative to primary capacity. *See Promoting a Competitive Market for Capacity Reassignments, Notice of Proposed Rulemaking*, FERC Stats. & Regs. ¶ 32,658, at P 1 (2010). Any proposed rules emanating from this proceeding should further ensure that secondary

(continued ...)

49. Finally, we note that Tres Amigas has yet to provide the Commission with details of its open season, the products it will offer, and the results of any transmission sales it makes. When Tres Amigas submits its open season report, the Commission will be able to evaluate whether sufficient long-term capacity has been allocated to ensure that secondary transmission rights can have a disciplining effect on Tres Amigas's negotiated rate authority. Occidental's rehearing request on this issue is therefore denied.

d. Competitive Alternatives

i. Request for Rehearing

50. Occidental also objects to the Commission's determination that "rates for transmission service on the Project should remain disciplined by . . . the difference in the price of generation in the markets connected by the Project."¹⁰⁴ Occidental contends that the difference in the price of generation between the markets connected to the Project permits Tres Amigas to capture and maintain monopoly power over the transmission capacity between WECC, ERCOT and the Eastern Interconnection. Occidental also argues that the Commission's finding is premised on the flawed notion that any proposal that expands capacity and trading opportunities between two markets is necessarily pro-competitive. Occidental contends this finding is contrary to Commission precedent on market-based rate authority for generation.¹⁰⁵

51. Occidental also challenges whether approval of negotiated rate authority for Tres Amigas is consistent with the Commission's precedent on merchant transmission projects, where "a significant tenet of the Commission's opportunity pricing model is that transmission prices based on opportunity costs should be capped at the cost of expanding the transmission system."¹⁰⁶ Occidental contends that the Commission has found that negotiated rates may be appropriate when service on a neighboring public utility under cost-of-service rates (capped at the utility's cost of expansion) can provide a reasonable alternative. However, Occidental asserts that Tres Amigas has failed to show that any transmission providers would be obligated to interconnect ERCOT, WECC and/or the

capacity rights on Tres Amigas's facility are traded in a competitive market that provides an alternative to primary capacity on the Tres Amigas Project.

¹⁰⁴ Occidental, Rehearing Request at 19 (citing March 18 Order at P 72, 77).

¹⁰⁵ *Id.*

¹⁰⁶ Occidental Rehearing Request at 19 (citing *TransEnergie*, 91 FERC ¶ 61,230 at 61,838).

Eastern Interconnection or that there is an alternative to the Project sufficient to discipline market power and provide a cap at a utility's cost of expansion. Accordingly, Occidental argues that the significant tenet of the opportunity cost pricing model is not met.¹⁰⁷

52. Occidental also objects to the Commission's determination that, as transmission customers of Tres Amigas, neighboring utilities that interconnect with the Project may have leverage when negotiating rates for service on the Project.¹⁰⁸ Occidental argues that the Commission fails to explain how this determination squares with its open access policies. Occidental argues that because the rates for service on Tres Amigas will likely reflect the expected price differential between interconnections, Tres Amigas's customers will automatically be sellers and buyers of power, and thus power merchants instead of transmission providers. Occidental argues that it is contrary to Order Nos. 888 and 890 to suggest that a transmission provider would exercise leverage in order to extract value from the Tres Amigas capacity in order to benefit its merchant arm. Occidental states that transmission providers should be indifferent to suppliers' interests and concludes that the March 18 Order's finding that neighboring utilities will have leverage due to their construction of interconnecting facilities is either: (1) erroneous because such utilities would be indifferent to merchant interests and thus not have any incentive to negotiate lower rates for transmission services on the Project; or (2) contrary to *Chinook* and Order Nos. 888 and 890.¹⁰⁹

ii. Commission Determination

53. As explained above, in determining whether negotiated rate authority is just and reasonable for a proposed merchant transmission project, the Commission evaluates whether there will be alternatives to the project that will impose some degree of price discipline on the project's rates. Specifically, the Commission has found that service on a neighboring public utility under cost-of-service rates can provide a reasonable alternative.¹¹⁰ The Commission has also found that the price customers are willing to pay for transmission service could also be disciplined by the difference in the market price of generation at the ends of the line.¹¹¹

¹⁰⁷ *Id.* at 19-20.

¹⁰⁸ *Id.* at 20 (citing March 18 Order at P 79).

¹⁰⁹ *Id.* at 21-22.

¹¹⁰ March 18 Order at P 62 (citing *Chinook*, 126 FERC ¶ 61,134 at P 38 & n.26).

