

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Aero Energy LLC

Docket No. TX06-2-000

ORDER GRANTING MODIFICATION

(Issued August 14, 2006)

1. On June 29, 2006, Aero Energy LLC (Aero) filed a motion for clarification of, or amendment to, the Commission's Proposed Order.¹ Aero requests that the Commission require the Sagebrush Partnership (Sagebrush) to provide firm transmission to the extent that the system impact study (SIS) shows that firm service is available without adversely affecting service to existing projects. As discussed below, we will grant Aero's motion, subject to further proceedings as specified below.

I. Background

2. The background to this case is described in detail in the Proposed Order. Briefly, Aero filed an application under sections 210 and 211 of the Federal Power Act (FPA)² requesting that the Commission direct the Sagebrush Partnership (Sagebrush) and Eurus Toyowest Management LLC (Eurus) to (1) allow Aero to interconnect with Sagebrush's transmission line (the Sagebrush Line), a 46-mile, 230 kV transmission line that extends from the Tehachapi region of California to Southern California Edison Company's (Edison) Vincent Substation,³ and (2) provide at least 50 MW and up to 120 MW of firm or non-firm transmission service for Aero to deliver power to Edison's Vincent

¹*Aero Energy, LLC*, 115 FERC ¶ 61,128 (2006) (Proposed Order).

² 16 U.S.C. §§ 824i, 824j (2000), as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1231, 119 Stat. 594, 955 (2005).

³ Sagebrush is the owner and Eurus is the operator of the Sagebrush Line.

Substation. The Proposed Order required Sagebrush and Eurus to interconnect with and provide non-firm transmission service to Aero. The Commission also ordered further procedures to establish the rates, terms and conditions of the services.⁴

3. The parties filed a joint motion for extension of time, which the Commission granted. They requested the extension to allow the SIS to be completed and the agreements negotiated. Sagebrush provided the SIS to Aero Energy.⁵ Aero argues that, contrary to Sagebrush's claim that only 3 MW of capacity are currently available on the Sagebrush Line, the SIS concludes that a new 120 MW project can be added to the generators already interconnected to the Sagebrush Line on a firm basis, without adversely affecting the ability of the Sagebrush Line to deliver the output of the existing generation and without degrading the reliability of the Sagebrush Line.

4. According to Aero, the Sagebrush SIS assumes a maximum line rating based on the nominal line rating in the Western Electricity Coordinating Council (WECC) database. Aero notes that the WECC does not rate lines and thus, the WECC database only contains data furnished by others.⁶ Aero states that Sagebrush has furnished no technical information to support the assumed line limit. The fact that the SIS demonstrates the ability to add another 120 MW of resources despite the assumed line limit suggests that the Sagebrush Line is capable of accommodating additional resources beyond 120 MW.

5. On June 22, 2006, Aero Energy received the draft transmission services agreement (TSA), which would allow non-firm service only, subject to the Sagebrush Partners' right to use some or all of the newfound capacity on a firm basis. The parties are at an impasse with regard to whether the Commission's Proposed Order requires only non-firm service, regardless of the results of the SIS. They also disagree about the definition of non-firm

⁴ The Proposed Order told the parties to negotiate the rates, terms and conditions of service. The Commission directed the parties to file within 28 days the rates, terms and conditions of service, SISs and the parties' positions on issues on which the parties could not agree. Proposed Order at P 2, 16-18, 43.

⁵ Aero claims that it was not provided with the original or first revision of the SIS. Having only received Revision 2 of the SIS on June 21, Aero states in its June 29 motion that it has not yet had the opportunity to discuss the findings of this revision or the finding of the prior revisions with Sagebrush. Aero notes that the independent engineer it retained to work with Sagebrush has requested, but has not been given access to complete line design data. Aero motion for clarification or amendment at 2 n.1.

⁶ Aero motion for clarification or amendment at 2.

service. On June 26, 2006, the parties filed a joint motion to hold this proceeding in abeyance pending the Commission's resolution of this motion.

II. Motion for Clarification or Amendment

6. Aero requests clarification or amendment so that the Proposed Order will require Sagebrush to provide firm transmission to the extent that the SIS shows that firm service is available without adversely affecting the service to existing projects. Aero notes that, while the Commission acknowledged in the Proposed Order⁷ that Aero Energy is seeking firm or non-firm service, in ordering paragraph B the Commission only ordered Sagebrush to provide non-firm transmission service.

