UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Plains and Eastern Clean Line LLC and	)	
Plains and Eastern Clean Line Oklahoma LLC	)	Docket No. ER12 -___-000

APPLICATION FOR AUTHORIZATION TO SELL TRANSMISSION SERVICES AT NEGOTIATED RATES AND FOR RELATED RELIEF

Pursuant to Section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d, and Part 35 of the regulations of the Federal Energy Regulatory Commission ("FERC" or "Commission") under the FPA, 18 C.F.R. Part 35 (2011), Plains and Eastern Clean Line LLC and Plains and Eastern Clean Line Oklahoma LLC,[1] collectively ("Applicant" or "Plains and Eastern"), respectfully request authorization to sell transmission services at negotiated rates. Applicant requests this authority for its Plains & Eastern Clean Line transmission project (the "Project" or the "Plains & Eastern Clean Line"), a ±600 kilo-volt ("kV"), high voltage, direct current ("HVDC") transmission line and associated facilities that will be capable of delivering up to 3,500 megawatts ("MW") of power from western Oklahoma, southwestern Kansas, and the Texas Panhandle to utilities and customers in Tennessee, Arkansas, and other markets in the Mid-South and Southeast. Upon completion, Applicant will turn over operational control of the Project to either the Southwestern Power Pool ("SPP") or another qualified entity that performs functions similar to a Regional Transmission Organization ("RTO") (collectively "grid operator") and/or offer non-discriminatory service pursuant to the *pro forma* Open Access

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[1] Due to state laws, the line will be owned by two separate legal entities. The portion of the line located in the state of Oklahoma will be owned by Plains and Eastern Clean Line Oklahoma LLC, a limited liability company organized under the laws of the state of Oklahoma, and the portion of the line located in the states of Arkansas and Tennessee will be owned by Plains and Eastern Clean Line LLC, a limited liability company organized under the laws of the state of Arkansas. For ease of reference, we refer to these two entities in the singular.

Transmission Tariff (OATT) requirements in Order No. 890. SPP is an RTO, an organization recognized by FERC to handle the challenges associated with planning and operating the transmission systems of multiple utilities.

In this filing, Plains and Eastern will demonstrate that it satisfies the standards established by the Commission in *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) ("Chinook"), that a transmission provider must meet in order to obtain negotiated pricing authority for a merchant transmission facility. Applicant will also demonstrate that granting its request, as detailed in this application, will be in the public interest. Applicant requests a waiver of specific Commission filing and reporting requirements, consistent with *Chinook* and other Commission orders granting negotiated rate authority to the owners of merchant transmission lines.

I. INTRODUCTION

Plains and Eastern seeks authorization to charge negotiated rates for transmission capacity on the Project, which will consist of one overhead HVDC transmission line, capable of transmitting up to 3,500 MW of power from the wind-rich regions of western Oklahoma, southwestern Kansas, and the Texas Panhandle to load centers farther east.[2] The Project will be approximately 750 miles long and will extend from a point to be located in the Oklahoma panhandle to an interconnection with the TVA's 500 kV system near Memphis, Tennessee. Applicant expects that the Project will deliver approximately 15 million megawatt-hours ("MWh") of energy per year, from its western end in Oklahoma to its eastern end in Tennessee. The Project will serve important public policy objectives, including the development of high

[2] The Plains & Eastern Project consists of two phases. The Project described in this application will be considered as the first phase ("Phase One"). Should the demand for renewables indicate a need for the second phase, Plains and Eastern will develop the second phase to deliver an additional 3,500 MW. This application seeks authority to negotiate rates and pre-subscribe capacity only for Phase One.

capacity factor wind resources in a region currently constrained by transmission limits, the transfer of that energy over a highly efficient transmission facility that can be operated with no parallel flow effects on the existing regional transmission grid, and the provision of renewable electric energy to areas of the United States without access to plentiful and low-cost renewable energy resources.

The development and construction costs to Applicant for the Project will be approximately $2.0 billion. Applicant has, through its affiliates, strong financial backing to develop a portfolio of HVDC transmission facilities to link regions of high renewable resource potential to major load centers requiring such supplies. The financial backing is essential to support the early developmental efforts of Plains and Eastern and its affiliates. However, Applicant must have recourse to the financial markets to secure the investment and debt capital necessary to construct and operate the Project. The Commission has acknowledged the substantial financial requirements of merchant transmission developers and affirmed its "commitment to fostering the development of merchant transmission projects through [its] adoption of a more flexible approach towards negotiated rate applications."[3] The Commission recognizes that it is being presented with and must evaluate requests "from a wide range of merchant projects that can differ substantially from one project to the next."[4] Applicant has relied on the Commission's pragmatic approach to the differing needs of specific projects in crafting the design of the customer solicitation and selection process detailed below and the negotiated rate authority that Applicant requests in this filing. In the discussion below, Applicant will demonstrate that the specific authority it seeks is compelled by financial realities and is consistent with the public interest.

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3 *Chinook* at P 54.

4 *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006 at P 16 (2010) ("Champlain Hudson").

II. COMMUNICATIONS

Applicant requests that all filings and other correspondence in this proceeding be sent to the following individuals, all of whom should be included on the Commission's official service list in this proceeding.[5]

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III. DESCRIPTION OF APPLICANT

Plains and Eastern Clean Line LLC is a limited liability company organized under the laws of the State of Arkansas and duly qualified to do business in the States of Oklahoma, Arkansas and Tennessee. Plains and Eastern Clean Line LLC's principal offices are located at 1001 McKinney Street, Suite 700, Houston, Texas 77002.

Plains and Eastern Clean Line Oklahoma LLC is a limited liability company organized under the laws of the State of Oklahoma and is duly qualified to do business in the State of Oklahoma. Plains and Eastern Clean Line Oklahoma LLC's principal offices are located at 1001 McKinney Street, Suite 700, Houston, Texas 77002.

Both Plains and Eastern Clean Line LLC and Plains and Eastern Clean Line Oklahoma LLC are wholly owned subsidiaries of Plains and Eastern Clean Line Holdings LLC, a Delaware limited liability company, which is a wholly owned subsidiary of Clean Line Energy Partners LLC ("Clean Line"), also a Delaware limited liability company. Clean Line was formed to construct and operate high voltage transmission lines and associated facilities designed to

[5] Applicant requests waiver of the provisions of Rule 203(b)(3), 18 C.F.R. §285.203(b)(3) (2011), in order to include more than two persons on the official service list.

connect the best renewable resources in the United States and deliver their output to load and population centers that have an increasing demand for electricity generated by renewable resources. Clean Line, through its wholly owned direct and indirect subsidiaries, has four high voltage transmission line projects under development in different regions of the U.S.[6] The Project, designated as the Plains & Eastern Clean Line, will be owned by Plains and Eastern Clean Line LLC and Plains and Eastern Clean Line Oklahoma LLC, and operation of the Project will be turned over to SPP or another qualified entity that performs functions similar to an RTO and/or service will be provided pursuant to an OATT.

Clean Line is supported by investors with significant experience in the energy industry and who understand the need to maintain a long-term investment focus as projects are brought to fruition. The majority owner of Clean Line is ZAM Ventures, L.P. ("ZAM Ventures"), the principal investment vehicle for ZBI Ventures, L.L.C. ("ZBI Ventures"). ZBI Ventures focuses on long-term investments in the energy sector and is a subsidiary of Ziff Brothers Investments, L.L.C. Neither ZAM Ventures nor ZBI Ventures is or will be actively involved in the day-to-day operations of Applicant or its affiliates. Additional equity owners of Clean Line include Michael Zilkha of Houston, Texas. The Zilkha family has a proven track record of building successful energy companies and was the primary investor in Horizon Wind Energy during its initial growth. Clean Line's investors are providing the critical initial support for the Project but do not intend to assume operational responsibility for the Plains & Eastern Clean Line; Applicant

[6] Clean Line Energy Partners and its subsidiaries are also developing the Rock Island Clean Line transmission project, the Centennial West Clean Line transmission project and the Grain Belt Express Clean Line transmission project. The Rock Island Clean Line transmission project will connect wind generation sources in Iowa, Nebraska, South Dakota and Minnesota to communities in Illinois and other states to the east. On May 22, 2012, the Commission granted Rock Island Clean Line LLC authority to negotiate rates and pre-subscribe up to 75% of its capacity. *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 (2012). The Centennial West Clean Line transmission project will run from New Mexico and Arizona to California. The Grain Belt Express Clean Line transmission project will bring electricity from wind generation sources in western Kansas to load and population centers in eastern Missouri and farther east.

will control such operations and, once constructed, will turn operational control of the line over to either SPP or another qualified entity and/or non-discriminatory service will be provided pursuant to the *pro forma* OATT requirements in Order No. 890.

