

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeem G. Kelly.

Aero Energy, LLC

Docket No. TX06-2-000

PROPOSED ORDER DIRECTING INTERCONNECTION AND TRANSMISSION
SERVICES AND ORDERING FURTHER PROCEDURES

(Issued April 28, 2006)

1. On February 17, 2006, Aero Energy (Aero) filed an application under sections 210 and 211 of the Federal Power Act (FPA),¹ or, in the alternative, section 211A,² requesting that the Commission direct the Sagebrush Partnership (Sagebrush) and Eurus Toyowest Management LLC (Eurus) to 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 to provide at least 50 MW and up to 120 MW of firm or non-firm transmission service necessary for Aero to deliver power to Edison's Vincent Substation.
2. In this proposed order, we order Sagebrush and Eurus to interconnect with and provide non-firm transmission service to Aero. We also order further procedures to establish the rates, terms and conditions of the services. Our public interest finding is

¹ 16 U.S.C. §§ 824i, 824j (2000).

² Energy Policy Act of 2005, Pub. L. No. 109-58, § 1231, 119 Stat. 594, 955 (2005). The Commission finds that since Aero has met the requirements of sections 210 and 211, as discussed below, there is no need to grant an order under the new section 211A.

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

conditioned on Sagebrush and Eurus's being fully and appropriately compensated for the services they provide from the date of the issuance of this order to the date of a final order under sections 210 and 211, at a rate ultimately approved by the Commission.

I. Background

3. Aero is a wholly-owned subsidiary of Western Wind Energy Corporation (Western Wind). Aero's primary business is to develop wind energy projects in California. Sagebrush is a California general partnership comprised of numerous partners (Partners), each of whom is a special purpose entity entitled to an undivided, proportional share of the Sagebrush Line capacity for the purpose of transmitting power from the connected qualifying facilities (QFs) and exempt wholesale generators (collectively, Projects) to the grid. Each owner of a Project owns one or more of the Partners' entitlements to a share of the Sagebrush Line capacity corresponding to the size of that owner's Project.

4. Aero is currently developing a 50 MW to 120 MW wind energy project in the Tehachapi region (Tehachapi Project), expected to be online by December 31, 2007; Aero commits to obtaining QF status for the facility. Aero has signed a 20-year Power Purchase Agreement (the Power Agreement) with Edison for the sale of a minimum of 50 MW and up to 120 MW of power generated from the Tehachapi Project, with power sales to begin by December 31, 2007. The Power Agreement calls for Aero to deliver electric energy to Edison at Edison's Vincent Substation.

5. On February 17, 2006, Aero filed an application requesting that the Commission order Sagebrush (or each of the Partners) to make available to Aero up to 120 MW of firm or non-firm transmission capacity over the Sagebrush Line so that Aero can deliver the electric energy from the Tehachapi Project to Edison's Vincent Substation. However, Sagebrush and Eurus argue that they are unable to make available more than 3 MW of unused capacity on the Sagebrush Line. Despite requests from Aero for a transmission study to determine the amount of capacity available, Eurus has apparently not completed such a study nor permitted Aero to complete one. Finally, Aero submitted a written request to Sagebrush for transmission service on August 16, 2005. Neither Sagebrush nor Eurus formally responded to the request.

II. Notices and Interventions

6. Notice of Aero's application was published in the *Federal Register*, 71 Fed. Reg. 11,602 (2006), with protests or interventions due on or before March 10, 2006. Sagebrush and Eurus filed a timely joint motion to intervene, and protest, while Caithness Sagebrush 20, LLC filed a timely motion to intervene in support of Sagebrush and

Eurus's protest. Sagebrush and Eurus dispute whether they are appropriate targets for Aero's request, whether there is sufficient capacity to accommodate Aero's request, and whether, in its August 16, 2005 letter, Aero made a good faith request for transmission service under section 211(a) as required under 18 C.F.R. § 2.20 (2005),⁴ because, they argue, Aero's request lacked many of requirements that the Commission's regulations require for a good faith request. Sagebrush and Eurus also claim that ordering them to provide transmission service to Aero would abrogate the rights of the Sagebrush partnership and thus amount to a taking of private property for public use without just compensation. Sagebrush and Eurus argue that such a taking would occur if the Sagebrush Partners receive less than fair market value to compensate them for being deprived of their rights under the Sagebrush Partnership Agreement.