7. Aero states that the non-firm service offered by Sagebrush reserves to the Sagebrush Partners all firm capacity on the line, whether known or not, whether currently existing or not, and whether or not additional capacity is made available by upgrades paid for by non-Sagebrush transmission customers. Consequently, Aero states, its transmission service may be completely and permanently interrupted at any time. Aero argues that this is contrary to section 212 of the Federal Power Act⁸ and contrary to the Commission's intention in ordering Sagebrush to provide transmission service to Aero Energy as long as that transmission service does not unreasonably impair the continued reliability of the Sagebrush Line.⁹

8. On July 14, 2006, Sagebrush filed an answer to the motion for clarification or amendment. On July 14, 2006 FPL Energy LLC (FPL Energy) filed a motion to intervene out of time, with no comments. The City of Industry (the City), Independent Energy Producers Association (IEP) and Arclight Capital Partners, LLC (Arclight) filed motions to intervene and comments in support of Aero's motion for clarification or amendment, and FPL Energy and Caithness Sagebrush 20 LLC (Sagebrush Partners)¹⁰ filed an answer to Aero's June 29 Motion. On July 17, 2006, Atlantic Power Holdings, LLC filed a motion to intervene. On July 19, 2006, the Public Utilities Commission of the State of California (Cal PUC) filed a motion to intervene. On July 25, 2006, Aero filed an answer to Sagebrush's and Sagebrush Partners' answer.

⁷ Proposed Order at P 5, 35, and 41.

⁸ 16 U.S.C. § 824k (2000).

⁹ Proposed Order at P 35.

¹⁰ Sagebrush Partners own a 48 percent interest in Sagebrush. Sagebrush Partners Answer at 1.

III. Discussion

A. Procedural Matters

9. We grant all motions to intervene out-of-time filed in response to Aero's motion for clarification because we have not yet issued a final order and because of the concerns raised by several intervenors that our order in this proceeding could establish binding precedent on broad issues affecting the industry. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006) prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Sagebrush's, Sagebrush Partners' and Aero's answers because they have provided information that assisted us in our decision-making process.

B. Sagebrush Entities' Argument

10. Sagebrush opposes an order that would direct it to provide firm transmission service to Aero. Sagebrush argues that there is no need for clarification, since the Commission's Proposed Order only requires Sagebrush to provide non-firm transmission service.¹¹ It cites *Cross Sound Cable, LLC*¹² for the proposition that "the mere fact that the Sagebrush Partners are allocated a property right to firm transmission capacity under the Partnership Agreement does not support a *per se* finding that any unused capacity is being withheld."¹³ Requiring Sagebrush to provide firm transmission service to Aero would deprive the Sagebrush Partners of their firm transmission rights and would create significant regulatory risk for those seeking financing for the construction of new transmission facilities, contrary to *Cross Sound*.

11. Like Sagebrush, Sagebrush Partners argue that they are entitled to reserve capacity on the Sagebrush line to accommodate their expansion plans¹⁴ and that a grant of firm transmission service to Aero would upset the long-term ownership rights and financing expectations of the Sagebrush Partners and stifle future investment in transmission facilities.¹⁵ They further argue that the non-firm service that they are offering to Aero has

¹¹ *Id.*

¹² 106 FERC ¶ 61,116 (2004) (*Cross Sound I*); order on reh'g, 109 FERC ¶ 61,223 (2004) (*Cross Sound II*).

¹³ Sagebrush answer at 12.

¹⁴ Sagebrush Partners answer at 2.

¹⁵ *Id.* at 3, 11-14.

many of the aspects of firm service, is consistent with section 211, and reasonably accommodates their long-term plans for the use of the Sagebrush Line.¹⁶ They also note that the holders of firm transmission rights are entitled to reserve their transmission rights even if they do not use them for a period of time.¹⁷

C. The City's Comments

12. The City argues that wind energy developers cannot develop generation facilities that are much needed in California on the basis of non-firm transmission service that may be completely and permanently interrupted due to a Sagebrush Partner's future decision to expand an existing project and/or develop a new project. The City also says that if the Commission is indeed relying on Sagebrush's claim that the Sagebrush Line has only 420 MW of capacity and only 3 MW of available capacity as the basis for ordering only non-firm service, then the Commission appears to be contemplating the kind of non-firm service that would only be curtailed for reliability or to accommodate existing service to existing projects.