IV. DESCRIPTION OF PROJECT

A. Overview

The Project will consist of an overhead HVDC transmission line, which will be capable of transmitting up to 3,500 MW of power from the wind-rich regions of western Oklahoma, southwestern Kansas, and the Texas Panhandle to load centers farther east. The Project will be approximately 750 miles long and will extend from a point to be located in the Oklahoma panhandle to an interconnection with TVA's 500 kV system near Memphis. The Project is expected to deliver approximately 15 million megawatt-hours ("MWh") of energy per year from its western end in Oklahoma to its eastern end in Tennessee. While it is likely that some wind generation facilities will construct the delivery facilities from their specific location in western Oklahoma, southwestern Kansas and the Texas Panhandle to the western terminus of the Project, the Applicant may also construct some of those facilities.

The Project will include converter stations for converting alternating current ("AC") electricity delivered to the Plains & Eastern Clean Line into direct current ("DC"), then converting the electricity back to AC for delivery into the grid. Consequently, the Project will have no parallel flow effects on SPP, TVA, or other transmission service territories. The HVDC technology to be used on the Project can transfer significantly more power with lower line losses over long distances than comparable AC lines and allows for a narrower right-of-way and fewer conductors over the path of the line. In addition, HVDC technology allows the operator direct control of energy flows, which is ideal for managing the injection of variable wind generation and charging customers for use of the line.

Applicant has been and will continue to work closely with land use and routing experts as well as landowners, local government officials, state and federal agencies, and other stakeholders in the areas through which the line will pass in order to gather input and determine the specific route for the transmission line. Applicant is consulting experts on topics such as threatened and endangered species, archaeology and cultural resources to ensure all appropriate considerations are taken into account in the routing decisions. Applicant will seek the appropriate authorizations from federal, state and local governments and agencies in order to determine the specific route for the Project. Additionally, Applicant expects the Project to be subject to review under the National Environmental Policy Act ("NEPA"), with the Department of Energy ("DOE") servicing as the lead agency. This NEPA process will include consideration of the environmental impacts of the Project and alternatives, including the permitting requirements of multiple federal agencies, and public scoping and comments.

While the specific route of the Project has yet to be determined, Applicant continues to conduct field reviews and stakeholder outreach to determine the optimal route for the line. Applicant has been carrying out a methodical and deliberate alternatives analysis to determine least-impact routes for the Project. This approach has a heavy component of active stakeholder involvement. To date, Plains and Eastern has conducted more than 1500 meetings related to development of the Project in Oklahoma, Arkansas, and Tennessee. Among these meetings, Applicant held workshops and other interactive sessions with state and federal agencies, as well as local officials and other significant stakeholder groups. In 2011, Plains and Eastern held extensive outreach meetings with local, state, and federal agencies, non-governmental agencies, local stakeholders, and tribes to discuss siting opportunities and constraints. This guidance helped to narrow the geographic approach to connect the Oklahoma Panhandle to western

Tennessee to one, five- to eight-mile-wide study corridor. In the first quarter of 2012, Applicant hosted 33 roundtable meetings for over 400 local leaders and tribal representatives across the study area to collect feedback on routing options inside the study corridor. Feedback from these meetings is being considered now as Applicant seeks to develop a study route and several alternatives for the Project.

Plains and Eastern is committed to working with local businesses as the Project becomes a reality; business opportunity meetings will be hosted in counties in the study corridor this summer. In the third and fourth quarters of 2012, \after all feedback is incorporated from stakeholder meetings, the Project will host open houses in every county along the study corridor. These open houses will introduce the Plains & Eastern Clean Line to the general public and will provide the opportunity to gather feedback on the study route and alternatives.

B. Project Benefits

As with Clean Line's other transmission projects, the Plains & Eastern Clean Line is designed to connect the best renewable resources in the United States to load and population centers that have an increasing need for electricity generated from such renewable resources. The Project will capitalize on the rich and energetic wind resources in areas that are capable of producing wind-generated electricity efficiently and at low cost. Numerous states and the federal government have instituted policies aimed at supporting the development of renewable energy resources and utilizing those resources to meet the country's future energy needs. In April 2011, TVA's Board of Directors approved an Integrated Resource Plan ("IRP") that included new renewable energy purchases. In the IRP's analysis of scenarios, it notes that "[i]mprovements in transmission system devices to manage power flows and advancement in DC line technologies will be needed to facilitate power transfers and the import of additional wind-sourced power."[7] The IRP further states that, "[r]enewable generation above existing wind contracts plays a key role in future resource portfolios."[8] The Project is an efficient and cost-effective way to satisfy the increasing demand for renewable energy, and wind-generated electricity specifically, in Arkansas, Tennessee and states farther east.[9] Applicant anticipates that other load-serving entities in other states with access to the TVA grid will import wind energy needed to satisfy their requirements for energy, including any mandates for renewable energy that may exist.

The ability to deliver new renewable energy directly to loads in TVA and the southeast while avoiding existing transmission constraints in the resource area is an important benefit of the Project. HVDC technology allows energy to flow long distances without directly affecting the power flow on the AC transmission grid in the regions that the HVDC line traverses. Moreover, to the extent that a new HVDC transmission line reduces the amount of energy that would otherwise flow on the existing AC grid, the result is improved reliability, reduced losses, and reduced congestion on the existing AC lines, which also will lower the overall cost of energy production dispatched on the AC grid. Less frequent congestion will reduce the need for a transmission operator to depart from least cost economic dispatch. In addition, the Plains & Eastern Clean Line will provide added stability and reliability to both the SPP and TVA systems.

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7 Tennessee Valley Authority Integrated Resource Plan, March 2010, at page 140.

8 *Id*. at 151.

9 In October 2011, Plains and Eastern signed an MOU with TVA to identify the full range of benefits that HVDC transmission projects may provide to TVA's stakeholders and to explore non-discriminatory methods for TVA to utilize independent transmission as a means to improve system reliability, increase resource flexibility, and enhance the potential for the integration of renewables. The Memphis Light, Gas and Water ("MLGW") Division Board of Commissioners recently passed a resolution unanimously in support of the development and implementation of clean energy transported by HVDC transmission to western Tennessee. The board also noted in the resolution that it will work cooperatively with TVA to bring additional low-cost, clean energy to benefit MLGW's customers.

C. Characteristics of Plains & Eastern

Western Oklahoma, southwestern Kansas and the Texas panhandle areas contain some of the United States' richest and most energetic wind resources, with higher average annual wind speeds than most other regions of the United States.[10] Net capacity factors in the Project's wind resource area routinely surpass 40% and are increasing with improvements in turbine technology; however, the resources to which Plains and Eastern expects to interconnect have yet to be developed due to the lack of transmission. Indeed, the "chicken-and-egg" dilemma that the Commission described for projects such as Chinook is equally applicable to the Plains & Eastern Clean Line: The developer must coordinate the construction of its transmission facility with the construction of new, renewable energy resources while also matching the generation source in one region with the demand sink located in a different geographic area.

New inter-regional transmission lines are critical to support the development of renewable energy at scale and lowest cost. As further discussed below, long-distance transmission lines -- especially lines dependent on wind-powered generation -- face obstacles to acquiring the necessary investors and anchor generators and customers necessary to develop these high-risk projects. Approval of the authorizations requested herein, including negotiated rates and the ability to pre-subscribe a sufficient amount of capacity on the Project, following Applicant's solicitation of interest in the Project, as described below, will encourage transmission developers and the investment community to pursue additional renewable-focused transmission projects such as the Plains & Eastern Clean Line.