¹¹¹ *Id.*

54. As we explained above, the March 18 Order rejected Occidental's view of the relevant market for transmission capacity as limited to intertie capacity between the three interconnections.¹¹² The Commission found that alternatives to the Project included opportunities in the Eastern Interconnection to buy and sell power in organized markets, opportunities in WECC for bilateral transactions with other market participants, and opportunities in ERCOT to continue purchasing and selling power within ERCOT.¹¹³ While existing and future interties could prove to be viable alternatives to the Tres Amigas Project, such alternatives were among many that supported a finding that negotiated rate authority is just and reasonable. Thus, we affirm the March 18 Order's conclusion that alternatives need not be functionally identical to the Project to satisfy the Commission's broad inquiry under the *Chinook* analysis.¹¹⁴ Furthermore, Tres Amigas has committed to expand its facility at cost-based rates where negotiated rates will not support the needed expansion. Accordingly, customers of Tres Amigas will have a number of cost-based alternatives (including on a cost-based expansion of the Project by Tres Amigas), so that Tres Amigas's ability to negotiate rates is effectively capped at the cost of expansion.

55. We also affirm the March 18 Order's conclusion that power price differentials between interconnections can be expected to serve as a cap on the rate customers are willing to pay for transmission service on the Project.¹¹⁵ Occidental suggests that Tres Amigas would be able to capture and maintain monopoly power over the transmission capacity between the interconnections by pricing its transmission capacity at the difference in power prices between the interconnections. While we agree that such price differentials would serve as an effective cap on the rates Tres Amigas would be able to negotiate for transmission service on the Project, we disagree with Occidental's conclusion that this means that Tres Amigas will somehow maintain monopoly power over the relevant markets. In light of the significant alternatives that potential Tres Amigas customers would have, the Tres Amigas Project represents merely one additional opportunity.

56. Moreover, since the earliest merchant transmission case, the Commission has relied on price differentials between interconnected areas as representing the opportunity costs upon which transmission providers may price transmission service, consistent with

¹¹² *Id.* P 72.

¹¹³ *Id.* P 74.

¹¹⁴ *Id.*

¹¹⁵ *Id.* P 77.

the Commission's "higher of" pricing policy.¹¹⁶ A transmission customer will only purchase transmission service on the Project if the combined price of energy and the transmission service to deliver that energy from the sending interconnection is less than the price of energy within the receiving interconnection. Alternatively, a load serving entity's cost of constructing new generation facilities within its interconnection also places an upper bound on the price it would pay to receive power from another interconnection. Accordingly, as in *TransEnergie*, we find that the price differentials between the three interconnections are effective representations of opportunity costs, confirming our finding that negotiated rate authority is just and reasonable and consistent with the Commission's long-standing opportunity cost pricing policy.¹¹⁷

57. Furthermore, we reject Occidental's assertion that if a neighboring utility becomes a transmission customer of Tres Amigas and expands its system to interconnect with the Project, it somehow becomes a power marketer in a manner that is inconsistent with the Commission's open access policies. When making investment decisions to serve its customers, a utility may look at all options available to it, including options to construct new generation or construct new transmission to remove constraints to accessing generation in other areas. Where a neighboring utility seeks to expand to the Project to access generation from another interconnection in order to serve its native load, it would be reasonable to evaluate whether doing so would be less expensive than other alternatives (such as constructing a new generator in its service territory). At the same time, Tres Amigas will have an incentive to negotiate acceptable rates and terms with neighboring utilities for service on the Project to ensure that the transmission connecting the Project with surrounding systems will be constructed.¹¹⁸ In this way, rates for service on Tres Amigas should represent opportunity costs, consistent with Commission pricing policy.

¹¹⁶ *TransEnergie*, 91 FERC ¶ 61,230 at 61,838.

¹¹⁷ *Id.* See also *Pennsylvania Electric Co.*, 58 FERC ¶ 61,278, *reh'g denied*, 60 FERC ¶ 61,034, *reh'g dismissed*, 60 FERC ¶ 61,244 (1992), *aff'd*, *Pennsylvania Electric Co. v. FERC*, 11 F.3d 207 (D.C. Cir. 1993). 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).

¹¹⁸ March 18 Order at P 79.

C. Burden of Proof

1. Request for Rehearing

58. Occidental argues that under section 205 of the FPA, Tres Amigas has the burden of showing that it would not be able to exercise market power if it were granted negotiated rate authority.¹¹⁹ Occidental contends that the March 18 Order inappropriately shifted this burden to intervenors and required them to show that Tres Amigas would have the ability to exercise market power. As an example, Occidental points to testimony in which its expert argued that Tres Amigas's use of new superconducting High Voltage DC technology developed by American Superconductor, an owner of Tres Amigas, could erect a barrier to competitive entry and that American Superconductor could have an incentive to withhold that technology from competitors.¹²⁰ Occidental claims that Tres Amigas failed to refute this evidence. Therefore, Occidental challenges the Commission's rejection of this argument because of the Commission's finding that this argument was unsupported, while at the same time ignoring Tres Amigas's description of the technology as new. Occidental contends that by ignoring Tres Amigas's failure to refute allegations that Tres Amigas could use this new technology to erect a barrier to new entry, the Commission essentially shifted the burden of proof from Tres Amigas to Occidental by determining that "Occidental has not shown that there is an absence of other companies that manufacture and sell DC cable technology."¹²¹

