

118 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Aero Energy, LLC

Docket No. TX06-2-000
TX06-2-002

ORDER ADOPTING PROTECTIVE ORDER AND NOTIFYING
COMPANY OF RELEASE

(Issued January 24, 2007)

1. Pursuant to the Federal Energy Regulatory Commission's (Commission) regulations, 18 C.F.R. § 388.112(e) (2006), the Commission hereby notifies Caithness Sagebrush 20 (Caithness) that the Commission will adopt the protective order proposed, with Caithness's proposed revisions as discussed below, in our Notification and Opportunity to Comment.¹ Upon Aero Energy LLC (Aero Energy) or any other party's signing of the protective order, the Commission will release to Aero Energy or the other party documents that may be considered privileged.

I. Background

2. The background to this order is described in detail in earlier orders in this case.² On September 13, 2006, Caithness filed information regarding wind development plans that it says will necessitate additional firm transmission capacity across the Sagebrush Line. Caithness requested confidential treatment of certain information contained in its

¹ *Aero Energy, LLC*, 118 FERC ¶ 61,014 (2007) (First Notification).

² *See Aero Energy, LLC*, 115 FERC ¶ 61,128 (2006) (Proposed Order) and *Aero Energy, LLC*, 116 FERC ¶ 61,149 (2006) (Order Granting Modification).

filing because it said the information is sensitive commercial and financial information that is privileged or confidential and not publicly available. Caithness did not provide a proposed protective order. Aero Energy first responded on September 20, 2006, requesting that a protective order be issued that would allow it access to the information while protecting the information from public disclosure. Caithness responded on September 26, 2006, arguing that it filed this information confidentially because of the sensitivity of project negotiations and because it is bound by confidentiality agreements with other parties in those negotiations. Aero Energy reiterated its request for a protective order in supplemental comments on October 4, 2006. In response, the Commission issued the First Notification, giving Caithness until January 19, 2007 to comment, which Caithness did.

II. Responses to the First Notification

3. Caithness maintains that release of its confidential information to competing developers is not required for the Commission to determine that Caithness had pre-existing plans to expand its generation. Also, Caithness argues that it is contractually bound by confidentiality agreements not to release information voluntarily to any other entities.³ It also argues that, because it made public the size of its planned expansion capacity, Aero Energy has enough information to assess how Caithness's need for firm transmission may affect the firmness of Aero Energy's request for transmission.⁴

4. Caithness also provides modifications to the proposed Protective Order.⁵ Specifically, Caithness asserts that when a party seeks to protect information based upon its commercial sensitivity, the party should be allowed to mark the information "Protected Materials Not Available to Competitive Duty Personnel." Competitive Duty

³ Response of Caithness Sagebrush 20, LLC to the Notification and Opportunity to Comment at 3 (Caithness Response).

⁴ *Id.*

⁵ *Id.* at 4.

Personnel⁶ should not be able to be Reviewing Representatives, as defined in the protective order, except in very limited circumstances.⁷ Caithness notes that the Commission has issued similar changes to a protective order previously.⁸

5. The City of Industry (the City), a self-described “local publicly owned electric utility” in California, filed a motion to intervene out of time on January 12, 2007. The City states that it needs to be a party because it is actively seeking firm resources to supply its growing native load and the outcome of this proceeding will affect the City’s resource plans to supply generation from its 20 MW wind development project in Tehachapi. Now that the City’s position in the queue and its chances of receiving transmission capacity on the Sagebrush Line have been tied to whether the Commission finds that certain of the Sagebrush Partners had expansion plans that pre-dated Aero Energy’s request for transmission, and because the information about the expansion plans may be released only to parties to the proceeding pursuant to protective orders, the City argues that it must become a party in order to protect its interests. Thus, the City argues that good cause exists for granting the City’s late motion to intervene and granting it party status. The City also argues that no party will be prejudiced or unduly burdened by the City’s participation, nor will the proceeding be disrupted by this intervention, as the City has already been participating to the extent necessary and agrees to accept the record as it finds it.

