

135 FERC ¶ 61,169
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.

SunZia Transmission, LLC

Docket No. EL11-24-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued May 20, 2011)

1. On February 23, 2011, SunZia Transmission, LLC (Petitioner) filed a petition for declaratory order (Revised Petition) seeking Commission approval of its proposal to allocate ownership rights¹ and offer capacity at negotiated rates, including through pre-subscribed contracts for the SunZia Southwest Transmission Project (Project), a transmission project it is currently developing in New Mexico and Arizona. Additionally, Petitioner requests the Commission to find that electrical interconnection or transmission service requests are premature prior to the Project achieving sufficient permitting and licensing maturity. The Commission grants Petitioner's requests regarding its proposed ownership structure and plans to offer capacity at negotiated rates, and denies, due to insufficient information, its request for a finding that electrical interconnection or transmission service requests are premature, as discussed below.

I. Background

2. On January 29, 2010, in Docket No. EL10-39-000, Petitioner filed a request for declaratory order (Initial Petition) seeking Commission approval of the ownership structure and transmission service plans for the Project. Petitioner requested that the Commission find the following: (1) each investor in SunZia Transmission, LLC may be

¹ As discussed below, the "SunZia Owners" are SouthWestern Power Group (SW Power), ECP SunZia, LLC (ECP SunZia), Shell WindEnergy, Inc. (Shell WindEnergy), and Tucson Electric Power Company (Tucson Electric). We will refer to the developers of the Project, which are the SunZia Owners as well as Salt River Project Agricultural Improvement and Power District (Salt River) and Tri-State Generation and Transmission Association, Inc. (Tri-State) as "Project Sponsors," collectively.

allocated firm transmission rights representing 100 percent of its respective *pro rata* investment in the transmission capacity of the Project; (2) three owners of the Project, SW Power, ECP SunZia, and Shell WindEnergy may use up to 100 percent of their *pro rata* share of capacity on the Project to serve affiliated generators that are Qualifying Facilities (QF) or eligible facilities of Exempt Wholesale Generators (EWG) with no resulting jeopardy to their QF or EWG status; and (3) SW Power and ECP SunZia may pre-subscribe up to 100 percent of their *pro rata* shares of the Project's transmission capacity through negotiated rate contracts.

3. In an order issued on May 20, 2010,² the Commission denied Petitioner's requested approvals without prejudice to Petitioner modifying its proposal to conform to Commission precedents and policy regarding open access to transmission service. The Commission found that the SunZia Owners may have ownership shares in the Project in proportion to their *pro rata* investment in the Project. However, the Commission found that this does not equate to these entities having exclusive discretion to use the capacity on their portion of the Project in any manner they wish.³ The Commission stated that each of the SunZia Owners is responsible for providing access to firm transmission service rights on their respective allotted portion of the Project consistent with the Commission's open access policies.⁴ The Commission also disagreed with Petitioner's characterization of the Project as a generator tieline as the physical attributes and flexible use of the Project were beyond those of a generator tieline. To the extent that SW Power, ECP SunZia, and Shell WindEnergy proposed to use up to 100 percent of their *pro rata* share of capacity on the Project to serve affiliated generators, the Commission found that granting these affiliates of SW Power, ECP SunZia, and Shell WindEnergy priority rights to 100 percent of the available capacity on these transmission owner's shares of the Project did not appear to allow non-affiliates open, transparent, and non-discriminatory access to their transmission systems. The Commission also found that SW Power and ECP SunZia may not allocate 100 percent of their respective shares of the Project's capacity to anchor customers through negotiated rates without making any initial capacity available to third parties through an open season.

II. Revised Petition

4. Petitioner states that the Revised Petition limits its requested approvals to conform with the Commission's findings and guidance provided in the May 2010 Order.

² *SunZia Transmission, LLC*, 131 FERC ¶ 61,162 (2010) (May 2010 Order).

³ *Id.* P 25.

⁴ *Id.* P 26.

Accordingly, Petitioner states that it no longer seeks firm transmission rights, as opposed to ownership interests in the Project for the SunZia Owners, and it no longer seeks reservation of capacity on the Project for generator tieline use.

5. Petitioner requests that the Commission find the following: (1) that each SunZia Owner has ownership rights in the Project representing 100 percent of its *pro rata* investment in the Project; (2) that SW Power, ECP SunZia, and Shell WindEnergy may allocate up to 50 percent of their *pro rata* shares of the Project's transmission capacity to anchor customers through long-term firm negotiated rate contracts, with the remaining 50 percent to be made available to interested customers through open seasons; and (3) that electrical interconnection or transmission service requests with respect to the Project are premature prior to the Project achieving sufficient permitting and licensing maturity.⁵

6. With regard to the Project specifics, Petitioner states that it is developing a 500 kV transmission line in New Mexico and Arizona. The Project will consist of up to two single-circuit 500 kV transmission lines approximately 500 to 550 miles in length, and will extend to key interconnections with the underlying extra high voltage (EHV) grid in New Mexico and Arizona. Petitioner explains that the Project will link approximately 3,000 to 4,500 MW of primarily renewable location-constrained generation resources in New Mexico and Arizona with markets and customers in the western United States. Petitioner also states that the Project will increase and improve the reliability and system power transfer capability of the underlying EHV system in New Mexico and Arizona.