7. On March 24, 2006, Aero filed an answer to the protest. Aero argues that, based on the knowledge available at the time of filing, Sagebrush and Eurus were the appropriate targets as the representatives of the individual Partners, and that Eurus had, in fact, represented itself as the agent of the individual Partners. It also amends its original filing to name each Partner, since it now has the names of the individual Partners thanks to Sagebrush and Eurus's protest. Aero also argues that it believes there is available capacity on the Sagebrush Line since Eurus spent three years negotiating with Aero's parent company, Western Wind, for available capacity, and continued to do so, even after leasing capacity to another company. With regard to the good faith request, Aero argues that the August 16, 2005 letter is just the latest written communication from Western Wind to the Partners during three years of negotiation for interconnection and transmission service, and that Aero and Western Wind together have met all twelve good faith requirements in the course of these negotiations. Finally, Aero argues that Sagebrush will receive fair market value for the service provided and thus cannot claim that it will suffer a taking of private property for public use without just compensation.

8. Finally, on April 11, 2006, Sagebrush and Eurus filed a reply to Aero's answer. Sagebrush and Eurus note that, in their negotiations with Western Wind regarding capacity, any claims that either side made as to the available capacity of the Sagebrush Line were subject to negotiation and execution of definitive agreements, completion of technical studies and any necessary upgrades to the Sagebrush Line, as well as obtaining

⁴ *Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Section 211(a) and 213(a) of the Federal Power Act, as Amended and Added by the Energy Policy Act of 1992*, FERC Stats. & Regs., Regulations Preambles, 1991-1996 ¶ 30,975 (1996) (*Policy Statement Regarding Good Faith Requests*).

all required regulatory approvals and approvals of the Sagebrush Partners. Sagebrush and Eurus state that a February 4, 2005 letter to Western Wind clearly stated that Eurus could not represent that transmission capacity was available for Western Wind. Again, they dispute that they are the appropriate targets of Aero's request and dispute Aero's filing as procedurally deficient.

III. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest and to an answer unless otherwise ordered by the decisional authority. We will accept Aero's March 24, 2006 answer as well as Sagebrush and Eurus's April 11, 2006 reply because they have provided information that assisted us in our decision-making process.

B. Interconnection

1. Statutory Provisions

11. Section 210(a)(1)⁵ provides that upon application of an electric utility:

[T]he Commission may issue an order requiring –

(A) the physical connection of . . . the transmission facilities of any electric utility, with the facilities of such applicant.

(B) such action as may be necessary to make effective any physical connection described in subparagraph (A), which physical connection is ineffective for any reason, such as inadequate size, poor maintenance, or physical unreliability.

⁵ 16 U.S.C. § 824i(a)(i) (2000).

12. Section 210(c),⁶ however, limits the Commission's ability to order interconnection:

No order may be issued by the Commission under subsection (a) unless the Commission determines that such order –

(1) is in the public interest,

(2) would –

(A) encourage overall conservation of energy or capital,

(B) optimize the efficiency of use of facilities and resources, or

(C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies, and

(3) meets the requirements of section 212.

13. Section 212(c)(1)⁷ provides that, before issuing a final order under section 210, the Commission shall issue a proposed order setting a reasonable time for the parties to agree to terms and conditions for carrying out the order, including the apportionment of and compensation for costs.

2. The Parties' Arguments

14. Aero states that transmission from the Tehachapi region is badly constrained, and that interconnection with the Sagebrush Line is the only economically feasible way that it can transmit electric energy from its Tehachapi Project to Edison's Vincent Substation. Aero states that an order directing interconnection between its Tehachapi Project and the Sagebrush Line will increase both the efficiency of the Sagebrush Line (in that the Sagebrush Line will transmit more electric energy than it would without such an order) and will increase the flow of cheaper electric energy to consumers in California.⁸ Sagebrush does not address the issue of interconnection, and so does not dispute any of Aero's assertions.

⁶ 16 U.S.C. § 824i(c) (2000).

⁷ 16 U.S.C. § 824k(c)(1) (2000).

⁸ Aero Application at 6, 10-13.