59. Occidental also argues that the Commission inappropriately dismissed a number of Occidental's arguments regarding market power as "speculative,"¹²² even though the arguments were supported by un rebutted expert testimony and are therefore not

¹¹⁹ Occidental, Rehearing Request at 22 (citing 16 U.S.C. § 824d; *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 14, (2007) ("The initial burden of showing that the tariff proposal is just and reasonable is on the party making the FPA section 205 filing."); Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 962 (stating that the "burden of proof [is] on the seller to show that it lacks, or has adequately mitigated, market power" when seeking market-based rates)).

¹²⁰ Occidental, Rehearing Request at 22-23 (citing DeRamus Affidavit at P 46, 64).

¹²¹ *Id.* at 23 (citing March 18 Order at P 82).

¹²² *Id.* at 23-24 (citing March 18 Order at P 72 (dismissing many of Occidental's arguments as speculative because they concern Tres Amigas's "potential to exercise market power at some point in the future, under varying sets of assumptions"))).

speculative and should be afforded substantial weight. Occidental cites as examples its concerns regarding Tres Amigas's high market shares, its ability to create durable barriers to entry, and Tres Amigas's ability to shift costs onto captive customers. Occidental argues that its expert relied on "varying sets of assumptions" due to Tres Amigas's failure to provide evidence adequate to do a market power analysis, which Occidental argues should weigh against Tres Amigas's request for negotiated rates.

60. Finally, Occidental objects to Commission findings that it could address market power issues under section 206 if such issues arise in the future, citing this as another example of the Commission shifting the burden away from Tres Amigas.¹²³ Occidental points out that under section 206, the complainant has the burden of proving that a utility's rates are no longer just and reasonable. Occidental argues that by postponing consideration of these significant market power issues to a future section 206 proceeding, the Commission cements the shift of the burden of proof from Tres Amigas to aggrieved parties.

2. Commission Determination

61. Occidental's request for rehearing on this issue is denied. Under section 205 of the FPA, the initial burden of showing that the tariff proposal is just and reasonable is on the party making the filing (here, Tres Amigas).¹²⁴ In the March 18 Order, the Commission determined that Tres Amigas had met its burden to show that its rate proposal was just and reasonable, consistent with its longstanding policy on merchant transmission developer requests for negotiated rate authority. The Commission therefore accepted the filing, subject to certain conditions.

62. On rehearing, Occidental argues that Tres Amigas did not meet its section 205 burden and that the Commission inappropriately shifted the burden of proof onto the intervening parties, rather than Tres Amigas. We disagree. Occidental's contention that the Commission "shifted" the burden of proof because it did not employ market power tests used in wholly separate areas of Commission policy is incorrect. As explained above, the Commission employed its longstanding transmission negotiated rate analysis in reaching its conclusion that Tres Amigas had met its burden of demonstrating that negotiated rate authority would be just and reasonable.

63. Further, Occidental is incorrect in asserting that the Commission shifted the burden to intervenors to show that Tres Amigas lacked market power. In the March 18

¹²³ *Id.* at 24-25.

¹²⁴ *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 14 (2007).

Order, after considering arguments from Tres Amigas and Occidental, the Commission made the following determination:

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.¹²⁵

64. Occidental argues that the Commission failed to consider testimony in which Occidental's expert witness, Dr. DeRamus, alleged that "it is unlikely that a competing developer would be able to use a similar technology, as a competing transmission developer would undermine the profits [American Superconductor] would be able to earn as one of the owners of Tres Amigas."¹²⁶ Dr. DeRamus further asserted that a section 206 action in response to allegations that American Superconductor was strategically withholding its technology would likely be insufficient because it is unclear whether such an action could be the basis for a section 206 proceeding, and that courts are generally reluctant to require companies to make their intellectual property available to competitors.¹²⁷ Finally, Dr. DeRamus made the following observation "If [American Superconductor's] technology is critical to new entry, and if [American Superconductor] stands to profit more as an owner of Tres Amigas from the use of its proprietary technology to competing transmission projects, then [American Superconductor] will have few incentives to license that technology to Tres Amigas's competitors for use in the relevant market."¹²⁸

65. Occidental argues that the Commission did not afford its expert's testimony sufficient weight, and that it failed to account for Tres Amigas's own characterization of the American Superconductor DC technology as "new" and potentially unique. We

¹²⁵ March 18 Order at P 82.

¹²⁶ DeRamus Aff. at P 46.

¹²⁷ *Id.* P 64.

