

127 FERC ¶ 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

EDFD-Handsome Lake	Docket Nos. ER09-666-001 ER09-666-002
EDFD-Perryman	ER09-667-001 ER09-667-002
EDFD-Keystone	ER09-668-001 ER09-668-002
EDFD-Conemaugh	ER09-669-001 ER09-669-002
EDFD-C.P. Crane	ER09-670-001 ER09-670-002
EDFD-West Valley	ER09-671-001 ER09-671-002

ORDER DENYING REHEARING
AND CONDITIONING MARKET-BASED RATE AUTHORIZATION

(Issued June 15, 2009)

1. In this order, we deny the request for rehearing of EDF Development, Inc. (EDFD), submitted on behalf of each of the several EDFD subsidiaries¹ (EDFD Subsidiaries), of the letter order issued on March 16, 2009 (March 16 Letter Order)² and condition the market-based rate authorization granted to the EDFD Subsidiaries in the March 16 Letter Order on the requirement that Sagebrush Partnership (Sagebrush) file an

¹ The EDFD subsidiaries are EDFD-Handsome Lake, EDFD-Perryman, EDFD-Keystone, EDFD-Conemaugh, EDFD-C.P. Crane, and EDFD-West Valley. The EDFD Subsidiaries ultimate parent company is Électricité de France, SA (EDF). EDFD February 20, 2009 Application, Docket Nos. ER09-666-000, *et al.* (Initial Application).

² *EDFD-Handsome Lake*, Docket No. ER09-666-000 (Mar. 16, 2009) (unpublished letter order).

Open Access Transmission Tariff (OATT) if any third party customer requests transmission service on the Sagebrush line, within 60 days of receiving such a request.

2. In addition, we accept the EDFD Subsidiaries' revised market-based rate tariff sheets that reflect their designation as Category 2 sellers, effective February 21, 2009.³

I. Background

3. The March 16 Letter Order accepted the application for market-based rate authorization submitted by EDFD on behalf of the EDFD Subsidiaries on February 20, 2009 and granted waivers of certain filing requirements and blanket authorizations for future issuances of securities and assumptions of liabilities. In particular, the March 16 Letter Order stated that based on the representations of the EDFD Subsidiaries that an affiliate of EDFD holds an equity interest in transmission facilities in California, that the EDFD Subsidiaries meet the criteria for Category 2 sellers in the Southwest region, and Category 1 sellers in all other regions.⁴ The March 16 Letter Order therefore directed the EDFD subsidiaries to submit revised market-based rate tariffs to reflect their correct Category status in the relevant regions.

4. On March 20, 2009, EDFD, on behalf of the EDFD Subsidiaries, filed a motion for an extension of time to comply with the requirement that it submit revised market-based rate tariff sheets as directed in the March 16 Letter Order. The Commission granted EDFD's March 20 request for an extension of time to and including May 15, 2009. On April 28, 2009, EDFD, on behalf of the EDFD Subsidiaries, filed a motion for an extension of time to comply with the requirements of the March 16 Letter Order until such time established by the Commission in its response to EDFD's request for rehearing of the March 16 Letter Order. The Commission denied EDFD's April 28 request for an extension of time.

³ EDFD-Handsome Lake, FERC Electric Tariff, Original Volume No. 1, Substitute Original Sheet No. 2 (superseding Original Sheet No. 2); EDFD-Perryman, FERC Electric Tariff, Original Volume No. 1, Substitute Original Sheet No. 2 (superseding Original Sheet No. 2); EDFD-Keystone, FERC Electric Tariff, Original Volume No. 1, Substitute Original Sheet No. 2 (superseding Original Sheet No. 2); EDFD-Conemaugh, FERC Electric Tariff, Original Volume No. 1, Substitute Original Sheet No. 2 (superseding Original Sheet No. 2); EDFD-C.P. Crane, FERC Electric Tariff Original Volume No. 1, Substitute Original Sheet No. 2 (superseding Original Sheet No. 2); EDFD-West Valley, FERC Electric Tariff, Original Volume No. 1, Substitute Original Sheet No. 2 (superseding Original Sheet No. 2).

⁴ March 16 Letter Order at 2.