13. The City supports Aero Energy's request that the Commission reconsider its Proposed Order and require Sagebrush to offer firm service to Aero Energy to the extent the SIS shows that such service is available. This would send a clear message to Sagebrush that it cannot keep other wind energy developers from obtaining firm capacity that does not impair the reliability of the system.

D. IEP's Response to and Arlight's Comments on Aero's Request for Clarification

14. IEP and Arlight argue that this case raises policy issues for both existing and future renewable resource generation and transmission infrastructure development. They note that private developers assume the costs and risks of constructing "private transmission lines" to serve their existing and planned generation facilities. It is critical to have regulatory certainty to allow developers to manage the risks inherent in their projects and to be able to plan project development, including necessary transmission arrangements, to meet current and future project needs. The Commission's decision in this case may affect the independent energy industry's ability or willingness to finance transmission expansions or additions, as well as the development and financing of new generation.

¹⁶ *Id.* at 6-13.

¹⁷ *Id.* at 11, citing *Cross Sound I and Cross Sound II; Southwestern Public Service Company*, 80 FERC ¶ 61,245 (1997) (*Southwestern*); *PacifiCorp*, 99 FERC ¶ 61,259 (2002) (*PacifiCorp*).

E. Aero's Motion for Leave to Answer and Answer

15. Aero argues that although the motions for late intervention and the Answers seem to imply that the Commission's decision in this case will have an industry-wide effect on merchant transmission facilities, the issues presented in this case are unique to the Sagebrush Line or, at the very least, to transmission lines with multiple ownership interests that are included within the Commission's grant of qualifying facility (QF) and/or exempt wholesale generator (EWG) status. Aero notes that the Sagebrush Line is not a "merchant transmission facility" like the Cross-Sound Cable facility and is not subject to the safeguards as apply to that facility and to other merchant transmission facilities, particularly the requirement "that all merchant transmission project activities need to be open and transparent."¹⁸ Thus, Aero argues that *Cross Sound*, relied upon by Sagebrush as justification for assigning all firm rights on the Sagebrush Line even above 420 MW in perpetuity to Sagebrush Partners, is not on point.

16. Aero further argues even if the Sagebrush Line really were like a merchant transmission facility, all the safeguards applied to such facilities should apply to the Sagebrush Line, and any transfers of capacity would have been open and transparent. Aero points out that this would at least allow entities such as Aero to bid for any capacity that a Sagebrush Partner makes available without being shunted aside because it will not grant an ownership interest in its project.

17. Furthermore, given that there are clearly other parties seeking access to the Sagebrush Line and given Sagebrush's unwillingness to offer service, Aero argues that it is questionable whether the Commission should continue to allow the current arrangement of including ownership interests in the Sagebrush Line as part of the QF/EWG facility.

18. Aero points out that Sagebrush has been claiming that the line capacity is 420 MW and that there is no additional capacity available, and since the Sagebrush Partners themselves determined that 420 MW should be the limit,¹⁹ Sagebrush now inconsistently insists that the Partnership Agreement already allocates all additional capacity identified by the SIS, seemingly without any limitations, including any limitations regarding who pays for any upgrades that may add capacity. Furthermore, arguing that the service that Aero is to receive is essentially firm is misleading. Non-firm service as defined by Sagebrush can be taken away at any time under the Sagebrush Partnership Agreement. Aero claims that, under Sagebrush's interpretation, each Sagebrush Partner, now realizing that its percentage interest includes additional capacity, may dispose of such

¹⁸ *Cross-Sound I*, 106 FERC ¶ 61,116 (2004) at P 22.

¹⁹ Sagebrush Answer at 7.

capacity immediately with no guarantee that Aero, the City of Industry or any other entity requesting service on the Sagebrush Line would ever be able to bid for such capacity.