¹²⁸ *Id.*

disagree. The Commission acknowledged these arguments in the March 18 Order,¹²⁹ and upon consideration, determined that Occidental's arguments did not show that Tres Amigas would be capable of erecting a barrier to entry among competitors.¹³⁰ Even assuming that Occidental's argument regarding American Superconductor's potential reluctance to license its cable technology was true, the Commission found that competitive alternatives need not be identical in every respect.¹³¹ Therefore, even if American Superconductor was reluctant to license its cable technology to competing projects, the general availability of alternative transmission line technologies led to the Commission's determination that American Superconductor's participation in the Tres Amigas project would not present a barrier to entry to potential competitors. Stated otherwise, when the Commission evaluates whether a merchant transmission developer can erect barriers to entry, it does not evaluate whether a competitor can build the exact same project; rather, it looks to determine whether some inherent characteristic of the merchant transmission project (or its owner) would prevent a competitor from developing a project that, while not identical, is functionally able to compete with the merchant project. As discussed above, the March 18 Order found that there are a number of existing competitors for the Tres Amigas project. Accordingly, the Commission reasonably determined that Tres Amigas had carried its burden under section 205 of the FPA to show that it was not establishing barriers to entry among competitors.

66. The Commission's statement that "Occidental has not shown that there is an absence of other companies that manufacture and sell DC cable technology," did not shift the burden of proof onto Occidental. Instead, given the Commission's determination that Tres Amigas would not be able to erect barriers to entry among competitors, the above-quoted statement simply pointed out that nothing in Occidental's testimony (which the Commission accepted for the sake of argument) contradicted the Commission's finding that Tres Amigas had met its section 205 burden of showing that negotiated rate authority would be just and reasonable. Accordingly, we reject Occidental's argument that this statement somehow shifted the section 205 burden from Tres Amigas to intervening parties.

67. Similarly, Occidental objects to the fact that the March 18 Order did not disprove all of the potential outcomes that Occidental postulates may result from granting Tres Amigas negotiated rate authority. Occidental points to the potential for Tres Amigas to have exceptionally high market shares, an ability to create durable barriers to entry, and

¹²⁹ March 18 Order at P 81.

¹³⁰ See *Chinook*, 126 FERC ¶ 61,134 at P 38.

¹³¹ March 18 Order at P 82.

an ability to shift costs onto captive customers. Although we addressed these arguments specifically above, we note that the Commission has reasonably determined that to the extent that a transmission provider requesting negotiated rate authority meets the tests articulated in *Chinook* (and employed in the March 18 Order), the potential for it to develop market power thereafter is most appropriately handled through the section 206 process.

68. In addition, the Commission will continue to monitor concerns through subsequent section 205 filings required by the Commission as a condition of its grant of negotiated rate authority. Through these subsequent section 205 filings, Tres Amigas will continue to bear the burden of showing that the rates it negotiates are just and reasonable and the Commission will then have additional factual information to evaluate the negotiated rates. Additionally, to the extent that any of the market power concerns raised by Occidental develop at some later point, the Commission repeatedly explained that “[Tres Amigas] will remain subject to ongoing oversight under section 206 of the FPA,”¹³² and that “the Commission will consider carefully any concerns that may be raised subsequently pursuant to section 206 of the FPA that [Tres Amigas] has obtained market power and is utilizing such market power to charge unjust and unreasonable rates.”¹³³ In addition to the recourse afforded by section 206, Tres Amigas remains subject to ongoing reporting requirements, which will assist both customers and the Commission in ensuring that Tres Amigas’s negotiated rate authority remains just and reasonable.¹³⁴

69. Instead of making ill-conceived findings based on any number of potential scenarios, the Commission appropriately relies on section 206 of the FPA to ensure that negotiated rate authority does not become unjust and unreasonable as any such scenarios develop into reality. The United States Court of Appeals for the D.C. Circuit recently noted the importance of section 206 of the FPA in situations where the potential for harm exists in the future, explaining that where a process approved by the Commission under section 205 of the FPA leads to an unjust outcome, an aggrieved party may petition the Commission under section 206 of the FPA.¹³⁵ Accordingly, we find the Commission’s

¹³² *Id.* P 80.

¹³³ *Id.* P 47.

¹³⁴ See *Champlain Hudson*, 132 FERC ¶ 61,006 at P 51 (citing 18 C.F.R. § 35.10b (2010); Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 817; Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 394).

¹³⁵ *Sacramento Municipal Utility Dist. v. FERC*, No. 07-1208, *et al.*, slip op. at 41 (D.C. Cir. July 23, 2010).

reliance on the section 205 filings required of Tres Amigas as a condition of the March 18 Order, coupled with the regulatory oversight mechanism embodied in section 206, and the ongoing reporting requirements, to be adequate means to ensure that Tres Amigas will comply with its obligations under the negotiated rate authorization granted in the March 18 Order.

The Commission orders:

Occidental's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.