7. Petitioner states that planning for the Project began in 2006, including an open season for Project investment. An agreement among initial sponsors to proceed with Project development was entered into in April 2008. Petitioner adds that the Bureau of Land Management (BLM) began environmental review of the Project pursuant to the National Environmental Policy Act in June 2009. Petitioner anticipates that BLM's draft environmental impact statement for the Project, which it states is a critical first step to further detailed design and commercial development, will be completed during May 2011. The Project is scheduled to be in service in 2015.⁶

⁵ Petitioner asks that this last request be treated separately from the other requests, and that the Commission not delay issuance of a separate order on the first two requests, in the event that this request requires additional Commission consideration. *See id.* at 3 n.5.

⁶ Revised Petition at 4-5.

8. In regard to ownership of the Project, Petitioner indicates that it is sponsoring the Project directly with Salt River,⁷ and Tri-State⁸ with Petitioner, Salt River, and Tri-State owning 86 percent, 13 percent, and 1 percent, respectively as tenants in common. Petitioner adds that the Project is sponsored indirectly by Petitioner's own individual owners Tucson Electric Power Company (Tucson Electric), SW Power, ECP SunZia, and Shell WindEnergy (collectively, SunZia Owners).⁹ Petitioner states that its 86 percent of the Project will be allocated to each of the SunZia Owners in proportion to their investments in the Project as follows: Tucson Electric, 1 percent; SW Power, 40 percent; ECP SunZia, 40 percent; and Shell WindEnergy Inc., 5 percent.

9. Petitioner explains that Tucson Electric is an investor-owned utility with a franchised service territory, which owns transmission facilities in Arizona and New Mexico and has a Commission-approved open access transmission tariff (OATT) for these facilities.¹⁰ Petitioner states that SW Power is an independent developer of generation and transmission facilities. SW Power is owned by MMR Group, Inc., a privately-owned construction services firm based in Baton Rouge, Louisiana. Petitioner also states that except for the Bowie Power Station in southeastern Arizona, which SW Power is currently developing, SW Power is not affiliated with any electric utility that serves load or has a franchised service territory.¹¹ Petitioner adds that in October 2010, MMR Group, Inc. purchased ECP SunZia; therefore, ECP SunZia is currently a wholly-owned subsidiary of MMR Group, Inc., and an affiliate of SW Power.¹² Petitioner

⁷ Salt River is a political subdivision of the State of Arizona that owns and operates electric facilities, including transmission facilities. *See* May 2010 Order, 131 FERC ¶ 61,162 at P 4 n.2.

⁸ Tri-State is an electric cooperative corporation that generates and transports electricity to its members' systems located in New Mexico, Colorado, Nebraska, and Wyoming. *See id.* P 4 n.3.

⁹ Revised Petition at 7-8.

¹⁰ *Id.* at 6 n.10.

¹¹ *Id.* at 6 n.11.

¹² Petitioner notes that ECP SunZia was previously wholly-owned by Energy Capital Partners I, LP and its parallel funds (collectively, ECP). Petitioner states that ECP SunZia currently has no affiliation with ECP and ECP's other project companies, including renewable generation developers in the southwest U.S. and Green Energy Express LLC.

indicates that Shell WindEnergy is a wholly-owned subsidiary of Shell Oil Company and is not affiliated with any transmission or distribution facilities in the United States, except for limited interconnection facilities necessary to connect its own generation facilities to the transmission grid or those consisting of distribution facilities interconnected with the grid and serving particular production fields for oil and gas. Petitioner states that Shell WindEnergy has an ownership interest in eight operational wind-powered generation facilities in the United States with a total gross capacity of nearly 900 MW and that none of Shell WindEnergy's affiliates is an electric utility that serves load or has a franchised service territory.¹³

10. Concerning operations of the Project, Petitioner explains that there will be one operation and maintenance manager designated by the Petitioner and that the Project Sponsors will develop a coordinated ownership and operating agreement, which Petitioner will file with the Commission to ensure uniform, transparent, and nondiscriminatory usage rights on the Project, responsibility for operation of the Project, transmission planning, and interconnection and expansion policies.¹⁴