3. Commission Determination and Further Procedures

15. To order interconnection, section 210(c) requires that the Commission must find that an interconnection order is in the public interest and that the proposed interconnection will meet at least one of the three specified criteria, *i.e.*, it will encourage conservation of energy or capital, optimize efficiency of facilities and resources, or improve the reliability of any electric utility system to which the order applies.

16. We find that Aero's application meets the standards for a proposed order directing interconnection under section 210(c).⁹ The requested interconnection would enable Aero to complete its Tehachapi Project, thus bringing more electric energy on line and promoting competition.¹⁰ It will also optimize the efficient use of system resources, by making more efficient use of the Sagebrush Line. We also find that the requested interconnection would encourage the conservation of energy and capital by providing the citizens of California with access to this wind power. Therefore, based on these preliminary findings, we find that it is in the public interest to issue this proposed order directing interconnection. However, any agreement that the parties may reach with respect to interconnection must adequately maintain the reliability of the Sagebrush Line. We discuss this issue more fully below.

17. Section 212(c)(1) provides that, before issuing a final order under section 210, the Commission must issue a proposed order setting a reasonable time for the parties to agree

⁹ With respect to meeting the requirements of section 212, we order further procedures, as discussed below.

¹⁰ We have long held that the "benefit of a competitive market is that it enhances efficiency." *See East Kentucky Power Cooperative, Inc.*, 111 FERC ¶ 61,031 at P 38 & n.24 (2005), *order directing the filing of interconnection agreement*, 112 FERC ¶ 61,160 (2005); *final order directing interconnection*, 114 FERC ¶ 61,305 (2006); *Public Service Company of New Mexico*, Opinion No. 203, 25 FERC ¶ 61,469 at 62,038 (1983), *opinion and order denying reh'g*, Opinion No. 203-A, 27 FERC ¶ 61,154 (1984). *See also Public Service Company of Indiana*, 49 FERC ¶ 61,346 at 62,243 (1989) (enhancing efficiency, by competition, can help achieve the goal of ensuring the lowest cost energy to consumers in the long run, consistent with reliable service). *See generally NAACP v. FPC*, 520 F.2d 432, 441 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976).

to terms and conditions for carrying out the order, including the apportionment of and compensation for costs. Should either party seek to conduct a system impact study, the other party must give it free access to do so.

18. If the parties are able to agree within the allotted time, the Commission will issue a final order reflecting the agreed-upon terms and conditions in that agreement, if the Commission finds them acceptable. In the alternative, if the parties are unable to agree within the allotted time, the Commission will evaluate the positions of each party and prescribe the apportionment of costs, compensation, and other terms and conditions of interconnection, as appropriate. The Commission gives the parties 28 days to negotiate an interconnection agreement reflecting all issues upon which the parties have agreed, and to identify all issues upon which the parties have not agreed and to give their rationale for their final position on those issues on which the parties have not agreed. This rationale should include complete disclosure of any system impact studies completed by any party. After considering their rationale for their final positions and any system impact studies provided, the Commission will issue a final order.

C. Transmission Service

1. Targets of the Filing

19. Section 211(a) of the FPA provides that any “electric utility ... or any other person generating electric energy for sale for resale, may apply to the Commission for an order ... requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant.”¹¹ The Commission’s authority to order transmission services, therefore, depends on whether the subject of the application is a transmitting utility within the meaning of the FPA. Section 3(23) of the FPA defines a “transmitting utility” as “an entity (including an entity described in 201(f)) that owns, operates or controls facilities used for the transmission of electric energy ... in interstate commerce ... for the sale of electric energy at wholesale.”¹²

¹¹ 16 U.S.C. §824j(a) (2000).

¹² 16 U.S.C. § 796(23) (2000), as amended by EPAct 2005, Pub. L. No. 109-58, § 1291, 119 Stat. 594, 984 (2005).