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[10] The National Renewable Energy Laboratory estimated that Oklahoma, Kansas and Texas are each among the top 10 U.S. states in wind energy potential, in the aggregate capable of producing more than 7.2TWh of energy each year. *See* http://www.windpoweringamerica.gov/windmaps/resource_potential.asp (estimating wind energy potential at eighty meters and greater than 30% gross capacity factor (last visited June 27, 2012).

D. Status of Project

Plains and Eastern has invested nearly three years and over $10 million to date to develop the Project. The Project and related delivery facilities will be an inter-regional transmission project connecting new renewable energy resources within the planning region of SPP to the TVA network. With the participation of SPP staff and affected SPP members, Plains and Eastern is carrying out studies to meet the requirements of SPP's Criteria 3.5 ("SPP Criteria 3.5 Studies"). These studies simulate the effects of the interconnection of the Project with SPP's system under multiple scenarios in order to assure that the interconnection provides for safe and reliable operation of the transmission system. The "steady state" analysis has been completed and a draft report has been provided to the affected parties for review, while the stability study is ongoing. On the eastern end of the line, TVA conducted a System Impact Study of the Plains & Eastern Clean Line interconnecting to the Shelby substation and an additional greenfield site, and has provided draft reports to Plains and Eastern. These reports include cost estimates and timelines for construction of TVA transmission infrastructure to reliably interconnect 3,500 MW delivered by the Project to the TVA system. Entergy's Independent Transmission Coordinator is finalizing its Affected System Impact study of the Plains & Eastern Clean Line interconnecting to Shelby and the greenfield site as well. MLGW has also studied Affected System Impacts to the MLGW grid and has provided a report to Plains and Eastern.

On June 24, 2010, Plains and Eastern Clean Line Oklahoma LLC submitted a request to the Oklahoma Corporation Commission ("OCC") for a certificate of public convenience and necessity to operate as a transmission public utility in the State of Oklahoma. On October 28, 2011, the OCC approved Plains and Eastern Clean Line Oklahoma LLC's request to conduct business in Oklahoma as a public utility. This approval gives Plains and Eastern Clean Line Oklahoma LLC the authority to own and operate electric transmission facilities providing wholesale bulk electricity transmission services within the State of Oklahoma. There is no further state siting approval under Oklahoma law; therefore, OCC approval of a specific line route is not needed to construct and operate an electric transmission line in the state.

On May 13, 2010, Plains and Eastern Clean Line LLC submitted an application to the Arkansas Public Service Commission ("PSC") seeking public utility status. On January 11, 2011, the PSC issued an order denying Plains and Eastern Clean Line LLC's application. While recognizing the circularity of the statutes governing the application and voicing their support for transmission development in the state,[11] the PSC denied Plains and Eastern Clean Line LLC's application without prejudice, stating that it cannot grant public utility status to Plains and Eastern Clean Line LLC based on the information about its current business plan and present lack of plans to serve customers in Arkansas. Plains and Eastern Clean Line LLC continues to analyze permitting options for the Project in Arkansas.

Plains and Eastern Clean Line LLC expects to file an application in 2013 with the Tennessee Regulatory Authority requesting a certificate of convenience and necessity to develop, own, and operate electric transmission lines in the State of Tennessee, or works with other utilities in the state.

Section 1222 of the Energy Policy Act of 2005 authorizes the DOE, acting through the Southwestern Power Administration ("Southwestern) and the Western Area Power Administration, to accept and use funds contributed by another entity to design, develop, construct, operate, and maintain transmission facilities. Pursuant to Section 1222, in July 2010,

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[11] Plains & Eastern Clean Line LLC, Arkansas PSC, Docket 10-041-U (order issued Jan. 11, 2011) ("[T]he Commission wholly supports the development of transmission infrastructure in the state of Arkansas as well as the development of opportunities to use and transmit renewable power for the benefit of Arkansas utilities and their ratepayers. In addition, the Commission notes with appreciation the extensiveness of Clean Line's presentation of the policy considerations supporting its CCN Application. Clean Line's efforts are laudable and its work is to be commended.")

Clean Line Energy Partners, on behalf of the Plains & Eastern Clean Line, submitted a proposal to the DOE and Southwestern to enter into a development agreement. Clean Line is seeking to work with Southwestern[12] to leverage DOE's institutional and siting abilities and tools to expedite the permitting process. Under the terms of its proposal, Plains and Eastern will finance the Project.

In April 2012, DOE indicated its willingness to enter into an agreement to accept funds from Clean Line to begin a federal environmental review of the Plains & Eastern Clean Line under the National Environmental Policy Act ("NEPA"). DOE, in consultation with Southwestern, will act as the lead federal agency for the NEPA process.

E. Specific Request for Authority to Negotiate 75% of Pre-Subscription Capacity

Applicant respectfully requests that the Commission consider and grant its request for authority to allocate up to 75% of the capacity on the line on a pre-subscribed basis. This request is consistent with proposals already approved by the Commission. Much of the country's renewable energy resources, including wind resources, are location-constrained, with the highest-potential energy resources located far from load centers. The Commission recognizes there is a "need for innovative proposals to develop new transmission projects, especially in regions rich in potential to deliver renewable energy to load centers."[13] Indeed, the integration of these location-constrained resources has been a key reason why the Commission has been willing to approve negotiated rate authority and pre-subscription of capacity when requested by merchant transmission developers.[14] The Commission has modified the set of conditions it

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12 The exact structure and ownership of the facilities has yet to be determined; however, Plains and Eastern expects to own and sell the capacity on the Project.

13 *Mountain States Transmission Intertie, LLC*, 127 FERC ¶ 61,270 at P 58 (2009) (citing *California Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061 (2007) ("CAISO")).

14 *See Tres Amigas LLC*, 132 FERC ¶ 61,233 at P 29 (2010).

requires for negotiated rate authority as its experience with merchant transmission has evolved. Recently, the Commission has distilled its analysis to four key principles – (1) just and reasonable rates, (2) safeguards against undue discrimination, (3) safeguards against unduly preferential access, and (4) conformance with reliability requirements.[15]

To date, the Commission has limited the amount of capacity that a merchant transmission developer is authorized to commit on a pre-subscription basis and has required that a portion of the capacity be offered in an "open season." The Commission's orders reflect the perception that an open season is necessary to ensure that transmission providers neither engage in undue discrimination nor grant undue preference to some of their prospective customers. In the following discussion, Applicant will articulate the reasons that the Commission should grant its request for authority to pre-subscribe 75% of its transmission capacity. The Applicant will describe the process it will use for its pre-subscription solicitation process and demonstrate that the process, in conjunction with the subsequent open season auction, will assure that the four factors reviewed by the Commission will be and have been, in fact, met. The Applicant will also discuss the financial and related considerations that demonstrate that pre-subscription of 75% of the capacity for a project with Plains & Eastern Clean Line's unique characteristics is necessary and a proper exercise of the Commission's discretion.

1. Commission Policy Regarding Open Seasons for Merchant Transmission Projects

The Commission requires merchant transmission developers requesting negotiated rate authority to allocate a portion of the capacity for a project in an open season.[16] An open season prevents the transmission developer from exercising undue discrimination in capacity

[15] *Chinook* at PP 37-53.

[16] *See, e.g.*, *Northeast Utils. Serv. Co.*, 98 FERC ¶ 61,310 at 62,328 (2002) ("[T]he open season process should be employed to initially allocate transmission rights and the parameters of the open season process should be non-discriminatory, fair and transparent.")

allocation.[17] The requirement also "enables the merchant transmission developer to determine the extent of interest in the Project, which in turn enables it to determine whether the Project needs to be re-sized to fit the market."[18] The Commission has not established a set of *pro forma* open season criteria or a standard open season format. Rather, the open seasons that have been approved by the Commission demonstrate considerable flexibility in both format and decisional criteria. Varied criteria have been used both to select eligible bidders and to select customers based on their open season bids. Moreover, while the open season requirement seeks "to provide a non-discriminatory, fair and transparent means of allocating transmission capacity," the Commission recognizes other methods may be appropriate to allocate transmission capacity and is "willing to consider options other than open seasons for the initial allocation of transmission rights."[19] The Commission's policy and precedent thus demonstrates considerable flexibility in how a transmission developer can effectuate the ultimate goals of the Commission's open season requirement.