11. Petitioner also states that Tucson Electric, Salt River, and Tri-State will make their shares of the Project available under their existing OATTs. SW Power, ECP SunZia, and Shell WindEnergy anticipate filing separate OATTs for their *pro rata* shares of the Project, which will include a uniform process for requesting interconnection and transmission service, including the procedures for requesting expansion of the Project.¹⁵ Petitioner notes that ECP SunZia and SW Power may file a single OATT for their combined shares of Project capacity due to their common ownership by MMR Group, Inc. In addition, SW Power, ECP SunZia, and Shell WindEnergy may establish a single Open Access Same-Time Information System (OASIS) administrator.¹⁶

12. Further, Petitioner states that the Project Sponsors (i.e., the SunZia Owners, Salt River, and Tri-State) have funded approximately \$16 million for the Project's development and anticipate having to fund an additional \$10 million prior to securing licenses, permits, rights-of-way, engineering, procurement, and construction and permanent financing for the Project. Petitioner asserts that with such significant private funds at stake, the Project Sponsors desire regulatory certainty as to fundamental aspects

¹³ Revised Petition at 6 n.13.

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 10 – 11.

¹⁶ *Id.* at 11, 16 n.32.

of the Project before completing the development phase. Therefore, Petitioner states it seeks Commission approval of the capacity allocation principles set forth in the Revised Petition by the end of April 2011 to allow the Project to proceed as planned in May 2011 when the Draft Environmental Impact Statement is expected to be issued.

III. Notice of Filing

13. Notice of Petitioner's revised filing was published in the *Federal Register*, 76 Fed. Reg. 12957 (2011), with interventions and protests due on or before March 17, 2011. None was filed.

IV. Discussion

1. Allocation of Ownership Rights

a. Petitioner's Position

14. Petitioner requests that the Commission confirm that each SunZia Owner owns that portion of the Project equal to its *pro rata* share of its investment in the Project. Petitioner explains that it requests this explicit finding in order to eliminate any uncertainty created by the fact that the SunZia Owners own their *pro rata* shares of the Project indirectly through SunZia Transmission, LLC. Petitioner explains that in the May 2010 Order, the Commission determined that the Commission's open access policies govern the extent to which investment in a transmission project grants a party transmission service rights, and that the SunZia Owners do not have exclusive rights to use the Project capacity equal to their share of investment in the Project.¹⁷ Petitioner states that the Commission also determined that each of the SunZia Owners is a transmission owner/provider of Project capacity in proportion to its investment in the Project, because each invested in the Project in response to an open season for investment and committed to fund the Phase I Project development cost.¹⁸

b. Commission Determination

15. In the May 2010 Order, the Commission found that each of the SunZia Owners is a transmission owner/provider of Project capacity in proportion to its investment in the Project, because each invested in the jurisdictional portion of the Project by way of an investment in SunZia Transmission, LLC.¹⁹ Moreover, the SunZia Owners, in addition to

¹⁷ *Id.*

¹⁸ *Id.* at 8 (citing May 2010 Order, 131 FERC ¶ 61,162 at P 24-25).

¹⁹ May 2010 Order, 131 FERC ¶ 61,162 at P 25.

Salt River and Tri-State, executed a Memorandum of Agreement under which the parties agreed to invest approximately \$26 million in total, on a *pro rata* basis, to cover the Phase I development costs.²⁰ Petitioner has not presented any additional information in its Revised Petition to alter the Commission's determination in the May 2010 Order. Accordingly, the Commission affirms that the SunZia Owners have ownership shares in the Project indirectly through SunZia Transmission, LLC in proportion to their *pro rata* investment in the Project.

2. Request for Negotiated Rate Authority

16. In addressing requests for negotiated rate authority from merchant transmission developers, the Commission has demonstrated a commitment to fostering the development of such projects where reasonable and meaningful protections are in place to preserve open access principles and to ensure that the resulting rates for transmission service are just and reasonable. The Commission, in recognizing the financing realities faced by merchant transmission developers and the customer-protection mandates of the Federal Power Act (FPA) and the Commission's open access requirements, has refined its approach on how it determines whether to grant negotiated rates.²¹ Specifically, the Commission has focused on the following four areas of concern: (1) the justness and reasonableness of rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements.²² This approach allows the Commission to use a consistent analytical framework to evaluate requests for negotiated rate authority from a wide range of merchant projects that can differ substantially from one project to the next.²³

17. As discussed below, Petitioner's proposal to allow SW Power, ECP SunZia and Shell WindEnergy to offer transmission service over the Project under negotiated rate authority, addresses these four concerns.

²⁰ *Id.*

²¹ *See Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (*Chinook*).

²² *See id.* P 37.