20. Aero's application asks the Commission to issue an order directing Sagebrush and Eurus to provide transmission service. However, both dispute being transmitting utilities and, thus, the appropriate targets of Aero's filing. Sagebrush says it is only the umbrella organization for the individual Partners, the real transmitting entities. Eurus argues it is only a manager and not a transmitting entity. Aero, however, counters in its answer that it failed to name a specific transmitting entity because, until Sagebrush and Eurus named the specific Partners in their motion to intervene, Aero did not know who those Partners were. Aero also explains that it named Sagebrush and Eurus as the transmitting entities because they are the representatives of those individual Partners. Aero argues that Eurus, at least, may be viewed as the agent for those individual partners, because it has named itself their representative before the Commission and negotiated with Aero as their general partner. Finally, in its answer, Aero also amends its original filing to name each of the individual Partners as the transmitting utilities it targets.

21. Sagebrush and Eurus claim that the Commission should dismiss Aero's filing on the basis that QFs are not transmitting utilities and that, therefore, the Commission does not have authority to order the requested transmission service. We agree with Aero in both its application and its answer that the Commission does have authority under section 211 to require a QF or EWG transmission line owner to provide transmission services to another QF or non-QF. As an initial matter we find that Sagebrush and Eurus are transmitting utilities. As noted above, a transmitting utility is defined as "an entity . . . that owns, operates or controls facilities used for the transmission of electric energy . . . in interstate commerce . . . for the sale of electric energy at wholesale." In prior filings made with the Commission, Sagebrush identified itself as the owner of the Sagebrush line.¹³ Sagebrush thus is a transmitting utility.¹⁴ Eurus, in prior filings, described itself as the operator of the Sagebrush line.¹⁵ Sagebrush is thus an entity that owns facilities used for transmission in interstate commerce for the sale of electric energy at wholesale, while

¹³ See, e.g., Petition for Declaratory Order, Docket No. EL03-121-000 (April 16, 2003). The Commission, in granting the declaratory order, noted that "Sagebrush . . . owns a 46-mile, 220-kV radial transmission line." *Sagebrush*, 103 FERC ¶ 61,300 at P 1,2 (2003).

¹⁴ See *supra* note 9.

¹⁵ See, e.g., Application for EWG status, Docket Nos. EG03-60-000 & EG03-60-001 (April 16, 2003), Eurus filed for EWG status as the owner of the Sagebrush Line. The Commission granted that request, reciting that Eurus was the operator of the Sagebrush Line, and that Sagebrush owned the line. *Sagebrush and Euros ToyoWest Management LLC*, 103 FERC ¶ 61,332 at P 1, 3 (2003).

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.” Accordingly, it is not true that Sagebrush and Eurus are not the appropriate targets under section 211 of the FPA. In any event, as Aero points out in its answer, Sagebrush QF’s and/or EWG’s each also are transmitting utilities since each owns and operates electric transmission facilities that are used for the sale of electric energy at wholesale.¹⁶

22. Sagebrush is also concerned that providing transmission service to Aero will result in a loss of QF status. However, the Commission’s precedent provides enough flexibility to allow Aero transmission service on the Sagebrush Line without a loss of QF status, regardless of whether Aero itself becomes a QF, or not. For instance, in *Oxbow*, the Commission found that because Oxbow was using a transmission line exclusively to transmit power generated by a QF, and because the facility would continue to be “owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities),”¹⁷ Oxbow was generally entitled to the waivers and could keep its QF status.¹⁸ Additionally, earlier in *Oxbow Geothermal*,¹⁹ involving the same company, the Commission allowed Oxbow to keep its QF status, notwithstanding finding Oxbow to be a transmitting utility. In *Oxbow Geothermal*, Oxbow Geothermal was the QF owner of a 214-mile, 230 kV transmission line. Sierra Pacific Power Company intervened in that case, stating that it would most likely seek interconnection and transmission service on Oxbow’s transmission line and wanted the Commission to find that, notwithstanding its QF status, Oxbow Geothermal was a transmitting utility. The Commission agreed with Oxbow Geothermal’s assertion that, because the transmission line was part of its

¹⁶ *Oxbow Power Marketing, Inc.*, 76 FERC ¶ 61,031 (1996) (*Oxbow*) (determining that the QF owner of a transmission line met the definition of “transmitting utility”). *Accord, Public Service Company of Colorado*, 99 FERC ¶61,214 at 61,898 (2002) (under the prior definition of transmitting utility, which specifically referenced QFs by name, the Commission reached the same conclusion that it does here).