Commission-approved open season formats include single auctions with threshold criteria[20] and multiple-stage open seasons.[21] Wyoming Colorado Intertie, LLC ("WCI") held an open season in which entities first submitted applications to become "qualified bidders" before

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[17] *See, e.g.*, *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104 at P 21 (2011) ("Hudson Transmission").

[18] *Champlain Hudson* at P 27 (2010).

[19] *Conjunction LLC*, 108 FERC ¶ 61,090 at PP 13-14 (2004) ("Conjunction"); *see also Neptune Regional Transmission System, LLC*, 103 FERC ¶ 61,213 at P 18 (2003) (noting that the Commission "is willing to consider other options to assist merchant transmission providers in exploring innovative methods for adding transmission to the power grid and for securing the financing needed for such projects").

[20] *See TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,347 (2000).

[21] *See Conjunction LLC*, 103 FERC ¶ 61,198 at P 16 (2003) (approving a series of four open seasons for capacity on a project to be developed by Conjunction's subsidiary, Empire Connection). Conjunction LLC explained that its future subsidiary, Empire Connection, was "exploring ways to incorporate bid credits for shippers of green power in ways that enhance the fuel diversity of the power being shipped over the Project without affecting the overall financial viability of the Project." Application for Authority to Sell Transmission Rights at Negotiated Rates, Docket No. ER03-452 (Jan. 27, 2003).

participating in an auction for transmission capacity.[22] Applicants to WCI submitted information concerning their "ability and plans to comply with objective creditworthiness standards … including the sufficiency of parent guarantees or the ability to post letters of credit or cash security for their project payment obligations."[23] WCI then issued notices to the qualified bidders, who then executed precedent agreements obligating the companies to enter into a transmission service agreement if they were a winning bidder in a subsequent auction. Montana Alberta Tie Ltd. ("MATL") conducted an open season in which it solicited interest, registered open season participants and commenced the open season. After receiving feedback from open season participants, MATL decided to modify its floor prices, the length of contracts available in the open season, the closing date for the open season, and the conditions precedent to its long-term purchase agreement for initial transmission service rights.[24] MATL communicated the changes to all registered open season participants as well as to "a number of interested parties that were not Registered Participants," prompting some of those parties to become registered participants.[25] MATL also waived the bid deadline "in several instances," but an independent auditor concluded "that reasonable steps were taken to ensure the process was open and non-discriminatory," and the Commission found "that the open season process employed by MATL was non-discriminatory, fair and transparent."[26]

The Commission also has permitted transmission developers considerable leeway in constructing an open season suited to the needs of the transmission developer as long as the Commission could ensure capacity was not allocated in an unduly discriminatory or preferential

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22 *Wyoming Colorado Intertie, LLC*, 127 FERC ¶ 61,125 at PP 14, 51 (2009).

23 Application for Authority to Sell Transmission Rights at Negotiated Rates of Wyoming Colorado Intertie, LLC, Exhibit A, Report on Open Season of Wyoming Colorado Intertie, LLC, ER09-834 (Mar. 11, 2009).

24 Report on Open Season of Montana Alberta Tie Ltd. at 4, Docket No. ER05-764-001 (May 16, 2005).

25 *Id.*

26 *Montana Alberta Tie Ltd.*, 112 FERC ¶ 61,018 at P 13 (2005).

manner. TransEnergie U.S., Ltd. ("TransEnergie"), for example, proposed an open season plan for allocation of capacity on the Cross Sound Cable Interconnector that included consideration of undefined "Non-Price Considerations" that might "reduce the project's risk and/or increase the project's value," including, but not limited to, modifications to capacity schedules and proposals to receive an option to purchase transmission assets.[27] The Commission approved the open season proposal, finding that TransEnergie had "specifie[d] the threshold criteria to be met for a bidder's proposal to be considered … during the open season, as well as the criteria to be employed by TransEnergie in weighing the bids."[28] Importantly, the Commission recognized that, "[w]hile the bid evaluation criteria reflect elements that are reasonable … there is no detail as to how these criteria will be applied."[29] The Commission further noted "that TransEnergie has agreed to disclose the basis for selecting the successful bidder(s) and the selection rationale in its post-open season report, which will also allow us to monitor how the selection criteria have been applied" and ensure that TransEnergie did not "favor any party over another."[30] Ultimately, 100% of the capacity awarded in TransEnergie's open season went to LIPA, the entity with which TransEnergie had worked to develop the Project and that had previously issued a request for proposals ("RFP") for a similar transmission project.[31] It is noteworthy that the only auction related to this process was the auction that LIPA held to solicit energy for its needs, which was

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27 TransEnergie U.S. Ltd's Open Season Submission and Request for Waiver, Attach. 1 at p. 6, Docket No. ER00-1-001 (June 9, 2000).

28 *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,347 (2000).

29 *Id.*

30 *Id.*

31 LIPA was the only entity that met TransEnergie's open season criteria of being able to enter into a binding agreement for transmission capacity without requiring further approval from a corporate board or management. Given the history of LIPA and TransEnergie working together to develop the project, it is not surprising that LIPA was able to commit to the project earlier than other entities that participated in the open season.

structured to include proposals for new transmission to provide a link to existing energy resources.[32]

Similarly, in *Northeast Utilities Service Company*, 98 FERC ¶ 61,310 (2002), the Commission approved Northeast Utilities Service Company's ("NUSCO") open season process and found its "criteria for evaluating non-financial terms and conditions" were reasonable. NUSCO proposed evaluating open season bids, in part, on a "qualitative basis" after identifying two or more bids that were "for all practical purposes, indistinguishable or that include[d] nonstandard terms that require[d] *ad hoc* evaluation."[33] NUSCO also proposed a "business risk criterion" that "applie[d] to the evaluation of *qualitative* elements of bids rather than *quantitative* elements (such as financial terms)." NUSCO planned to use this criterion to distinguish between "equally valuable bids." Finally, NUSCO also "reserve[d] the right to adjust or penalize bids with idiosyncratic financial terms" in order to "acknowledge [the] risks (or benefits) in bids whose quantitative terms are not amenable to the usual standard financial evaluation techniques, which NUSCO acknowledges results in a violation of the principle of equal and identical treatment for all bids."[34] In approving the open season proposal, the Commission explained that its "concern in evaluating the open-season process is to provide transparency in the bidding process, and to enable unsuccessful bidders to determine if they were treated in a fair manner."[35] Again, the Commission emphasized that, "[s]ince Commission policy requires that the open-season reports, including the non-price terms and conditions, be publicly disclosed, the report

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32 *See* Comments of the Long Island Power Authority and LIPA on the Post Open Season Report at 6–7, Docket No. ER00-1-003 (Sept. 13, 2000) ("LIPA counts on the availability of the CSC to enable it to increase the amounts of installed capacity or energy or both that it purchases in New England.")

33 Compliance Filing of Northeast Utilities Service Company Responding to the Commission's Directive to Provide Additional Information at 14, Docket No. ER01-2584-001 (Oct. 26, 2001).

34 *Northeast Utils. Serv. Co.*, 98 FERC ¶ 61,310 (2002).

35 *Id.*

will enable the Commission and other parties to monitor how the selection criteria are applied and to ensure that one party is not unfairly favored over another."[36]

Finally, Zephyr Power Transmission, LLC ("Zephyr") included in its open season criteria a non-price factor related to "whether the underlying energy source was a renewable energy project."[37] The Commission has not yet acted on Zephyr's open season report, but the proposal seems consistent with the subjective criteria the Commission previously has permitted transmission developers to consider in evaluating bids for transmission capacity.

The Commission has departed from its earlier precedent that explicitly mandated an open auction requirement for one hundred percent of project capacity and has allowed two alternate methods of capacity allocation, an open RFP process[38] and pre-subscription to anchor customers. The Commission evaluates "any proposal to allocate all or a portion of initial capacity outside of an [auction-based] open season on a case-by-case basis to ensure that merchant transmission developers do not act in an unduly discriminatory manner in allocating initial capacity."[39] In *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104 (2011) ("Hudson Transmission Partners"), the Commission approved both allocation of capacity through an RFP process (75% of total capacity) and additional pre-subscription of capacity (up to 15% of total capacity) prior to an open season. The Commission thus allowed Hudson Transmission Partners, LLC ("Hudson Transmission") to allocate 90% of the capacity of its transmission project outside the requirements of a formal, auction-based open season.