²³ *Tres Amigas LLC*, 130 FERC ¶ 61,207, at P 38 (2010) (*Tres Amigas*).

a. **Just and Reasonable Rates**

i. **Petitioner's Position**

18. Petitioner proposes that SW Power, ECP SunZia, and Shell WindEnergy be allowed to enter into long-term firm transmission contracts with unaffiliated anchor tenants for up to 50 percent of their *pro rata* shares of the Project.²⁴ Petitioner asserts that “[i]n the May 2010 Order, the Commission acknowledged the pro-competitive market forces that will apply downward pressure on the negotiated rates that [SW Power], ECP SunZia, or [Shell WindEnergy] may charge for use of the Project.”²⁵ Petitioner states that none of SW Power, ECP SunZia, or Shell WindEnergy has affiliates with traditionally regulated transmission systems and the ability to pass through costs to captive customers. According to Petitioner, in the May 2010 Order the Commission noted the potential for expansion on neighboring public utilities’ systems with service at cost-based rates, the obligation of the SunZia Owners to expand if a third party requests service on the Project beyond the available initial capacity, and the fact that transmission customers on either end of the Project have no obligation to purchase service from any SunZia Owner and would do so only if it is cost effective. Petitioner also asserts that the Initial Petition and the May 2010 Order “clearly established that each of the SunZia Owners has assumed the full market risk for the cost of constructing its share of the Project.”²⁶

19. Petitioner also asserts that the Revised Petition addresses the Commission’s concern in the May 2010 Order that no initial capacity was proposed to be made available to interested customers in an open season.²⁷ Petitioner states that it is committed to making initial capacity available to interested customers in an open season and that SW Power, ECP SunZia, and Shell WindEnergy each proposes to pre-subscribe no more than 50 percent of their *pro rata* shares of the Project to unaffiliated anchor customers through long-term firm negotiated rate contracts and to allocate the remaining initial capacity through open seasons. Petitioner asserts that its revised anchor tenant proposal satisfies the Commission’s just and reasonable rate criterion for granting negotiated rate authority.

²⁴ Revised Petition at 8.

²⁵ *Id.* at 12.

²⁶ *Id.*

²⁷ *Id.* at 12-13 (citing May 2010 Order, 131 FERC ¶ 61,162 at P 44-45).

ii. **Commission Determination**

20. In determining whether negotiated rate authority would be just and reasonable, the Commission has looked at a number of different merchant transmission provider characteristics, including: whether it has assumed the full market risk of the project; whether it is building within the footprint of its own (or an affiliate's) traditionally regulated transmission system with captive customers; whether the merchant transmission provider or affiliate already owns transmission facilities in the particular region of the project; whether it has committed to a fair, open and transparent open season for the initial allocation of capacity; what alternative the customers have; whether any barriers to entry among competitors exist that would allow the merchant transmission provider to exercise market power for an excessive period of time; and whether the merchant transmission provider has the ability to withhold capacity.²⁸ Additionally, the Commission requires merchant transmission providers retaining control of their projects to create firm tradable secondary transmission rights and to create and maintain an OASIS for customers to purchase and sell these rights.²⁹

21. With regard to the Commission's concern as to whether merchant transmission providers have affiliates with traditionally regulated transmission systems that enable them to pass on costs to captive customers, SW Power, ECP SunZia, and Shell WindEnergy satisfy this concern, because none of them has any such affiliates. Further, regarding competitive alternatives that customers may have to a merchant transmission project, we note that the Project will interconnect with or near public utilities, from which customers may secure service under cost-based rates. Therefore, the potential for expansion on neighboring public utilities' systems and the cost-based rates associated with such expansion provides some alternatives to the Project and downward pressure on the negotiated rates that SW Power, ECP SunZia, and Shell WindEnergy could charge.³⁰ Furthermore, a transmission customer on either end of the Project would not be required to purchase transmission service from SW Power, ECP SunZia, or Shell WindEnergy. Such transmission customer could opt to purchase transmission service from SW Power, ECP SunZia, or Shell WindEnergy, or could purchase service from other transmission providers in the area of the Project to the extent it were cost effective to do so.³¹

²⁸ *Tres Amigas LLC*, 130 FERC ¶ 61,207 at P 44. See also *Chinook*, 126 FERC ¶ 61,134 at P 38; *Montana Alberta Tie., Ltd.*, 116 FERC ¶ 61,071, at P 53-54 (2006).

²⁹ *Chinook*, 126 FERC ¶ 61,134 at P 39.

³⁰ *Id.*

³¹ *Id.* P 57.

22. SW Power, ECP SunZia, and Shell WindEnergy are new entrants into the transmission market and are therefore not increasing their presence in the area, nor do they have local affiliates that own transmission facilities in the region. Moreover, once the Project is operational, the Commission's open access requirements will ensure that SW Power, ECP SunZia, and Shell WindEnergy cannot effectively erect barriers to entry into the relevant markets. Petitioner agrees that SW Power, ECP SunZia, and Shell WindEnergy will file with the Commission separate OATTs that will provide third parties with a transparent and uniform process for requesting electrical interconnection and transmission service after the initial capacity subscriptions, including the procedures for requesting expansion of the Project to accommodate such requests.³² In addition, Petitioner commits that all customers with rights to use Project capacity will retain firm tradable secondary rights with respect to their contracted capacity.³³ Further, SW Power, ECP SunZia, and Shell WindEnergy will maintain a single OASIS to ensure uniformity of customer treatment, and one operations and maintenance (O&M) manager will be designated for the Project.