¹⁷ 16 U.S.C. § 796(18)(B) (2000).

¹⁸ *Oxbow*, 76 FERC ¶ 61,031 at 61,179.

¹⁹ *Oxbow Geothermal Corporation*, 67 FERC ¶ 61,193 at 61,604 (1994) (*Oxbow Geothermal*).

qualifying facility, Oxbow Geothermal, as a QF, is exempt from regulation as the owner and operator of the transmission line and related facilities under most of the sections of the FPA.²⁰

2. Good Faith Request

23. Although Aero's August 16, 2005 request for interconnection and transmission service does not meet all of the technical requirements of the Commission's rules for making a good faith request (18 C.F.R. § 2.20 (2005)), nevertheless, the Commission finds that Aero has substantially complied with the Commission's requirements. In its August 16, 2005 request, Aero identified itself as the prospective purchaser of the requested transmission service, and specified the type, amount, firmness, and duration of the service requested, and the origin and destination of the prospective power flow. It also proposed a specified amount per year for the service.

24. Aero did not specify that it is eligible to request the service, that the Commission is authorized to order the type of service that it is requesting, and that its request is intended to satisfy the request for transmission services requirement under sections 211(a) and 213(a) of the FPA, and is not a request for mandatory retail wheeling prohibited under section 212(h) of the FPA. Nor did Aero specify the hourly quantities of electric energy that it would deliver or the terms and conditions for the service.

25. In its answer, though, Aero points out that it has been negotiating with Sagebrush and Eurus for three years, that they are well aware of the details of Aero's project and that, as of June 10, 2005, they were in possession of the Power Agreement between Aero Energy and Edison, which contains the details of the expected power flow across the Sagebrush Line. The Power Agreement provides that the initial contract capacity will be 50 MW, with the possibility of an additional 70 MW in the future.

26. Also, there is only one kind of service possible on the Sagebrush Line, and that is point-to-point service - from the point of Aero's interconnection with the Sagebrush Line to the point of the Sagebrush Line's interconnection with Edison's Vincent Substation. Finally, the Sagebrush QFs/EWGs are neighboring wind developers to Aero, and all of the wind facilities in the area will have similar transaction profiles, based primarily on prevailing wind patterns and speeds.

²⁰ *Id.* at 61,605.

27. The Commission's regulations provide that it is the Commission's intention to "encourage an open exchange of information that exhibits a reasonable degree of specificity and completeness between the party requesting transmission services and the transmitting utility."²¹ The Commission finds that, under all of the circumstances of this case, an exchange of information with a reasonable degree of specificity and completeness has occurred. Further, the Commission's *Policy Statement Regarding Good Faith Requests* states that the Commission's guidelines for good faith requests are neither rigid nor all-encompassing. Rather, they are meant to encourage negotiation.²² Further still, while the Commission's regulations enumerate 12 components that generally constitute the minimum components of a good faith request for transmission service, the Commission has stated that it did not intend to mandate strict and complete adherence to each of the components and that there is no requirement that an entity requesting transmission services must submit all of the components of a good faith request on a single date; rather, the intent is that the parties exchange information as soon as such information is available, and attempt to resolve transmission requests themselves before coming to the Commission with a transmission request.²³

28. Here, while Aero's August 16, 2005 letter to Sagebrush and Euris is deficient in some respects, as Aero notes in its answer, over the course of three years Aero has made available to the owners of the Sagebrush Line all of the information necessary to satisfy the elements of a good faith request. Moreover, Sagebrush and Euris are involved with projects similar to and in a location proximate to Aero's project. We therefore find that under all of the circumstances here, Aero has made a good faith request for transmission service.

3. Sufficient Capacity

29. Sagebrush claims that there are only 3 MW of available capacity on the Sagebrush Line because all of the remaining capacity on the Sagebrush Line is, under the terms of the Partnership Agreement, at all times owned by and fully allocated to the Partners.²⁴

²¹ 18 C.F.R. § 2.20(a)(4) (2005).

²² *Policy Statement Regarding Good Faith Requests*, FERC Stats. & Regs., Regulations Preambles, 1991-1996 ¶ 30,975 at 30,863.

²³ See, e.g., *Peco Energy Company*, 98 FERC ¶ 61,308 at 62,318-19 (2002).