The Commission's order in *Hudson Transmission Partners* shows that in evaluating alternatives to an auction-based, formal open season, the Commission focuses on whether the

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36 *Id.*

37 Open Season Report for Zephyr Power Transmission, LLC, Docket No. ER09-433, at 10 (May 20, 2010).

38 *Hudson Transmission* at P 28; *Conjunction* at P 14.

39 *Chinook* at P 42.

allocation methodology is open, competitive, and conducted in a not unduly discriminatory manner. In *Hudson Transmission Partners*, the Commission noted that the use of the RFP conducted by the New York Power Authority ("NYPA") was an "open, competitive, and government-entity led RFP process" that "assures that Hudson Transmission has not acted in an unduly discriminatory manner with regard to the allocation of capacity to NYPA," and that "use of the NYPA RFP is consistent with our open-season criteria for merchant transmission projects."[40]

Having already secured a commitment for 75% of the capacity of its project, Hudson Transmission also requested the Commission to allow it to pre-subscribe up to 15% of the transmission capacity to anchor customers. Hudson Transmission argued this level of pre-subscription (bringing a total of up to 90% of pre-subscribed capacity) would "help assure the financial viability of the Project," "ensure that the Project will be completed on or ahead of schedule," and "motivate additional sources of private equity to support additional merchant transmission development in the area."[41] The Commission granted Hudson Transmission's request, acknowledging the "financing realities faced by developers" and its own precedent approving similar pre-subscription requests "in light of the difficulties in financing merchant transmission projects."[42]

In November 2011, Rock Island Clean Line LLC ("Rock Island"), an affiliate of Clean Line Energy Partners, filed an application at the Commission requesting authority to negotiate rates and subscribe up to 75% of its Project's capacity with anchor tenant customers, with the remaining capacity to be sold through an open season process. On May 22, 2012, the Commission granted Rock Island's request, giving it regulatory approval to negotiate rates with

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[40] *Hudson Transmission Partners* at P 28 (2011).
[41] *Id.* at P 24.
[42] *Id.* at P 29.

potential customers and enter into transmission service agreements for up to 75% of the capacity on the line.[43] Relying on *Hudson* and *Chinook*, the Commission found that precedent distinguishes merchant transmission projects from traditional public utilities in that the developers of merchant projects assume all of the market risk of a project and have no captive customers from which to recover the cost of the project.

2. Financial Consideration Related to Pre-Subscription Authorization for Plains & Eastern Clean Line

The characteristics of the Project described below support Applicant's proposed solicitation of interest procedures and request to pre-subscribe up to 75% of the Project capacity. The Commission has recognized that numerous factors make it difficult to develop transmission projects that will satisfy the important national and state goal of connecting location-constrained renewable energy to major load centers. Merchant transmission projects face a "chicken-and-egg" problem where "generators, purchasers, and transmission owners all wait for the other to commit money to a project before committing themselves."[44] As the California Energy Commission has explained, "renewable projects cannot secure contracts under RPS procurement procedures without knowing whether existing transmission will be able to accommodate them. At the same time, utilities are wary of investing in [transmission built to deliver renewable energy] without assurances of cost recovery, which is premised on the renewable generation being built."[45]

Wind energy presents numerous specific risks that transmission project developers and investors must overcome. The remote location of wind resources requires longer transmission lines to connect the generators to load centers, and long transmission lines can be cost

43 139 FERC ¶ 61,142 (2012).
44 Chinook at P 44.
45 California Energy Commission, *2005 Integrated Energy Policy Report* at 99 (Nov. 2005).

prohibitive. Transmission lines linking windy areas typically provide interconnections to multiple generators. As noted above, because the transmission line and generators rely on each other, they must work together closely and contractually allocate the risk of development failures. This need to coordinate timelines and contractual arrangements with several parties increases a transmission line's risk of completion. Additionally, wind generators are more likely to "come on line in small increments over an extended period of time,"46 which further increases the risk undertaken to finance the Project and provide the critical initial commitments to supply energy on the Project. Wind-powered generators also typically are constructed with less lead-time than other generators and are therefore less willing to commit to large transmission projects well in advance of construction of the generator. To compensate for these obstacles, Plains and Eastern premises its business model on marketing its capacity to creditworthy renewable energy suppliers and load-serving entities that have a demand for renewable energy suppliers.

Obstacles to financing merchant transmission projects can be reduced to the extent that a transmission developer can negotiate pre-subscription agreements with creditworthy anchor customers. Lenders demand to see a secure source of revenue as a predicate for project financing. Merchant transmission developers need the flexibility to enter into pre-subscription negotiations with multiple parties for large amounts of capacity of the project. In *Hudson Transmission Partners*, the Commission recognized the fact that, even though 75% of the total project capacity was already allocated to NYPA, a government entity, Hudson Transmission nevertheless faced significant financial uncertainty, therefore justifying authorization to pre-subscribe additional capacity. The need for financial security is greater for a merchant transmission developer like Plains and Eastern that does not have such a significant portion of project capacity guaranteed by a stable, reliable customer like NYPA.

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[46] *CAISO* at P 66.

3. Plains and Eastern's Proposed Capacity Allocation Process Satisfies the Commission's Requirements

Applicant's request for authority to allocate up to 75% of the Project's transmission capacity to pre-subscribed anchor customers is premised on a pragmatic solicitation and selection process uniquely suited to the needs of the Project. The potential to develop new renewable wind resources and the demand for additional energy resources in the target market for the Project are well established. With this knowledge, Plains and Eastern can design a solicitation and selection process that will fulfill the Commission's requirements for negotiated rate authority. Specifically, developers of wind energy resources have engaged in broad based efforts to identify wind energy sites in the areas adjacent to the western terminus of the Plains & Eastern Clean Line. The universe of financially viable wind power developers and load-serving entities is sufficiently limited that Applicant has developed a good understanding of known potential customers. Plains and Eastern commits to implement a process by which it will solicit requests for expressions of interest from the set of known potential customers identified in its outreach efforts who (1) have demonstrated the ability to meet creditworthiness standards that will be necessary to secure the equity and loan financing necessary for the Project, (2) have a demonstrable need to pre-subscribe to significant blocks of Project capacity, and (3) are likely to execute a precedent agreement in a timeframe consistent with the development timeline needed by Plains and Eastern. Applicant also commits that it will entertain requests to include additional potential customers who express interest based on this filing and demonstrate the ability to meet the preconditions described in this paragraph.

In response to expressions of interest, Applicant will provide detailed Project information to any prospective transmission service customer that is a *bona fide* candidate for negotiated rates. Any prospective customer that has responded to the request for expressions of interest will be deemed a *bona fide* candidate if it meets the definition of an Eligible Customer under the Commission's *pro forma* OATT and also demonstrates that it (1) meets the pre-conditions described above, (2) has experience in developing generation or has a need for energy to satisfy service requirements to electric customers, and (3) agrees to enter into appropriate confidentiality agreements. The Project information will include the documents needed to submit a request for capacity, state Plains and Eastern's minimum requirements for contract term and projected capacity reservation price based on the cost recovery needed to support the financial viability of the Project, describe the process Applicant will follow to negotiate precedent agreements, and provide a form of precedent agreement that will form the basis for negotiations. The selection of entities with which Plains and Eastern will enter negotiations will be based on selection criteria that are consistent with FERC requirements for negotiated rate authority.

If this request is approved by the Commission, Applicant will then enter into negotiations for precedent agreements with prospective customers for up to 75% of Project capacity, provided qualified expressions of interest in such quantity are submitted. To the extent that the full 75% of capacity on the Project is not allocated in the process described, Applicant will hold an open season and include the balance of the 75% of capacity approved for pre-subscription commitments, along with the 25% it commits in this filing to offer in an open season auction. Financing and construction will be predicated on precedent agreements and subsequent execution of transmission service agreements containing standard industry requirements for creditworthiness of the anchor customer. Prior to energization of the Project, Plains and Eastern will file an OATT, or, in coordination with the grid operator file an OATT that will be administered by the grid operator or a rate schedule in the OATT of the RTO. Plains and Eastern will also file the transmission service agreements, prior to commencement of service pursuant to its OATT or filed rate schedule.