19. Finally, Aero adds that offering firm service using capacity that was apparently unknown prior to the SIS cannot possibly increase the risk to the Sagebrush Partners. If, as the Sagebrush Partners claim, they were only aware of 420 MW of total available capacity, their investment decisions and expectations can only be based on the original 420 MW. Thus, offering firm transmission service to Aero is a bonus in that such service would defray the Sagebrush Partners' costs of operating and maintaining the Sagebrush Line. Additionally, Aero notes that the Commission has already dispensed with this issue, noting that it "will condition . . . an order on Sagebrush and Eurus' receiving full and fair compensation for the transmission service that they provide to Aero."²⁰

F. Commission Determination

20. The Commission will grant Aero's request for modification of the Proposed Order to require firm service. Sagebrush and Sagebrush Partners' reading of *Cross Sound* is inaccurate. That case involved a merchant transmission line that was subject to numerous provisions to ensure open, non-discriminatory access. While it is true that in *Cross Sound* the Commission found that treating firm transmission rights as property rights does not *per se* indicate that withholding unused transmission capacity is an automatic or a serious possibility,²¹ the Commission was, nevertheless, concerned that there be no market power abuse through the withholding of transmission capacity.²² The Commission noted that mitigation by ISO New England (ISO-NE) would be a first line of defense against such abuse of market power,²³ and that under ISO-NE's Market Rule 1, "withholding transmission capacity is subject to mitigation."²⁴ Thus, in *Cross Sound* the Commission made sure that the holders of firm transmission rights would not withhold transmission capacity from the market. The Commission found that the holders of firm transmission rights would not be able to withhold transmission capacity from the market

²⁰ Proposed Order at P 40.

²¹ *Cross Sound I*, 106 FERC ¶ 61,116 at P 23.

²² *Cross Sound I*, 106 FERC ¶ 61,116 at P 23; *Cross Sound II*, 109 FERC ¶ 61,223 at P 26.

²³ *Cross Sound I*, 106 FERC ¶ 61,116 at P 23.

²⁴ *Id.*

because the ISO-NE, through the mitigation provisions of Market Rule 1, would be able to prevent such withholding.²⁵

21. This case presents a different situation. Here, there is no Market Rule 1 and no ISO-NE to enforce it. And here, withholding transmission capacity from the market is precisely what Sagebrush wants to do. Having built the Sagebrush Line, Sagebrush now wants to bank unused transmission capacity until it, and no one else, wants to use it. As we noted in the Proposed Order, the Sagebrush Partners may not reserve all of the Sagebrush Line's transmission capacity to themselves, whether they use that capacity or not. That would defeat the Commission's authority under sections 211 and 212 of the FPA to direct a transmission owner or operator to provide transmission as long as it is in the public interest and does not unreasonably affect the continued reliability of the transmission line.²⁶

22. *Southwestern* and *PacifiCorp* are irrelevant. In both cases the Commission refused to limit the amount of capacity or advance reservation of firm transmission service. In each instance, however, the reserved firm transmission service was transmission service that was currently in use and *was to become available in the future*. Neither case refers to firm transmission service involving current capacity that is now idle. The Commission in each case made its order conditional upon "the absence of hoarding or other anticompetitive practices."²⁷ In *Southwestern*, the Commission noted that Southwestern would have to buy transmission capacity either on its own or another's transmission system under the terms of the OATT. Also, while *Southwestern* indicates that the possible purchase of non-firm service discourages hoarding, under FPA sections 211 and 212 there is no reason to allow firm transmission service to lie idle when someone else needs it.

²⁵ *Cross Sound I*, 106 FERC ¶ 61,116 at P 23; *Cross Sound II*, 109 FERC ¶ 61,223 at P 26.

²⁶ Proposed Order, 115 FERC ¶ 61,128 at P 38.

²⁷ *PacifiCorp*, 99 FERC ¶ 61,259 at 62,120; *Southwestern* ¶ 80 FERC ¶ 61,245 at 61, 905-906, citing to Order No. 888, *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,693 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002), where the Commission stated: "In the absence of evidence of hoarding or other competitive practices, we will not limit the amount of transmission capacity that a customer may reserve."

