

## **FERC Grants Negotiated Rate Treatment, Declines to Disclaim Jurisdiction Over Proposed Transmission “Superstation”**

**March 23, 2010**

On March 18, the Federal Energy Regulatory Commission (FERC or the Commission) issued two orders with respect to the proposed Tres Amigas “Superstation” (or the Project). As proposed, the Project would consist of a three-way alternating current (AC)/direct current (DC) transmission interconnection station that would interconnect the three asynchronous transmission grids in the coterminous United States: the Eastern Interconnection, the Electric Reliability Council of Texas (ERCOT), and the Western Electricity Coordinating Council (WECC) in Clovis, New Mexico, thus allowing significant amounts of power to be transmitted among the three interconnections for the first time.

In Docket No. EL10-22, the Commission denied Tres Amigas’s request for a blanket disclaimer of jurisdiction over facilities that would interconnect the ERCOT grid with the Superstation. 130 FERC ¶ 61,205 (2010). In Docket No. ER10-396, FERC conditionally granted Tres Amigas’s request for authorization to charge negotiated rates for transmission service on the Project, based on the Commission’s precedent concerning merchant transmission facilities. 130 FERC ¶ 61,207 (2010).

With respect to Tres Amigas’s petition for a disclaimer of jurisdiction, FERC began its analysis by noting that utilities in ERCOT are not generally subject to Commission jurisdiction under the Federal Power Act (FPA) because their facilities are not used for transmission and sales of electric energy in interstate commerce. In the case of the proposed Superstation, energy would be generated in one state and transmitted to another state for consumption in that state, necessarily involving the transmission of electric energy in interstate commerce. As such, without an exemption, the interconnection would result in ERCOT and ERCOT utilities becoming subject to the Commission’s jurisdiction as public utilities. The Commission noted, however, that it has the authority to issue orders allowing interconnection to facilities that will be used to transmit energy, or permitting transmission over facilities, under FPA sections 210 and 211, respectively, between ERCOT and the Superstation while retaining the jurisdictional status quo.

However, the Commission did not believe that Tres Amigas had demonstrated that FERC should grant a blanket disclaimer of jurisdiction under existing law over the prospective transmission facilities that would interconnect the ERCOT grid with the Superstation. The Commission noted that it has rejected requests in the past for a blanket section 211 order, stating that it may only order a transmitting utility to provide transmission service to an actual applicant because the requirements of sections 210 and 211 of the FPA make it necessary to know the parties and circumstances of such an application.

In Docket No. ER10-396, the Commission granted Tres Amigas’s request to charge negotiated rates over its merchant transmission project, subject to certain conditions. The Commission noted that Tres Amigas stated that traditional, cost-based transmission pricing is not feasible for the Project because it has no captive customers, there is no regional transmission organization under which the costs of the Project can be recovered, the beneficiaries of the Project are spread throughout the three interconnections, and the risks associated with the Project exceed those associated with typical cost-based transmission projects.

Conditionally granting Tres Amigas’s proposal, the Commission relied on the four-factor test for approval of negotiated rates for merchant transmission projects: (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.

Among other things, the Commission directed Tres Amigas to seek approval under section 205 of the FPA for appropriate future authorizations; to seek authorization for any anchor shipper customer arrangement through a section 205 filing (limited to 50% of the Project’s initial capacity), and to offer the same rate given to an anchor customer to an open-season customer that agrees to the same terms; not to withhold any capacity that is not committed to an anchor customer during the open-season process; to file a post-open season report; and to participate in Order No. 890 planning processes, for reliability purposes, with the utility systems that propose to interconnect to the Project.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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