5. On May 15, 2009, EDFD Subsidiaries submitted revised market-based rate tariff sheets to reflect the Commission's determination that they are Category 2 sellers in the Southwest region in compliance with the March 16 Letter Order. Notice of EDFD's May 15 filing was published in the *Federal Register*, 74 Fed. Reg. 25,527 (2009), with interventions or protests due on or before June 5, 2009. None was filed.

6. In its Initial Application, EDFD represented that it meets the requirements for Category 1 status in all regions, and stated that "the EDFD Subsidiaries, EDFD, and other EDF subsidiaries (a) do not own or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid, (b) are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as an EDF affiliate's generation assets, and (c) do not raise other vertical market power issues."⁵ However, EDFD also represented that its affiliate "enXco, through its subsidiary Oasis Power Partners, LLC [Oasis], holds an equity interest in the Sagebrush Partnership ('Sagebrush'). Sagebrush owns and operates a 46-mile, 230 kV transmission line that extends from the Tehachapi region of California to Southern California Edison Company's Vincent Substation. [Oasis] does not operate or control the operations of the Sagebrush line."⁶ EDFD also represented that "[o]ther than its indirect interest in the Sagebrush Partnership ..., enXco does not directly or indirectly own or control any transmission facilities in North America."⁷

7. EDFD also explained in its Initial Application that Sagebrush is a general partnership comprised of numerous partners. Each Sagebrush partner is contractually entitled to use an undivided, proportional share of the Sagebrush line capacity to interconnect qualifying facilities (QFs) and exempt wholesale generators (EWGs) to the interstate electric transmission system. Further, EDFD represented that the members of the Sagebrush partnership hold interests proportionate to their use of the Sagebrush line.⁸

⁵ Initial Application at 18 (citing 18 C.F.R. § 35.36(a)(2)).

⁶ *Id.* at 11 and n.37.

⁷ *Id.* at 11.

⁸ *Id.*

II. Discussion

8. In Order No. 697, the Commission created two categories of sellers.⁹ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888);¹⁰ that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.¹¹ Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.¹²

A. Request for Rehearing

9. EDFD requests rehearing of the Commission's designation of the EDFD Subsidiaries as Category 2 sellers in the Southwest region. EDFD contends that designating the EDFD Subsidiaries as Category 2 sellers in that region is inconsistent with the definition of Category 1 sellers under section 35.36(a)(2) of the Commission's regulations. EDFD argues that ownership of transmission facilities causes the owner and

⁹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 848, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008), *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008).

¹⁰ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *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).

¹¹ 18 C.F.R. § 35.36(a)(2) (2008).

¹² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

its affiliates to be deemed a Category 2 Seller unless such ownership consists of “limited equipment necessary to connect individual generating facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888...).”¹³ According to EDFD, “[o]wnership of lines that do nothing more than connect the sellers’ generation facilities to the grid cannot be used to exercise market power in the markets in a region.”¹⁴

10. EDFD asserts that section 35.36(a)(2) of the Commission’s regulations provides a bright line test for determining whether the ownership of transmission facilities causes the owner to be included as a Category 1 or Category 2 seller.¹⁵ It argues that sellers who own transmission facilities nevertheless qualify as Category 1 sellers if they can meet either of two requirements: (1) they own only limited equipment necessary to connect their generation facility to the grid; or (2) they are not subject to the Order No. 888 requirements to file an OATT. EDFD contends that the transmission facilities at issue satisfy both of these tests and therefore fall on the Category 1 side of the bright line established in the Commission’s regulations. It argues that “the facilities at issue consist solely of limited equipment necessary to connect [Oasis’] individual facility to the transmission grid.”¹⁶ In support of this argument, EDFD submits that recently issued letter orders have considered the nature of Oasis’ ownership of the Sagebrush line, and designated other entities affiliated with the Sagebrush line as Category 1 sellers.¹⁷ EDFD further argues that the Commission’s conclusion in these recently issued letter orders is also consistent with its prior orders involving other affiliates of the EDFD Subsidiaries.¹⁸

¹³ EDFD April 15, 2009 Rehearing Request at 4-5 (quoting 18 C.F.R. § 36.36(a)(2)).