III. Discussion

A. Procedural Matters

6. We grant the City’s motion to intervene out-of-time because we have not yet issued a final order and because of the concerns raised by the City that this proceeding could affect its interests.

⁶ These would include any person whose duties include: (i) the marketing or sale of electric power at wholesale; (ii) the purchase or sale of electric power at wholesale; (iii) the direct supervision of *any* employee with such responsibilities; (iv) the provision of electricity marketing consulting services to entities engaged in the sale or purchase of electric power at wholesale; or (v) primary responsibility for negotiating power purchase and transmission service (Competitive Duties).

⁷ Caithness Response at 4.

⁸ See *San Diego Gas & Electric Co.*, 93 FERC ¶ 63,035 (2001).

B. Commission Determination

7. Although Aero Energy did not file a request for the information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, it is appropriate to consider whether the information is exempt from public disclosure under FOIA; otherwise there would be no need for the protective order, because Aero Energy could obtain it under FOIA.

8. Caithness claims that the information is sensitive business information that may be protected under FOIA Exemption 4. In order to qualify for protection under Exemption 4, the information must be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. 5 U.S.C. § 552(b)(4). Generally, in order to be “confidential” for purposes of FOIA Exemption 4, disclosure of the information must either impair the government’s ability to obtain similar information in the future, or cause substantial harm to the competitive position of the submitter of the information.⁹

9. Caithness has convinced us that public release of this information may cause substantial competitive harm to Caithness. Therefore, we find that the information is entitled to protection from public disclosure under the FOIA.

10. Next, we turn to whether release of the information to parties who sign a protective order is appropriate. Other parties in this proceeding have due process rights to assess the legitimacy of Caithness’s claim. The fact that Caithness has made public the *size* of its claimed expansion does not allow Aero Energy to assess whether Caithness really had a pre-existing plan to expand. The burden of proof is on Caithness as the party requesting to safeguard its information to show that the protective order does not adequately protect its interests.¹⁰ Caithness has failed to explain why the confidential information that it has filed should not be available to Aero Energy under a protective

⁹ See *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁰ See *Westar Energy, Inc.*, 115 FERC ¶ 61,034 at P 7 (2006) (“...release under a protective order should be adequate protection against harm. The burden is on the party seeking to safeguard the information to show that the protective order does not adequately safeguard its interests.”); see also *Mohave Pipeline Co.*, 38 FERC ¶ 61,249 at 61,842 (1987) (“[s]ince in most instances a protective order can protect against harmful disclosure, a party claiming that confidential material should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests and that this concern outweighs the need for the material to develop the record.”).

order that would protect Caithness from inappropriate use of this information. While the information may be of a sensitive commercial and financial nature that is privileged and confidential, that does not mean that it should not be released to Aero Energy or another party under a protective order. Protective orders are used so that confidential business information will be protected while simultaneously protecting the due process rights of another party to challenge relevant information relied upon by the party seeking confidentiality.¹¹ Such protective orders prevent broader dissemination of the sensitive information for business purposes or commercial advantage.¹² We note that Caithness assumes that the Commission may make a finding in Caithness's favor based on the information while not letting Aero Energy see and comment on whether the information supports that finding. Caithness has failed to explain why the Commission should rely on its confidential information without protecting Aero Energy's due process rights. Therefore, the Commission will adopt the proposed protective order. Accordingly, the Commission will release this non-public information to any party that executes and remits the protective order within 5 days of the issuance date of this order.

11. We would like to address a misapprehension under which Caithness appears to be laboring. It is the Commission that will release materials that Caithness submitted under seal, not Caithness. Therefore, it is the Commission that will mark those materials "Protected Materials Not Available to Competitive Duty Personnel." Caithness's proposed P8 in the protective order will be revised accordingly. Additionally, since it is the Commission who is releasing this information, and not Caithness, Caithness's contractual obligation not to release this information voluntarily appears to have been met.