As detailed above, the Commission has expressed its willingness "to consider options other than open seasons for the initial allocation of transmission rights."[47] The Commission relies on open seasons to prevent the transmission developer from exercising undue discrimination in the allocation of project capacity and to enable the transmission developer to determine the extent of interest in the transmission project and to size the project accordingly.[48] Applicant's solicitation process for expressions of interest in the Project and the related authorizations requested herein are designed to overcome the unique challenges inherent in constructing the Project and to allocate transmission rights early in the process but in a non-discriminatory, fair, and transparent manner.

While the solicitation process described above will allow Applicant to accurately determine the extent of market interest in the Project, the capacity of the HVDC transmission line proposed by Plains and Eastern cannot be readily modified depending on the extent of the market interest. Any reduction in the size of the Project would require Plains and Eastern to increase the anticipated cost of subscribing to capacity on the Project, making it more difficult to secure customers and financial support for the Project. If the solicitation process reveals excessive market interest in transmission capacity from the resource area, such interest would support the development of the second phase of the Project, although it is likely that the receipt and delivery points will differ from those currently contemplated for Phase One. Applicant

[47] *Conjunction* at PP 12, 14 (2004); *see also Neptune Regional Transmission System, LLC*, 103 FERC ¶ 61,213 at P 18 (2003) (noting that the Commission "is willing to consider other options to assist merchant transmission providers in exploring innovative methods for adding transmission to the power grid and for securing the financing needed for such projects").

[48] *Champlain Hudson* at P 27 (2010) (stating that an open season enables "the merchant transmission developer to determine the extent of interest in the Project, which in turn enables it to determine whether the Project needs to be re-sized to fit the market.").

would nevertheless be unable to re-size the Project without prohibitive delays and additional costs. Plains and Eastern Clean Line LLC has submitted interconnection requests to TVA for the designed capacity of the Project and would have to restart the interconnection process if Project capacity increases. Increasing capacity also would require new engineering costs, modifications to the Project's converter stations, and new studies for the Project, all of which would greatly increase the cost of the Project. Plains and Eastern is not opposed to undertaking the second phase of the Project in the future, but it would not be practically feasible, regardless of market interest, to materially increase the size of Phase One of the Plains & Eastern Clean Line at this time. Thus, neither Applicant's proposed open solicitation process nor a more traditional open season process would cause Plains and Eastern to adjust the size of the Project. If market interest is insufficient to support the Project, Plains and Eastern will be able to reach this determination just as much by the proposed open solicitation and selection process as by a traditional open season.

The negotiation of a precedent agreement and, ultimately, a transmission service agreement is critical to development of the Project. As explained by the Commission in *Chinook*, "financial commitments made by anchor customers prior to an open season provide crucial early support and certainty to merchant transmission developers, which enable them to gain the critical mass necessary to develop these projects. This approach may be particularly beneficial to address the unique challenges associated with location-constrained resources."[49] Indeed, the financial commitments agreed to by anchor customers will allow Plains and Eastern to identify those customers most interested in the unique attributes of the Project and thus enhance the prospects for bringing the Project to completion.

[49] *Chinook* at P 44.

The development of long-distance transmission projects capable of efficiently connecting renewable energy resources to major load centers is an important national and state goal that will require innovative solutions to overcome the risks inherent in such projects. The Commission has stated the need for such proposals and has shown its support for merchant transmission projects by permitting the pre-subscription of capacity and negotiated rates. The specific facts of the Plains & Eastern Clean Line justify allowing Applicant to allocate up to 75% of the capacity of the Project to anchor shippers that have demonstrated an ability and willingness to support this important project, especially in light of the non-discriminatory, fair, and transparent nature of the pre-subscription process proposed by Plains and Eastern.

V. PLAINS AND EASTERN'S PROPOSAL FOR NEGOTIATED RATE AUTHORITY IS CONSISTENT WITH FERC'S REQUIRMENTS

A. Chinook and Subsequent Commission Orders Have Established a Four-Part Test for Negotiated Rate Authority.

In *Chinook*, the Commission set forth a four-factor analysis to evaluate merchant transmission owners' requests for negotiated rate authority. As explained in *Chinook*, and subsequently applied by the Commission, the analysis focuses 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.[50] The four-factor analysis was developed, in part, to more flexibly "address[] the financing realities and other issues faced by merchant transmission developers."[51] As discussed below, Applicant's proposal satisfies all four factors of the Commission's analysis.

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[50] *See, e.g.*, *Hudson Transmission Partners* at P 14 (citing *Chinook*, 126 FERC ¶ 61,134 at P 37).
[51] *Chinook* at P 37.

Before analyzing each of the four factors developed in *Chinook*, it is important to address how the Applicant's request differs from a proposal previously rejected by the Commission. In *SunZia Transmission, LLC*, 131 FERC ¶ 61,162 (2010) ("SunZia"), the Commission denied SunZia Transmission, LLC's request for approval to allocate firm transmission rights to affiliated generators at negotiated rates. SunZia Transmission LLC did not propose to hold any sort of open season for capacity on the project at issue in that proceeding, and the lack of an open season weighed heavily in the Commission's rejection of SunZia Transmission LLC's request for negotiated rate authority. The Commission found that without a more open process for allocating capacity, SunZia Transmission LLC could not satisfy three of the Commission's four factors discussed in *Chinook*.

SunZia is distinguishable from Applicant's proposal in that Plains and Eastern will not enter into an agreement for pre-subscribed capacity with any affiliate. This eliminates much of the Commission's concern regarding the danger of undue prejudice and the possibility that the rates negotiated will be unjust and unreasonable. Also, Applicant's proposed solicitation process for identifying potential anchor customers will provide an open, transparent process by which all interested customers will have an opportunity to obtain capacity on the Project. Applicant's commitment to provide all *bona fide* candidates for negotiated rates an explanation of its process for negotiation of precedent agreements will provide the Commission an opportunity to review the design and implementation of the process. Any entity that perceives that the process proved to be unduly discriminatory or preferential will have the facts needed to protest the result. Plains and Eastern will negotiate with potential customers at arm's length and with no incentive to allocate capacity to any particular party. Such negotiations with unaffiliated entities voluntarily entering into an agreement with Plains and Eastern will be subject to the price-limiting forces analyzed below. Plains and Eastern further commits to holding an open season for all capacity not pre-subscribed by anchor shippers or initially pre-subscribed but that later becomes available. Applicant commits that it will offer capacity that has not been pre-subscribed in one or more open seasons and in its initial open season will offer capacity on the same terms and conditions as that agreed to with anchor customers.[52] Applicant believes its proposal to allocate up to 75% of the initial capacity on the Project to anchor customers is economically justified and consistent with precedent.[53]

B. Plains and Eastern's Proposal Satisfies the *Chinook* Requirements

1. <u>Plains and Eastern's rates will be limited to a just and reasonable level by effective economic constraints</u>

Under the first of the four *Chinook* requirements, the Commission requires that the rates are just and reasonable. The Commission considers whether the merchant transmission owner has assumed the full market risk for the cost of constructing its proposed project and is not building within the footprint of its own or an affiliate's traditionally regulated transmission system. If so, the Commission determines there are no "captive" customers who would be required to pay the costs of the project.[54] The Commission also considers whether the merchant transmission owner or an affiliate already owns transmission facilities in the particular region

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52 The commitment to offer the capacity on the same terms and conditions as that agreed to with anchor customers is consistent with the Commission's precedent set forth in *Tres Amigas*, 131 FERC ¶ 61,281 at P 14 (2010) (clarifying that Tres Amigas' "proposal to offer its anchor customer agreement on a one-time-only basis satisfies the Commission's policy that initial merchant transmission line capacity be allocated in a fair, open and non-discriminatory manner").