23. Furthermore, we find to be just and reasonable Petitioner's proposal that SW Power, ECP SunZia, and Shell WindEnergy reserve 50 percent of their respective shares of the Project's capacity for negotiated-rate, anchor customer arrangements with the remaining 50 percent of the initial capacity to be allocated in open seasons.³⁴ Reserving 50 percent of the respective shares of the Project's capacity owned by SW Power, ECP SunZia, and Shell WindEnergy for anchor customer arrangements means that a significant amount of the initial capacity of the Project will be available to customers in open seasons.

24. These factors, in addition to Petitioner's commitment to hold open seasons, including hiring an independent consultant to evaluate the open season results and filing the evaluation as part of the open season report,³⁵ and its commitment to provide service

³² Petitioner states that SW Power and ECP SunZia may elect to file a single OATT with respect to their combined shares of the Project capacity given MMR Group, Inc.'s recent acquisition of ECP SunZia. Revised Petition at 11 n.23.

³³ *Id.* at 8.

³⁴ *See Chinook*, 126 FERC ¶ 61,134 at P 60 (accepting proposal to reserve 50 percent of two merchant projects' initial capacities for anchor tenant arrangements with the remaining 50 percent to be made available in open seasons).

³⁵ Revised Petition at 9.

pursuant to Commission-approved OATTs lead us to conclude that Petitioner's proposal has met the first prong of the four-factor test.

b. Undue Discrimination

i. Petitioner's Position

25. Petitioner notes that in the Initial Petition it discussed the difficulties that the merchant transmission developers of the Project (i.e., SW Power, ECP SunZia, and Shell WindEnergy) face in financing their shares of the Project and the resultant need for long-term financial commitments by anchor customers prior to an open season to support their up-front financing risks associated with the Project. Petitioner states that in the Revised Petition, SW Power, ECP SunZia, and Shell WindEnergy each commits to allocating at least 50 percent of its *pro rata* share of initial capacity on the Project through open seasons, and to offering the same rates, terms, and conditions to customers under the open season as offered to anchor customers, assuming equal or superior creditworthiness of the customers.³⁶ Petitioner asserts that SW Power, ECP SunZia, and Shell WindEnergy each commits not to allocate any of its pre-subscribed share of the Project capacity (i.e., that share of capacity subject to anchor customer arrangements) to any of its own affiliates.

26. Additionally, Petitioner adds that while SW Power and ECP SunZia now are affiliated with each other, SW Power and ECP SunZia, on the one hand, and Shell WindEnergy, on the other, are not affiliated by virtue of their joint investment in the Project. Petitioner asserts that SW Power, ECP SunZia, and Shell WindEnergy commit not to be anchor tenants on their own or affiliates' portions of the Project, but SW Power and ECP SunZia and Shell WindEnergy request that the Commission allow each of them and their respective affiliates to negotiate anchor tenant arrangements with respect to capacity owned by their unaffiliated co-investors, i.e., Shell WindEnergy as anchor tenant on capacity owned by SW Power or ECP SunZia and SW Power and ECP SunZia as anchor tenant on capacity owned by Shell WindEnergy. Petitioner adds that consistent with Commission precedent, affiliates of SW Power, ECP SunZia, or Shell WindEnergy may bid for service on Project capacity owned by their affiliates in the initial or subsequent open seasons.³⁷ Petitioner asserts that with the procedural safeguards it has

³⁶ *Id.* at 13. If a party believes it has been treated in an unduly discriminatory manner while seeking to participate in an open season, it may avail itself of its rights under section 206 of the FPA. *See Sacramento Municipal Utility Dist. v. FERC*, 616 F.3d 520, 542 (D.C. Cir. 2010) (*SMUD v. FERC*).

³⁷ *Id.* at 10 n.22 (citing *Sea Breeze Pacific Juan de Fuca Cable LP*, 112 FERC ¶ 61,295, at P 29 (2005); *Neptune Regional Transmission System, LLC*, 103 FERC

(continued...)

committed to in the Revised Petition, including offering the same terms to customers in the initial open seasons with equal or superior creditworthiness that commit to the same term of service, there is no opportunity for undue preference to affiliates or otherwise.