12. Our regulations at 18 C.F.R. § 388.112(e) require that, before the Commission releases a document for which privileged treatment has been requested, the Commission give a notification of that release of the information. Therefore, this order provides Caithness with such notification. As in the First Notification, Caithness is advised that, although the request was made by Aero Energy, since the Commission has adopted the protective order, the information may be made available to other parties in the proceeding upon execution of the protective order. Any party seeking access to this confidential information via the protective order must execute it and submit it to the Commission within five days of the issuance of this order.

¹¹ See *Oasis Power Partners, LLC*, 109 FERC ¶ 61,180 (2004).

¹² *Id.*

13. Any party who obtains information pursuant to the protective order will be given fifteen days from the date of this order in which to submit any additional comments based on information in the protective order per the restrictions on non-public information in that order.¹³

14. The adopted protective order is attached.

The Commission orders:

- (A) The confidential information that Caithness provided will be released no sooner than five days after the issuance of this order to Aero Energy or any other party signing the attached protective order.
- (B) Any comments based on the confidential information must be submitted to the Commission within fifteen days of the issuance of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹³ See PP 15 and 16 of the attached protective order regarding the restrictions on filing information that reflects protected material.

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Aero Energy, LLC

**Docket No. TX06-2-000
TX06-2-002**

PROTECTIVE ORDER

(Issued January 24, 2007)

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Federal Energy Regulatory Commission ("Commission").

2. A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury.

3. Definitions -- For purposes of this Order:

(a) The term "Participant" shall mean a Participant as defined in 18 CFR § 385.102(b).

(b) (1) The term "Protected Materials" means (A) materials (including depositions) provided by a Participant in response to discovery requests and designated by such Participant as protected; (B) any information contained in or obtained from such designated materials; (C) any other materials which are made subject to this Protective Order by a Presiding Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants; (D) notes of Protected Materials; and (E) copies of Protected Materials. The Commission shall physically mark them on each page as "PROTECTED MATERIALS" or with words of similar import as long as the term "Protected Materials" is included in that designation to indicate that they are Protected Materials.

(2) The term "Notes of Protected Materials" means memoranda, handwritten notes, or any other form of information (including electronic forms) which copies or

discloses materials described in Paragraph 3(b)(1). Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials, except as specifically provided in this order.

(3) Protected Materials shall not include (A) any information or document contained in the files of the Commission, or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order, or (C) any information or document labeled as "Non-Internet Public" by a Participant, in accordance with Paragraph 30 of FERC Order No. 630, FERC Stat. & Regs. ¶ 31,140. Protected Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

(c) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which Participants who have been granted access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding.

(d) The term "Reviewing Representative" shall mean any person who has signed a Non-Disclosure Certificate and who is:

- (1) Commission Trial Staff, should any be designated in this docket;
- (2) any attorney who makes an appearance in any proceeding in this docket for a Participant;
- (3) any attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Subparagraph (2);
- (4) any expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;
- (5) any person designated as a Reviewing Representative by order of any Presiding Judge or the Commission; or

(6) any employees or other representatives of Participants that may appear in this proceeding with significant responsibility for this docket.

4. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided in Paragraphs 7-11.

5. Protected Materials shall remain available to Participants until the later of the date on which an order terminating this proceeding becomes no longer subject to judicial review, or the date on which any other Commission proceeding relating to the Protected Material is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraph 6, below. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. Any Protected Materials not returned or destroyed shall remain subject to the Protective Order.

6. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 8-9. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities. For documents submitted to the Commission, the Commission shall follow the notification procedures of 18 CFR § 388.112 before making public any Protected Materials.

7. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Materials, but

such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

8. The Commission will physically mark those Protected Materials that the disclosing Participant states in good faith contain market sensitive information, public disclosure of which would competitively harm the Participant, with the words "Not Available to Competitive Duty Personnel." Any challenge to such designations may be made as provided in this protective order for challenges to designations of materials.