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 6 (citing *Gamma Mariah*, 44 FERC ¶ 61,442 (1988); 18 C.F.R. § 292.101(b)(1)(i)).

¹⁷ *Id.* at 6-7 (citing *EDF Development Inc.*, Docket No. ER09-502-000 at 2 (Feb. 25, 2009) (unpublished letter order); *Shiloh Wind Project 2, LLC*, Docket Nos. ER08-1237-001, *et al.* (Mar. 9, 2009) (unpublished letter order)).

¹⁸ *Id.* at 8 (citing *Wapsipinicon Wind Project, LLC*, Docket No. ER08-1288-000 (Oct. 15, 2008) (unpublished letter order); *Shiloh Wind Project 2, LLC*, Docket Nos. ER08-1237-000 (Aug. 28, 2008) (unpublished letter order); *Fenton Power Partners I, LLC*, Docket No. ER07-357-002 (July 2, 2008) (unpublished letter order)).

11. EDFD also contends that the EDFD Subsidiaries should be designated as Category 1 sellers because Oasis' ownership interest in the Sagebrush line has been found by the Commission to be part of Oasis' QF and, on that basis, neither Oasis nor Sagebrush has been required to comply with the requirements of Order No. 888 to file an OATT.¹⁹

12. Further, EDFD asserts that there are good policy reasons to designate the EDFD Subsidiaries as Category 1 sellers. It contends that there are a number of other transmission lines owned by one or more QFs that, like the Sagebrush line, EDFD claims are used solely to transmit power from the QFs to the grid. According to EDFD, this is why section 292.101(b)(1) of the Commission's regulations describes what type of transmission lines can be included as part of the QF.²⁰ EDFD adds that there are a number of EWGs that are interconnected to the grid by transmission lines of several miles in length, and that it is for this reason that the definition of a Category 1 seller in the market-based rate regulations allows ownership of limited transmission facilities and transmission facilities where the Commission has not required an OATT.²¹

13. In addition, EDFD contends that Order No. 697-A provides policy reasons for not imposing extensive reporting requirements on small sellers such as the EDFD Subsidiaries. Specifically, EDFD argues that designating the EDFD Subsidiaries as Category 2 sellers would be inconsistent with the Commission's statement in Order No. 697-A that the creation of a category of sellers that are not required to submit regularly scheduled updated market power analyses (Category 1 sellers) is based in part on recognizing the administrative burden imposed on smaller sellers that are unlikely to possess market power.²² EDFD states that to the extent that the Commission is concerned about the denial of access over the Sagebrush line and similar lines, "these issues are not addressed by a triennial market power update" and that the Commission instead retains its Federal Power Act section 210 and 211 authority to address such concerns.²³

¹⁹ *Id.* at 8-9 (citing *Sagebrush*, 103 FERC ¶ 61,300 (2003); *Eurus Toyowest LLC*, 107 FERC ¶ 61,323 (2004)).

²⁰ *Id.* at 9-10 (citing FERC Stats. & Regs. ¶ 31,014, at 31,279 (1995)).

²¹ *Id.* at 10.

²² *Id.* at 10 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 360).

²³ *Id.* at 11.

B. Commission Determination

14. We reject EDFD's argument that the Sagebrush line, in which EDFD's affiliate Oasis has an ownership interest, is "limited equipment necessary to connect its individual generating facility to the transmission grid." In *Aero Energy, LLC*,²⁴ the Commission found that "[Sagebrush] is the owner of a transmission line that transmits electric energy in interstate commerce for sale at wholesale. This makes it a transmitting utility."²⁵ The Commission stated that:

In prior filings made with the Commission, Sagebrush identified itself as the owner of the Sagebrush line. Sagebrush is thus a transmitting utility. Eurus,^[26] in prior filings, described itself as the operator of the Sagebrush line. Sagebrush is thus an entity that owns facilities used for transmission in interstate commerce for the sale of electric energy at wholesale, while Eurus is an entity that operates facilities used for transmission in interstate commerce for the sale of electric energy at wholesale. As such, both meet the statutory definition of "transmitting utility."²⁷