²⁴ Sagebrush Protest at 18.

Sagebrush states that the fact that actual usage of the Sagebrush Line at any given time may not amount to 420 MW (the capacity of the Sagebrush Line) is immaterial, because of the unique nature of an intermittent power source. Sagebrush states that the Partners have agreed that the load associated with the allocated capacity of the Sagebrush Line should include a ten percent safety margin above the nameplate capacity of each Project to account for the fact that at various times any given Project may produce energy above its nameplate rating, depending on the wind speed at any given time. Sagebrush states that the ten percent safety margin allows the Partners the flexibility to overproduce, depending on wind conditions, without endangering the integrity of the Sagebrush Line.²⁵ Sagebrush notes that wind power facilities produce energy intermittently, in correlation to the prevailing wind conditions, so there may be times when these facilities over- or under-produce.²⁶

30. Sagebrush argues that, even if minor changes in operations could increase the capacity of the Sagebrush Line to accommodate the transmission capacity that Aero seeks, the Partnership Agreement already allocates that capacity to the Partners, each of which, in turn, has contractually committed itself to providing to utility purchasers an amount of electric energy that corresponds to their percentage interest.²⁷ Sagebrush adds that the Partnership Agreement provides that at no time is any person other than a Partner or its affiliate to use the Sagebrush Line.²⁸

31. Sagebrush concludes, therefore, that, based on the terms of its Partnership Agreement, which divides the capacity of the Sagebrush Line up among the entities participating in the Partnership, it has no additional capacity to accommodate Aero's request.²⁹ It also states that accommodating Aero's request might threaten the reliability of the Sagebrush Line, because it might reduce the ten percent safety margin that allows the Partners to produce electric energy at levels above the nameplate ratings of their units, depending upon wind speed, thus endangering the Sagebrush Line's integrity.³⁰

²⁵ *Id.*

²⁶ *Id.* at 20.

²⁷ *Id.* at 20-22.

²⁸ *Id.* at 20.

²⁹ *Id.* at 18-22.

³⁰ *Id.* at 20.

32. Aero disagrees. Aero estimates that there is at least an additional 129 MW of available capacity above the 420 MW rated capacity on the Sagebrush Line.³¹ Aero points out that there are significant transmission constraints in the Tehachapi region. Currently, the Sagebrush Line is the only transmission line from the Tehachapi region to the grid with available capacity.³² According to Aero, while the California Public Utilities Commission, the California Independent System Operator Corporation, and California public utilities are aware of the transmission constraints, there are no firm plans for increasing transmission capacity from the Tehachapi region. Aero notes that, although Edison intends to upgrade its transmission line from the Tehachapi region to its Vincent Substation, there is no date set for when it would complete such an upgrade. So Aero's alternatives are either to build its own transmission line to the Vincent Substation, which, according to Aero, would be prohibitively expensive, or to obtain access to the Sagebrush Line.³³

33. Aero concedes that "whether there is excess capacity on the Sagebrush Line is unclear,"³⁴ and states that it is willing to conduct a system impact study itself if Sagebrush would permit it.³⁵ Aero argues that Sagebrush does not reveal the extent to which each Partner uses its apportioned capacity on the Sagebrush Line, so it is impossible to determine how much capacity each Partner is using, and when. It is possible that the Sagebrush Line may only experience load near its rated capacity for a short period of time during the year. Significant capacity, thus, may be available at other times during the year, Aero states, especially when any of the interconnected wind projects experience outages and/or de-ratings. Whether there is available capacity on the Sagebrush Line is important, Aero adds, because directing Sagebrush to transmit electric energy for Aero would increase the supply of electric energy available to consumers in California.³⁶

³¹ The Chief Engineer of Western Wind calculates that the Sagebrush Line can carry an additional 129 MW of power above its 420 MW original capacity. Aero Answer at 12 and Exhibit E.

³² *Id.* at 13 and Exhibit A at 1-4.

³³ Aero Application at 11-12.

³⁴ *Id.* at 13

³⁵ *Id.* at 13-14.

³⁶ *Id.* at 12; Aero Answer at 13.