53 As discussed above, in *Hudson Transmission Partners*, the Commission permitted pre-subscription of up to 90% of capacity on a project in a mixed RFP/pre-subscription process. Also, in *Champlain Hudson*, the Commission permitted pre-subscription of up to 75% of capacity on the Champlain Project through bilateral negotiations with anchor customers. Further, the Commission recently granted Rock Island Clean Line LLC's request to allocate 75% of the capacity on its Project to anchor customers. Rock Island Clean Line LLC is owned by the same parent company, Clean Line Energy Partners LLC, that owns Plains and Eastern and Plains and Eastern Oklahoma, and the two Projects share the same business model and ideals.

54 *See, e.g.*, *Hudson Transmission Partners* at P 15; *Champlain Hudson* at P 22 ("It is sufficient that Champlain has agreed to bear the risk that the Champlain Project will succeed or fail based on whether a market exists for its services and the fact that Champlain has no ability to pass on any costs to captive ratepayers.").

where the project is to be located, what alternatives customers have, whether the merchant transmission owner is capable of erecting any barriers to entry among competitors, and whether the merchant transmission owner would have any incentive to withhold capacity.[55]

Plains and Eastern will assume the full market risk of the Project and is a new entrant into the transmission market with no captive customers and thus has no ability to pass on any costs to captive ratepayers. As explained above, Plains and Eastern Clean Line LLC and Plains and Eastern Clean Line Oklahoma LLC are wholly owned subsidiaries of Plains and Eastern Clean Line Holdings LLC, which is a wholly owned subsidiary of Clean Line Energy Partners. Clean Line Energy Partners is developing several high voltage transmission lines throughout the United States but none of those transmission projects will have captive customers to whom costs of any of Clean Line Energy Partners' transmission projects could be allocated. Moreover, the Project is an inter-regional transmission project and, while operational control of the project will be handed over to either SPP or another qualified entity that performs functions similar to an RTO or service provided pursuant to an OATT, the costs of the Project will not be allocated either on a load-ratio-share or cost-causation basis to the class of load-serving entities taking service under the OATT in SPP. Instead, Plains and Eastern will recover its costs either through a schedule in SPP's OATT specific to the Project, or its own OATT; only customers that have agreed contractually to purchase transmission capacity on the Project will have the obligation to pay for service. This approach requires that Applicant must rely on contractual commitments to recover the costs of its investment. Accordingly, the Project will succeed or fail based on whether a market exists for transmission capacity on the Project, and Plains and Eastern assumes the full market risk of the Project.

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55 *See, e.g.*, *Hudson Transmission Partners* at P 15; *Champlain Hudson* at P 17.

Plains and Eastern will also be incapable of erecting any barriers to entry and would have no incentive to withhold capacity. No entity is required to purchase transmission service from Plains and Eastern, and customers will only purchase such service if it is cost effective. Once constructed, Applicant will turn over operational control of the Project to either SPP or another qualified entity and/or provide non-discriminatory service pursuant to the *pro forma* OATT requirements in Order No. 890, and the Commission's open access requirement will ensure that Plains and Eastern cannot erect barriers to entry or exercise market power in the relevant markets. None of the transmission projects affiliated with Plains and Eastern is likely to secure the same customers as Applicant's facility.[56] Moreover, should an entity affiliated with or under common control with Plains and Eastern seek to develop a generation project in the market it serves, Applicant will commit to exclude such entity from negotiations for pre-subscribed transmission capacity.

The negotiated rates for Plains and Eastern would also be limited by the alternatives that customers will have to purchasing transmission service on the Plains & Eastern Clean Line and additional price constraints (e.g., transmission service over SPP's grid pursuant to SPP's OATT). In light of Applicant's commitment that no affiliates will become anchor customers on the Project, these price constraints ensure Plains and Eastern's negotiated rates will be just and reasonable. As explained in *Hudson Transmission Partners*, "[t]he Commission has recognized that negotiated rates for service over merchant transmission projects are effectively capped at the differential in power prices between markets at either end of the Project."[57] Furthermore,

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56 *See supra* note 6. The wind farms that will connect to the Project will likely be within a 50-mile radius of the windward end converter station. While Clean Line's Grain Belt Express Clean Line project will originate in Kansas, it is not expected to transport wind generation from the same area of Kansas as the Plains & Eastern Clean Line, as the expected western terminals of the Projects are located about 110 miles apart. The Plains & Eastern Clean Line will terminate in the TVA/Southeastern market, while Grain Belt will connect to the MISO and PJM markets.

57 *Hudson Transmission Partners* at P 20.

customers' ability to purchase energy or construct generation in these other markets effectively limits the rate Plains and Eastern can negotiate with its customers. The Commission's requirement that public utilities expand their transmission capacity at cost-based rates upon request also limits Applicant's negotiated rates by the cost of such expansion on neighboring utilities. Finally, available existing transmission capacity and planned transmission projects, such as the SPP Priority Projects and Balanced Portfolio Projects, which will also serve wind generators in the Great Plains, will serve to limit the negotiated rates on the Project. These limitations on the Project's negotiated rates, in conjunction with Applicant's assumption of the market risk for the Project, the lack of captive customers, and an inability to erect barriers to entry or to exercise market power, support a finding that the requested negotiated rate authority for service on the Project will result in just and reasonable rates.

2. Plains and Eastern has structured its request to eliminate any potential for undue discrimination

The Commission "primarily looks at two factors to ensure that applicants cannot exercise undue discrimination" in charging negotiated rates: (1) the terms and conditions of a merchant transmission developer's capacity commitment process; and (2) its OATT commitments or its commitment to turn operational control over to an RTO or ISO.[58] The intent of a merchant transmission project's open season is "to provide a non-discriminatory, fair and transparent means of allocating transmission capacity," and the Commission is "willing to consider options other than open season for the initial allocation of transmission rights."[59] As further explained above, Plains and Eastern is requesting authorization to offer 75% of the capacity on the Plains

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58 *See, e.g.*, *Hudson Transmission Partners* at P 21.

59 *Conjunction* at P 14 (2004); *see also Chinook* at P 42 ("[W]e will evaluate any proposal to allocate all or a portion of initial capacity outside of an open season on a case-by-case basis to ensure that merchant transmission developers do not act in an unduly discriminatory manner in allocating initial capacity."); *Neptune Regional Transmission System, LLC*, 103 FERC ¶ 61,213 at P 18 (2003) (noting that the Commission "is willing to consider other options to assist merchant transmission providers in exploring innovative methods for adding transmission to the power grid and for securing the financing needed for such projects").

& Eastern Clean Line to anchor customers willing to provide the necessary support for the Project. After concluding its negotiations for pre-subscribed capacity, Applicant will make an informational filing with the Commission.[60] The filing will provide information regarding the respondents selected to negotiate for anchor customer status, a general description of the precedent agreements negotiated, and a listing of which anchor customers have executed transmission service agreements. As noted above, executed transmission service agreements will be filed prior to the initiation of service.

Plains and Eastern also commits to hold an open season for the remaining 25% of Project capacity as well as for any additional transmission capacity not secured by anchor customers. For example, it is not uncommon for respondents initially selected to negotiate for anchor customer status on a transmission project to suspend or terminate a precedent agreement without executing a transmission service agreement.[61] In its initial open season, the Applicant will offer the same contractual rates, terms, and conditions agreed to by anchor customers to any open season participant willing to purchase transmission capacity for the same term. The specific rules of the open season for the uncommitted capacity, detailed bidding guidelines, evaluation criteria, estimated rates, and proposed form agreements will be posted on an internet website and forwarded to interested parties. In addition to the outreach Applicant will have already conducted in order to obtain anchor customers on the Project, further public notice of the Project and the open season will be provided in appropriate trade publications.

No transmission affiliates of Plains and Eastern are located in the immediate vicinity of the Project and, thus, no affiliates are expected to interconnect with the Project. In addition, no

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60 *See Champlain Hudson* at P 44.
61 *See supra* note 46.

affiliates of Plains and Eastern will become anchor customers on the Plains & Eastern Clean Line.