The Commission therefore found it to be in the public interest to order Sagebrush and Eurus to provide transmission service on the Sagebrush line for Aero Energy,²⁸ directed Sagebrush and Eurus to interconnect with and provide firm transmission service to Aero Energy under sections 210 and 211 of the Federal Power Act (FPA), and directed Aero Energy, Sagebrush and Eurus to file an executed interconnection agreement and Transmission Service Agreement (TSA) with the Commission.²⁹ Consistent with the

²⁴ *Aero Energy, LLC*, 115 FERC ¶ 61,128, at P 21 (2006) (Proposed Order), *order granting modification*, 116 FERC ¶ 61,149 (2006) (Modification Order), *final order directing interconnection and transmission service*, 118 FERC ¶ 61,204 (2007) (Final Order), *order denying reh'g*, 120 FERC ¶ 61,188 (2007) (*Aero Energy Orders*).

²⁵ *Aero Energy, LLC*, 120 FERC ¶ 61,188 at P 13.

²⁶ Eurus Toyowest Management LLC (Eurus) is the operator of the Sagebrush line. Proposed Order, 115 FERC ¶ 61,128 at n.3.

²⁷ Proposed Order, 115 FERC ¶ 61,128 at P 21 (footnotes omitted).

²⁸ *Id.* P 35.

²⁹ Final Order, 118 FERC ¶ 61,204 (2007). We note that in determining that Sagebrush should be required to provide firm transmission service to Aero, the Commission found that "withholding transmission capacity from the market is precisely what Sagebrush wants to do. Having built the Sagebrush Line, Sagebrush now wants to

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Commission's determination in the *Aero Energy* Orders, we confirm here that the Sagebrush line is a transmission facility. Accordingly, we find that the March 16 Letter Order correctly designated the EDFD Subsidiaries as Category 2 sellers.

15. Based on the provision of service to Aero Energy in compliance with our prior orders, the EDFD Subsidiaries satisfy the vertical market power analysis for market-based rates, subject to the condition that Sagebrush file an OATT if any third party customer requests transmission service on the Sagebrush line, within 60 days of receiving such a request. This is consistent with our precedent on waivers of the open access tariff requirement.

16. The requirement that Sagebrush file an OATT if any third party customer requests transmission service on the Sagebrush line is consistent with *Gamma Mariah*, *Oxbow Geothermal Corp.*, and *Lockport Energy Associates, L.P.* In *Gamma Mariah*, the Commission granted QF status to the QFs that own undivided interests in the Sagebrush Line and included the undivided interests of each QF in the Sagebrush Line as part of the individual QFs.³⁰ However, the Commission explained in *Gamma Mariah* that if Sagebrush “charge[s] for use of the transmission facilities after the facilities are placed in service, such action may result in a finding of jurisdiction under the Federal Power Act.”³¹ In *Oxbow*, the Commission explained that any use of the Oxbow line other than to transmit the QF's output to the purchasing utility and to transmit maintenance and backup power from the purchasing utility of the QF to the QF would result in a finding of jurisdiction under the FPA.³² Following the issuance of Order No. 888, in similar cases the Commission did not simply make a statement of jurisdiction under the FPA; rather, it required owners of subject transmission facilities to file an OATT if a customer sought transmission service over the lines.³³

bank unused transmission capacity until it, and no one else, wants to use it.”
Modification Order, 116 FERC ¶ 61,149 at P 21.

³⁰ *Gamma Mariah, Inc.*, 44 FERC ¶ 61,442, at 62,399 (1988) (*Gamma Mariah*).

³¹ *Id.*

³² *Oxbow Geothermal Corp.*, 67 FERC ¶ 61,193, at 61,604-05 (1994) (*Oxbow*).

³³ See *Lockport Energy Associates, L.P.*, 96 FERC ¶ 61,003, at 61,008 (2001) (“Lockport will be subject to the same requirements we discussed in *Oxbow*, i.e., Lockport must file an OATT and provide comparable access if an eligible customer seeks and qualifies for transmission service under the Commission's Order No. 888.”). In *Eurus ToyoWest LLC*, an order conditionally granting the petition for a declaratory order of Eurus ToyoWest, an upstream owner of a portion of the Sagebrush line, the