9. Solely with respect to Protected Materials that have been marked "Not Available to Competitive Duty Personnel" (and information derived therefrom), a Reviewing Representative may not include any person whose duties include (i) the marketing or sale of electric power at wholesale; (ii) the purchase or sale of electric power at wholesale; (iii) the direct supervision of *any* employee with such responsibilities; (iv) the provision of electricity marketing consulting services to entities engaged in the sale or purchase of electric power at wholesale; or (v) primary responsibility for negotiating power purchase agreements and transmission service (collectively, "Competitive Duties"). If any person who has been a Reviewing Representative subsequently is assigned to perform any Competitive Duties, or if previously available "Protected Materials" are marked as "Not Available to Competitive Duty Personnel," with the exception of the Reviewing Representative's own data, such person shall have no access to materials marked "Not Available to Competitive Duty Personnel" (and information derived therefrom) and shall dispose of such Materials, and shall continue to comply with the requirements set forth in the Non-Disclosure Certificate and this Protective Order with respect to any Protected Materials to which such person previously had access.

10. Notwithstanding the foregoing, persons who otherwise would be disqualified as Competitive Duty Personnel may serve as Reviewing Representatives, subject to the following conditions: (i) the Participant who employs or has retained that person certifies in writing to the Commission that its ability to effectively participate in this proceeding would be prejudiced if it was unable to rely on the assistance of the particular Reviewing Representative; (ii) the party claiming such prejudice must identify by name and job title the particular Reviewing Representative required; (iii) the party claiming such prejudice must acknowledge in writing to the Commission that access to the Protected Materials which are "Not Available to Competitive Duty Personnel" shall be restricted only to purposes of the litigation of this proceeding, absent written consent of the Commission; (iv) such party acknowledges that any other use shall constitute a violation of an order of the Federal Energy Regulatory Commission; and (v) the Competitive Duty Personnel acting as a Reviewing Representative has provided a declaration or affidavit

acknowledging his or her familiarity with the contents of this order and the particular restrictions set forth in this paragraph. Once materials are clearly and correctly labeled, compliance will be the responsibility of the Reviewing Party. Materials marked as "Not Available to Competitive Duty Personnel" shall be returned or destroyed at the conclusion of this proceeding as otherwise provided herein.

11. If a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 3(d) above, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached, that person shall be a Reviewing Representative pursuant to Paragraphs 3(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Commission for resolution.

12. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate; provided, that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

(b) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

13. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 3(d), access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

14. Subject to Paragraph 17, the Commission shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Commission, the parties to the dispute shall use their best efforts to resolve it. Any participant that contests the designation of materials as protected shall notify the party

that provided the protected materials by specifying in writing the materials the designation of which is contested. This Protective Order shall automatically cease to apply to such materials five (5) business days after the notification is made unless the designator, within said 5-day period, files a motion with the Commission, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the participant seeking protection. If the Commission finds that the materials at issue are not entitled to protection, the procedures of Paragraph 17 shall apply.

15. All copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to Protected Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS" and shall be filed under seal and served under seal upon the Commission and all Reviewing Representatives who are on the service list. For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such, will also be filed with the Commission and served on all parties on the service list and any Presiding Judge. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

16. If any Participant desires to include, utilize or refer to any Protected Materials or information derived therefrom in testimony or exhibits during any hearing in these proceedings in a manner that might require disclosure of such material to persons other than reviewing representatives, such participant shall first notify both counsel for the disclosing participant and any Presiding Judge or the Commission of such desire, identifying with particularity each of the Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Commission.

17. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

18. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge, the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

19. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Commission.
20. All Protected Materials filed with the Commission, any Presiding Judge, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order.
21. If the Commission finds at any time in the course of this proceeding that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for three (3) business days from the date of issuance of the Commission's determination. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Commission's decision respecting Protected Materials or Reviewing Representatives.
22. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.
23. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.
24. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this proceeding. Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Aero Energy, LLC

**Docket No. TX06-2-000
TX06-2-002**

NON-DISCLOSURE CERTIFICATE OF COMPETITIVE DUTY PERSONNEL

I hereby certify my understanding that access to Protected Materials identified as "Not Available to Competitive Duty Personnel" is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of such Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I further understand that access to Protected Materials identified as "Not Available to Competitive Duty Personnel" shall be restricted only to purposes of the litigation in this proceeding. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____
Title: _____
Representing: _____
Date: _____