27. Finally, Petitioner maintains that SW Power, ECP SunZia, and Shell WindEnergy do not intend to provide ancillary services. Petitioner asserts that because SW Power, ECP SunZia, and Shell WindEnergy will not own generation supporting their *pro rata* shares of the Project and therefore lack the means to provide generation based ancillary services, provision of ancillary services by these entities is not practical.

ii. Commission Determination

28. The Commission looks specifically at the merchant transmission owner's open season and OATT commitments in determining whether negotiated rate authority could lead to undue discrimination on a particular transmission project. Here, in addition to Petitioner's commitments stated above in the discussion of just and reasonable rates, Petitioner states that SW Power, ECP SunZia, and Shell WindEnergy will each file with the Commission a report on the process used to identify the anchor customers and the details of the associated agreement. Additionally, Petitioner commits to make an FPA section 205 filing with the Commission to seek authorization for anchor customer transactions identified after the allocation of each of SW Power's, ECP SunZia's, Shell WindEnergy's initial capacity.³⁸

29. Petitioner also commits that SW Power, ECP SunZia, and Shell WindEnergy will adopt non-discriminatory OATT provisions, as well as the other books and records commitments made in its Initial Petition. Specifically, after commercial operation, SW Power, ECP SunZia, and Shell WindEnergy commit that: (1) books and records for SW Power, ECP SunZia, and Shell WindEnergy will comply with the Commission's Uniform System of Accounts (Part 101 of FERC's regulations) and will be subject to examination as required by Part 41 of the Commission's regulations; (2) SW Power, ECP SunZia, and Shell WindEnergy will file financial statements and reports in accordance with Part 141 of the Commission's regulations; and (3) the books and records of SW Power, ECP

¶ 61,213, at P 21-22 (2003)).

³⁸ *Id.* at 9.

SunZia, and Shell WindEnergy will be audited by independent auditors.³⁹ These commitments will assist the Commission in carrying out its oversight role and in ensuring that SW Power, ECP SunZia, and Shell WindEnergy continue to honor the commitments they assume in the Revised Petition.

30. Moreover, SW Power, ECP SunZia, and Shell WindEnergy are required to file OATTs that adhere to the Order No. 890⁴⁰ *pro forma* OATT prior to service commencing on their individual portions of the Project. Any deviations from the *pro forma* OATT must be supported and will be evaluated by the Commission when they are submitted so as to ensure that SW Power, ECP SunZia, and Shell WindEnergy will provide open and nondiscriminatory service on their portion of the Project.

31. Under the Commission's policies, transmission providers must offer or provide ancillary services under their OATTs.⁴¹ However, the Commission has recognized that this may not be practical in some instances, such as when a merchant transmission developer does not own generation and therefore lack the means to offer or provide generation-based ancillary services.⁴² Thus, the Commission has found that to the extent a merchant transmission developer is not in a position to offer or provide ancillary services, it should negotiate in the transmission service agreements it enters into with its customers as to how ancillary services for the project will be supplied.⁴³ SW Power, ECP SunZia, and Shell WindEnergy commit to do so.

³⁹ *Id.* at 14 n.29.

⁴⁰ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁴¹ *See* Order No. 890 FERC Stats. & Regs. ¶ 31,241 at *pro forma* OATT section 3 (Ancillary Services) (providing that transmission providers are required to provide (or offer to arrange with the local control area operator), and the transmission customer is required to purchase, the following ancillary services: (i) scheduling, system control and dispatch, and (ii) reactive supply and voltage control from generation or other sources).

⁴² *See Chinook*, 126 FERC ¶ 61,134 at P 64.

⁴³ *Id.*

32. Therefore, for the reasons discussed above the Commission finds that Petitioner's proposal including the commitments made herein should not lead to undue discrimination and therefore meets the second prong of the four-factor test.

c. Undue Preference and Affiliate Concerns

i. Petitioner's Position

33. Petitioner asserts that SW Power, ECP SunZia, and Shell WindEnergy commit not to use any of their respective shares of the Project for affiliated generation through the anchor tenant arrangements.⁴⁴ However, as discussed above, Petitioner states that generation affiliates of SW Power and ECP SunZia, on the one hand, or Shell WindEnergy, on the other, may seek to subscribe to long-term transmission service arrangements through the anchor customer process with each other. Petitioner explains that even though each of SW Power, ECP SunZia, and Shell WindEnergy is affiliated with SunZia, and SW Power and ECP SunZia are currently affiliated with each other, SW Power and ECP SunZia are not affiliated with Shell WindEnergy.⁴⁵ Petitioner further proposes that the remaining initial transmission capacity not secured by anchor tenants will be allocated to customers through initial open seasons by each of SW Power, ECP SunZia, and Shell WindEnergy.⁴⁶

34. In addition, as noted above, Petitioner states that it will make an informational filing with the Commission for any anchor tenant transaction entered into pursuant to the Commission's authority granted in this docket, which will describe the principle terms of the agreement and the process used to identify customers. Petitioner reiterates that SW Power, ECP SunZia, and Shell WindEnergy commit to giving the same rates, terms, and conditions of service to any customer in the initial open seasons with equal or superior creditworthiness that is willing to agree to the same time commitment as an anchor customer. SW Power, ECP SunZia, and Shell WindEnergy again commit to make a future filing under section 205 of the FPA seeking authorization for any anchor customer arrangement entered into after the initial capacity commitments are made, but prior to the Project's commercial operation date.⁴⁷

⁴⁴ Revised Petition at 15.