Applicant further limits the risk of undue discrimination by committing to post on its website the results of any open season it conducts, including the identity of the winning bidders and the quantity and term of the transmission capacity purchased. As required by the Commission, shortly after closing of the open season, Applicant will file the results of the open season with the Commission in an open season report that will include, at a minimum, the terms of the open season, including notice of the open season and the method for evaluating bids, the identity of the parties that purchased capacity, and the amount, term, and price of that capacity.[62] The open season report, coupled with the ability of parties to file complaints regarding Plains and Eastern's allocation of capacity, are "the primary tools" by which the Commission can ensure Applicant does not unduly discriminate.[63] Finally, any capacity remaining on the Plains & Eastern Clean Line following the anchor tenant process and open seasons will be made available for use through either SPP or another qualified entity or pursuant to an OATT.

With respect to the Commission's second factor in its review of undue discrimination concerns, once the Project is constructed, Plains and Eastern will turn operational control of the Project over to either SPP or another qualified entity that performs functions similar to an RTO and/or provide non-discriminatory service pursuant to the *pro forma* OATT requirements in Order No. 890. Applicant also commits to keep separate books and records for the Project, to keep such accounting books and records in accordance with generally accepted accounting principles, to have such books and records audited by an independent auditor, and to make such

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62 *See Hudson Transmission Partners* at P 30.

63 *Id.*

books and records available to the Commission for inspection. These additional commitments help ensure non-discriminatory service on the Plains & Eastern facilities and are consistent with Commission precedent.[64]

3. Plains and Eastern's business organization eliminates any incentive for undue preference and affiliate concerns

The Commission's "concerns regarding the potential for affiliate abuse arise when the merchant transmission owner is affiliated with either the anchor customer, participants in the open season, and/or customers that subsequently take service on the merchant transmission line."[65] As explained above, no affiliate of Plains and Eastern will be an anchor customer on the Project. While Applicant does not believe any affiliate will participate in the open season or subsequently take service on the Plains & Eastern Clean Line, the safeguards described and committed to above will ensure that any affiliate that does subscribe to capacity on the Project may do so only through an open season. If an affiliate should subsequently take service on the transmission line, operational control of the Plains and Eastern facilities by an RTO/grid operator and/or pursuant to the non-discriminatory provisions of the *pro forma* OATT requirements in Order No. 890 will assure that no undue preference results due to an entity's affiliation with Plains and Eastern. Applicant also will bar any affiliates from seeking anchor customer status and permit affiliates only the option to participate in the open season process. Finally, Applicant will file electric quarterly reports of its transactions and comply with the standards of conduct to the extent required of similar transmission providers subject to the jurisdiction of the Commission. In addition to the commitments above, this additional Commission oversight and Plains and Eastern's business organization will adequately address any affiliate concerns present at this early stage of the Project.

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64 *See Hudson Transmission Partners* at PP 9, 43.

65 *Hudson Transmission Partners* at P 32.

4. Plains and Eastern will promote regional reliability and operational efficiency

To ensure regional reliability and operational efficiency of the electric transmission system, the Commission subjects merchant transmission projects to mandatory reliability requirements and requires merchant transmission developers to comport with all applicable requirements of the North American Electric Reliability Corporation ("NERC") and any regional reliability council in which they are located.[66] Turning over control of the merchant transmission facilities to an RTO or ISO or similar qualified entity also facilitates regional reliability and enhances operational efficiencies. As stated above, once the Project is constructed, Plains and Eastern will turn over operational control of the Project to SPP or another qualified entity that performs functions similar to an RTO, and/or provide non-discriminatory service pursuant to the *pro forma* OATT requirements in Order No. 890. Plains and Eastern will also participate in the reliability planning processes and is legally required to comply with all applicable reliability rules, including all applicable NERC requirements and procedures.

VI. Plains and Eastern's Request for Waivers of Filing and Reporting Requirements are Consistent with the Commission's Previous Actions and Consistent with the Public Interest.

While Applicant will not become a "public utility" until it commences interstate transmission or has a voluntary rate filing accepted by the Commission,[67] Plains and Eastern respectfully requests waivers of the same filing requirements that the Commission previously granted merchant transmission providers.[68] Specifically, Applicant respectfully requests waiver of: (1) Section 35.13(a) of the Commission's regulations, 18 C.F.R. § 35.13(a), (abbreviated cost of service filings) (2) the full reporting requirements of Subparts B and C of Part 35 of the

66 *Hudson Transmission Partners* at P 35.

67 *See Multitrade Limited Partnership*, 63 FERC ¶ 61,252 at 62,292 (1993).

68 *See, e.g.*, *Hudson Transmission Partners* at PP 38-43; *Champlain Hudson* at P 59; *Chinook* at PP 68-69.

Commission's regulations, 18 C.F.R. Part 35, except for Sections 35.12(a) (filing of initial rate schedules), 35.13(b) (general information to be filed with rate schedules), 35.15 (notices of cancellation or termination), and 35.16 (notices of succession); (3) the requirement to file FERC Form No. 1, Annual Report of Major Electric Utilities, Licensees and Others; and (4) Part 141 relating to forms and reports (with the exception of Sections 141.14 and 141.15).[69]

As the Commission has explained, because Plains and Eastern "is proposing to charge negotiated rates, the regulations requiring the filing of cost-based data are not applicable."[70] Similarly, with respect to waiver of certain sections in Part 141 of the Commission's regulations, the Commission "has traditionally granted waivers and blanket authorizations only to those entities that are not subject to traditional cost-based regulation." Because Plains and Eastern will not sell transmission service at cost-based rates and does not have captive customers, Plains and Eastern respectfully requests waivers of the regulations and requirements listed above, consistent with waivers previously granted to merchant transmission providers. As stated above, Plains and Eastern commits to keep separate books and records for the Project and for each legal entity, to keep such books and records in accordance with generally accepted accounting principles, and to make such books and records available to the Commission for inspection. In addition to the specific waiver requests set forth above, Applicant respectfully requests waivers of any other part of the Commission's regulations as necessary to grant the authorizations requested herein.

VII. Conclusion

The Plains & Eastern Clean Line Project is a $2.0 billion, approximately 750-mile, 3,500 MW HVDC merchant transmission project that will link wind-rich regions of western Oklahoma, southwestern Kansas and the Texas Panhandle to load centers east of the Mississippi

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69 *See Hudson Transmission Partners* at PP 42-43.
70 *Id.* at P 42.

River. The Project will facilitate the development of important new renewable wind energy generation in what is one of the prime renewable energy development regions of the United States and provide the opportunity for load-serving entities – both those with renewable portfolio requirements, as well as those with a demonstrated interest in purchasing renewable energy – to access competitively priced supplies of renewable energy. In addition, the Project will cause no unscheduled parallel flows on the existing AC transmission grid and will likely reduce transmission constraints on the regional grid, thus lessening the need for balancing areas to depart from least-cost economic dispatch. Plains & Eastern Clean Line will represent a major advancement in fulfilling the Commission's goals of expanding transmission infrastructure and adding new sources of competitively priced energy.

As explained in detail in the application, Applicant requests that the Commission provide it authority to commit up to 75% of its capacity in the form of pre-subscribed transmission service agreements and to negotiate rates with customers. Plains and Eastern has described the process that it will use to solicit and select from requests for transmission service. It has explained how this process, when implemented, will establish an open, transparent, non-discriminatory process for offering transmission service that complies with and promotes the principles underlying the Commission's precedent regarding open seasons for merchant transmission. Applicant has further explained that the economic imperatives for building a merchant transmission line of major scale proposed to connect yet undeveloped generation resources to load readily justify the need for 75% pre-subscription and negotiated rate authorization. Applicant's proposal is commercially reasonable and supports the policies underlying prior Commission orders in which the Commission has approved the use of pre-subscription of capacity and negotiated rates.

WHEREFORE, based on the showing of need, consistency of the proposal with Commission precedent, and in light of the commitments that Plains and Eastern has made in this application, the Applicant respectfully requests that the Commission issue by September 1, 2012, an order granting Plains and Eastern Clean Line LLC and Plains and Eastern Clean Line Oklahoma LLC authorization to sell transmission rights at negotiated rates and to pre-subscribe up to 75% of its planned capacity for the Plains & Eastern Clean Line, as reflected in the transmission service agreements reached with anchor customers.

Respectfully submitted,

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