23. Sagebrush argues that granting Aero firm transmission rights over the Sagebrush line for 20 years would remove the incentive to build transmission lines, since, to obtain financing, merchant transmission projects need long-term contracts and a relatively stable regulatory environment.²⁸ We disagree. What Sagebrush wants is to withhold from the market transmission capacity that is needed by others. We do not see how the Sagebrush parties' legitimate expectations are thwarted by requiring them to allow Aero to obtain firm service if capacity is available. There is no reason to expect that an order directing firm service over the Sagebrush Line will impede future investment in transmission facilities. So long as transmission owners receive full and fair compensation for the transmission capacity that they provide, and there is no impairment of reliability, there is no reason to believe that they will not get the financing that they need for their projects.

24. Indeed, this case is almost the mirror image of *Cross Sound*. In *Cross Sound*, the Commission noted that the Long Island Power Authority (LIPA) had purchased all of the transmission rights over the Cross Sound Cable and that it was in LIPA's best interest to sell off unneeded capacity on the Cross Sound Cable so that it may reduce its costs. That was one of the factors that made it less likely, in the Commission's judgment, that there would be hoarding of unused transmission capacity.²⁹

25. Also, we disagree with Sagebrush Partners' implication that the non-firm service that Sagebrush is offering to provide Aero is the equivalent of firm service "at least for the immediate term."³⁰ Sagebrush can at any time remove the non-firm service that it is offering Aero. Aero has no certainty that the service will continue, no way to know when Sagebrush will withdraw it, and cannot rely upon it for the long term. The transmission service that Sagebrush is offering is, therefore, not equivalent to firm service.

26. Sagebrush and Sagebrush Partners claim that their intention to allow existing transmission capacity on the Sagebrush Line to lie fallow until they may need it is consistent with FPA section 211. They are incorrect. Indeed, their intention to reserve transmission capacity they are not using is antithetical to the statutory purpose. When it enacted section 211, Congress provided for the use of all transmission capacity. What FPA section 211 does *not* contemplate is precisely what Sagebrush and Sagebrush Partners want to do here; that is, allow transmission capacity on the Sagebrush Line to go unused until they need it.

²⁸ Sagebrush answer at 11-13, *citing Cross Sound II*, 109 FERC ¶ 61,223 at P 25.

²⁹ *Cross Sound II*, 109 FERC ¶ at P 27.

³⁰ Sagebrush Partners answer at 6.

27. Ordering Paragraph B of the Proposed Order directed Sagebrush and Eurus to provide Aero with non-firm transmission service because Sagebrush claimed that there was only 3 MW of available capacity on the Sagebrush Line and Aero stated that it was willing to accept firm or non-firm service.³¹ Since it was alleged that only 3 MW of available firm transmission capacity existed, and since Aero was willing to accept non-firm service, that is all we ordered. However, the Commission intended to require Sagebrush to provide firm transmission to the extent that the SIS shows that firm service is available without adversely affecting service to existing projects. Since it appears that the Sagebrush SIS concludes that an additional 120 MW of firm transmission is available on the Sagebrush Line, the Commission requires Sagebrush to provide firm service to Aero, at least up to 120 MW. If further study shows there is additional firm transmission available on the Sagebrush Line, then Sagebrush must make this additional firm transmission available to Aero as well.

28. While the Sagebrush SIS indicates that 120 MW of firm transmission is available on the Sagebrush Line, and while we do not believe that Sagebrush Partners can contractually reserve all firm capacity in the Sagebrush Line through their partnership agreement, we believe that it is possible that the Sagebrush Partners already have specific expansion plans that will require the use of firm transmission rights on the Sagebrush Line. We will, therefore, give the owners of the Sagebrush Line, the opportunity to demonstrate that the Sagebrush Partners have pre-existing contractual obligations or other specific plans that will prevent them from providing the requested firm transmission service to Aero at a future date. The Sagebrush Partners may make a filing within 30 days tendering evidence showing that the Sagebrush Line's available firm transmission is needed to serve future expansion plans. If the filing demonstrates specific expansion plans, including definitive dates for expansion, Aero's use of firm transmission service will be limited to the period before such expansion.

29. The Commission re-directs the parties to continue negotiating the rates, terms and conditions of service. The Commission also re-directs the parties to file within 30 days the rates, terms and conditions of service, SISs and the parties' positions on issues to which the parties could not agree.

³¹ Proposed Order at PP 2, 29, 36.

The Commission orders:

Aero's motion for amendment is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.