⁴⁵ *Id.* at 15.

⁴⁶ Petitioner states that due to their common upstream ownership, SW Power and ECP SunZia may conduct a joint open season with respect to their shares of the Project.

⁴⁷ Petitioner states that any long-term transmission agreements entered into after

(continued...)

35. Further, Petitioner states that SW Power, ECP SunZia, and Shell WindEnergy each commits to comply with FERC's Standards of Conduct, as well as other affiliate rules and filing requirements. Petitioner indicates that open seasons for initial capacity held by each of SW Power, ECP SunZia, and Shell WindEnergy will comply with Commission precedent, will be fair, transparent, and nondiscriminatory, and will use an independent evaluator for its open season to preclude any issues that may arise to the extent that its affiliates of SW Power, ECP SunZia, and Shell WindEnergy bid into its open season. Petitioner commits to file open season reports with the Commission shortly after the close of the open seasons, which will include the terms of the open season, including notice of the open season and the bid evaluation methodologies, the identity of the parties purchasing capacity, and the amount, term, and price of that capacity.⁴⁸

36. Petitioner claims that in the open seasons each prospective generation affiliate will compete for transmission service rights through the same transparent and open processes applicable to all prospective customers so there will be no opportunity for undue preference.

ii. Commission Determination

37. In order to ensure that service on merchant transmission projects will not result in any undue preference to any particular entity, the Commission examines carefully situations where the merchant transmission developer is affiliated with the anchor customer, the open season participants, and/or customers that subsequently take service on the merchant line to ensure that there is sufficient transparency, openness and other protections in place to preclude unduly preferential treatment.⁴⁹

38. The Commission finds that although SW Power, ECP SunZia, and Shell WindEnergy are all co-investors in the Project, Shell WindEnergy is not an affiliate of either SW Power or ECP SunZia. That is, SW Power and ECP SunZia together and Shell WindEnergy are unaffiliated co-investors and are not affiliates in the same corporate family, which could raise concerns related to undue preference. Based on Petitioner's explanation herein, we therefore find that SW Power and ECP SunZia (together) are hereby permitted to enter into anchor tenant agreements with Shell WindEnergy and vice versa. In addition, we find that the open season process will also limit the potential for

the commercial operation date will be governed by the relevant OATT. Revised Petition at 9 n.20.

⁴⁸ *Id.* at 9.

⁴⁹ *Tres Amigas*, 130 FERC ¶ 61,207 at P 91; *Chinook*, 126 FERC ¶ 61,134 at P 48.

preferential treatment in the anchor tenant arrangements. As noted above SW Power, SunZia, and Shell WindEnergy each commits to allocating at least 50 percent of its *pro rata* share of initial capacity on the Project through open seasons, and to offering the same rates, terms, and conditions to customers under the open season as offered to anchor customers, assuming equal or superior creditworthiness of the customers.⁵⁰ Because they will need to offer the anchor tenant agreements to open season customers, SW Power, ECP Sunzia and Shell WindEnergy will be less likely to agree to preferential terms in negotiating anchor tenant arrangements. Additionally, Petitioner has committed to make an informational filing with the Commission for any anchor customer transaction describing the principal terms of the agreement and the process used to identify anchor customers.

39. Furthermore, the Commission finds that Petitioner's proposal for negotiated rate authority does not raise concerns regarding undue preference to affiliates because Petitioner commits that SW Power, ECP SunZia, and Shell WindEnergy each will not allocate any of its pre-subscribed share of the Project capacity to any of its own affiliates. The Commission interprets this to mean that, for example, SW Power commits that its Bowie Power Station affiliate will not be allowed to participate as an anchor customer on either SW Power's or ECP SunZia's portion of the Project. Accordingly, given Petitioner's commitment to comply with FERC's Standards of Conduct, other affiliate rules, and filing requirements, we find that the Revised Petition should not lead to any undue preference and affiliate concerns. Therefore, we find that Petitioner's Revised Proposal meets the third prong of the four-factor test.

d. Regional Reliability and Operational Efficiency

i. Petitioner's Position

40. Petitioner reaffirms the commitments made in the Initial Petition with respect to regional reliability and operational efficiency. Petitioner states that the Commission found, in the May 2010 Order, that the Petitioner's commitments in this regard were sufficient to satisfy this fourth prong of the Commission's negotiated rate analysis. Thus, Petitioner maintains that operation of the Project will be fully coordinated and efficient.⁵¹

⁵⁰ As noted above, if a party believes it has been treated in an unduly discriminatory manner while seeking to participate in an open season, it may avail itself of its rights under section 206 of the FPA.