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17. We disagree with EDFD's assertion that the EDFD Subsidiaries should be designated as Category 1 sellers because the ownership interest in the Sagebrush has been found by the Commission to be part of Oasis' QF, and on that basis, neither Oasis nor Sagebrush has been required to file an OATT. Although the Commission has noted that because most QFs own little transmission and it is thus not likely that they will be asked to provide reciprocal service, the Commission has nevertheless declined to grant QFs a blanket waiver of the open access requirements of Order No. 888 or even a waiver of the reciprocity requirements of Order No. 888.³⁴ Further, as discussed above, consistent with Commission precedent, owners of QFs that include transmission facilities that are deemed to be part of a QF will be required to file an OATT and provide comparable access on those facilities if an eligible customer seeks and qualifies for transmission service under Order No. 888.³⁵

18. We also reject EDFD's argument that the EDFD Subsidiaries should be designated as Category 1 sellers because "there are a number of other transmission lines owned by one or more QFs that, like the Sagebrush line, are used solely to transmit power from the QFs to the interconnected grid,"³⁶ as well as EDFD's claim that designating the EDFD Subsidiaries as Category 2 sellers is inconsistent with the Commission's policy of not requiring small market-based rate sellers that are unlikely to possess market power to file updated market power analyses. The Commission requires that a market-based rate seller that owns, operates, or controls transmission facilities, or that is affiliated with an entity that owns, operates, or controls transmission facilities be designated as a Category 2 seller. In fact, the Commission also explained that "Category 1 sellers must not own or control transmission facilities, and must present no other vertical market power issues."³⁷

Commission reiterated that in *Gamma Mariah*, the Commission "contemplated that a future disposition of capacity in the Sagebrush Line, once the Sagebrush Line was placed in service, could result in a finding of jurisdiction." *Eurus ToyoWest II LLC*, 107 FERC ¶ 61,323, at P 19 (2004) (granting Eurus ToyoWest's petition for a declaratory order finding that the regulatory status of the Sagebrush line or of its QF owners would not be changed upon the transfer of the unused capacity in the Sagebrush line to a third-party QF) (citing *Gamma Mariah*, 44 FERC ¶ 61,442 at 62,339).

³⁴ Proposed Order, 115 FERC ¶ 61,128 at P 39 (quoting Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,980-81).

³⁵ See *supra* P 15.

³⁶ EDFD April 15 Rehearing Request at 9-10.

³⁷ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, FERC Stats. & Regs. ¶ 32,602 at n.185 (2006).

The Commission has also explained that Category 1 sellers have no affiliation with an entity that owns or controls transmission in the same region as the seller's generation facility.³⁸ As explained above, the Commission has previously determined the Sagebrush line to be a transmission facility. Therefore, sellers affiliated with the Sagebrush line are Category 2 sellers. With respect to EDFD's argument that several Commission delegated letter orders have designated entities affiliated with the Sagebrush line as Category 1 sellers, we find the previous designation of entities that have an ownership interest in or control over the Sagebrush line, or that are affiliated with an entity that has an ownership interest in or control over the Sagebrush line, as Category 1 sellers to be in error, to be addressed by a future Commission order.³⁹

The Commission orders:

(A) The Commission hereby denies EDFD's request for rehearing, as described in the body of this order.

(B) The EDFD Subsidiaries' revised market-based rate tariff sheets are hereby accepted for filing effective February 21, 2009, as discussed in the body of this order.

(C) The EDFD Subsidiaries' market-based rate authorization is hereby conditioned on the requirement that Sagebrush file an OATT if any third party customer requests transmission service on the Sagebrush line, within 60 days of receiving such a request.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 853.

³⁹ Category 1 status was erroneously granted to sellers in *Wapsipinicon Wind Project, LLC*, Docket No. ER08-1288-000 (Oct. 15, 2008) (unpublished letter order); *Shiloh Wind Project 2, LLC*, Docket No. ER08-1237-000 (Aug. 28, 2008) (unpublished letter order); *Fenton Power Partners I, LLC*, Docket No. ER07-357-002 (Jul. 2, 2008) (unpublished letter order); *Oasis Power Partners, LLC*, ER05-41-001 (Mar. 9, 2009) (unpublished letter order); *Chanarambie Power Partners LLC*, Docket No. ER03-1340-004 (Mar. 9, 2009) (unpublished letter order).