⁵¹ Revised Petition at 16.

ii. **Commission Determination**

41. The Commission has previously found that in order to ensure regional reliability and operational efficiency, it expects that any merchant transmission projects connected to an Regional Transmission Organization (RTO) or Independent System Operator (ISO) turn over operational control to the RTO/ISO;⁵² however, in this case there is no RTO or ISO for the Project to connect to, as proposed. The Commission has also stated that while separate reliability requirements are no longer necessary for merchant transmission projects in light of the development of mandatory reliability requirements, the Commission has noted that merchant developers must comply with all applicable requirements of the North American Electric Reliability Corporation (NERC) and any regional council.⁵³

42. The Commission acknowledges that the Petitioner reaffirms the commitments made on ensuring regional reliability and operational efficiency of the Project. In the May 2010 Order, the Commission accepted that the Project continues to be evaluated and integrated into the coordinated regional planning processes conducted by the Western Electricity Coordinating Council (WECC) and the Southwest Area Transmission Subregional Planning Group.⁵⁴ Additionally, Petitioner commits to complying with all applicable NERC and WECC reliability requirements and procedures. The Project will have a single O&M manager to operate the Project, and that operator will be designated by SunZia Transmission, LLC. In addition, SW Power, ECP SunZia, and Shell WindEnergy intend to use a single OASIS administrator with respect to all of their shares of the Project capacity, and to participate in the Order No. 890 planning processes with utility systems with which the Project will interconnect.⁵⁵ Therefore, the Commission continues to find that the Project meets the regional reliability and operational efficiency requirements under the fourth prong of the Commission's negotiated rate authority analysis.

43. In conclusion, the Commission finds that the Project as described in the Revised Petition meets the requirements of the four-factor test used to evaluate merchant

⁵² *Tres Amigas*, 130 FERC ¶ 61,207 at P 95.

⁵³ *Id.*

⁵⁴ May 2010 Order, 131 FERC ¶ 61,162 at P 67.

⁵⁵ *Id.*

transmission projects for negotiated rate authority. Therefore, the Commission hereby grants negotiated rate authority to Petitioner for service on the Project.

3. Third Party Request for Transmission Service

a. Petitioner's Position

44. Petitioner requests a Commission finding that neither Petitioner nor any of the SunZia Owners be required to accept any electrical interconnection or transmission service requests with respect to the Project prior to the earlier of (1) publication in the *Federal Register* of the Final Environmental Impact Statement for the Project; or (2) notice by Petitioner to the Commission that Petitioner or the SunZia Owners are prepared to accept and process requests for electrical interconnection and transmission service.⁵⁶ In support of its request, Petitioner explains that, with the exception of Tucson Electric, neither Petitioner nor any of the SunZia Owners is a jurisdictional public utility with an OATT or other rate schedule on file with the Commission.⁵⁷ Accordingly, Petitioner argues that, to the extent the Project does not yet exist and neither SunZia nor the majority of the SunZia Owners are public utilities subject to Commission jurisdiction, it would be premature to accept requests for electrical interconnection or transmission service. In further support of its request, Petitioner argues that until various permitting and licensing activities are completed, construction costs are estimated, and a final project alignment is determined, it would not be possible to properly process any interconnection or transmission service requests. Petitioner also indicates that one or more third parties may already have an interest in submitting electrical interconnection and transmission requests for the Project to SunZia or the SunZia Owners.⁵⁸

a. Commission Determination

45. We will deny Petitioner's request because it has not provided sufficient information upon which to grant the request. Petitioner implies but does not state that it has received inquiries from third parties for capacity on the Project. Moreover, the timing of the solicitation for anchor tenant agreements and subsequent open seasons for transmission service is not known at this time. Bids from potential transmission

⁵⁶ Revised Petition at 18.

⁵⁷ *Id.* at 17.

⁵⁸ *Id.*

customers in the open seasons could be considered requests for transmission service. Petitioner has not explained how granting this request could affect service requests received during the open season bid solicitation process. Accordingly, Petitioner's request for a finding that third-party requests for electrical interconnection or transmission service requests are premature is denied.

The Commission orders:

(A) SW Power, ECP SunZia, and Shell WindEnergy are hereby granted authority to sell transmission rights at negotiated rates, subject to conditions discussed in the body of this order.

(B) SW Power, ECP SunZia, and Shell WindEnergy are hereby directed to file their OATTs in compliance with this order prior to the beginning of each of their open seasons.

(C) SW Power, ECP SunZia, and Shell WindEnergy are hereby directed to file a report of each of the open season's results with the Commission within 30 days of the close of each open season.

(D) SW Power, ECP SunZia, and Shell WindEnergy are hereby directed to make an informational filing with the Commission within 30 days of SW Power, ECP SunZia, or Shell WindEnergy entering any anchor tenant agreement, as discussed above.

(E) Petitioner's request for a finding that third-party requests for electrical interconnection or transmission service requests are premature is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.