34. Aero observes that, at one point during negotiations, Sagebrush offered to accommodate Aero's request for transmission service in return for a two-third's ownership share,³⁷ suggesting that there may be sufficient additional capacity available to allow Aero to transmit electric energy from its Tehachapi Project to Edison's Vincent Substation.

35. We find that it is in the public interest to order Sagebrush and Eurus to provide transmission service for Aero from its Tehachapi Project to Edison's Vincent Substation, so long as that transmission service does not unreasonably impair the continued reliability of the Sagebrush Line.³⁸ We will direct the parties to negotiate the rates, terms and conditions of the transmission that we are ordering here.

36. Aero states that it is willing to accept non-firm transmission service.³⁹ If it is indeed Sagebrush's position that it cannot provide even non-firm transmission service for Aero, then we direct Sagebrush to conduct a system impact study to support that conclusion.⁴⁰ We direct Sagebrush to complete this study within 28 days, as discussed below, make it available to Aero and file it with the Commission. We direct Sagebrush and Aero to work together on this study, and to exchange information during the study process, with the goal of mutually resolving as many differences as possible.

4. Public Interest

37. Section 211(a) provides that the Commission may issue an order directing transmission service only if such order meets the requirements of section 212 and is otherwise in the public interest.⁴¹ In *Florida Municipal Power*, we determined that, as a general matter, the availability of transmission service enhances competition in power markets by increasing the power supply options of buyers and the power sales options of

³⁷ Aero Application at 8; Aero Answer, Exhibit A at 2.

³⁸ 16 U.S.C. § 824j(b) (2000).

³⁹ Aero Answer at 10.

⁴⁰ *E.g., El Paso Electric Company*, 68 FERC ¶ 61,182 at 61,925, 61,938, *order dismissing rehearing*, 68 FERC ¶ 61,399 (1994).

⁴¹ 16 U.S.C. § 824j (a) (2000).

sellers and leads to lower costs to consumers.⁴² Thus, so long as the transmitting utility receives full and fair compensation for the transmission services it provides, and there is no unreasonable impairment of reliability, requiring transmission service is in the public interest.⁴³

38. The same general principles apply here as well. Sagebrush may not embargo its transmission line through reference to a contract. That is, it may not, by contract (in this case the Sagebrush Partnership Agreement), reserve all of the capacity of the Sagebrush Line to itself, whether it uses 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 so long as it is in the public interest and does not unreasonably affect the continued reliability of the transmission line.

39. As long as Sagebrush receives full and fair compensation for the transmission service that it will provide, and there is no unreasonable impairment of reliability, providing Aero with transmission service appears to be in the public interest. Indeed, this is consistent with our policy of open and non-discriminatory transmission access.⁴⁴ Moreover, although the Commission has noted that "[b]ecause most QFs own little

⁴² *Florida Municipal Power Agency v. Florida Power & Light Company*, 65 FERC ¶ 61,125, *reh'g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994) *order denying reh'g, granting clarification, and accepting compliance filing*, 74 FERC ¶ 61,130 (2001); *aff'd* 315 F.3d 362 (D.C. Cir. 2003) (*Florida Municipal Power*).

⁴³ *Florida Municipal Power*, 65 FERC at 61,615. *See also Duquesne Light Company*, 71 FERC ¶ 61,155 at 61,517 (1995).

⁴⁴ *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 (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).

transmission, it is not likely that they will be asked to provide reciprocal service," the Commission has declined to grant QFs a blanket waiver of the open access requirements of Order No. 888 or even a waiver from the reciprocity requirements of Order No. 888.⁴⁵

40. Additionally, we find that Sagebrush and Eurus's claim that granting transmission service would be an illegal taking is without merit. As Aero points out in its answer, the law is well settled that for a government regulation to amount to an adverse taking, it must effectively destroy all beneficial uses of the property.⁴⁶ An order directing Sagebrush and Eurus to provide Aero with transmission service would not do this. Indeed, we must and will condition such an order on Sagebrush and Eurus' receiving full and fair compensation for the transmission service that they provide to Aero.

5. Reliability

41. Under section 211(b) of the FPA the Commission may not order transmission service if to do so would unreasonably impair the continued reliability of electric systems affected by the order.⁴⁷ Without a study clearly showing that there is insufficient capacity available on the Sagebrush Line to accommodate Aero's request (and that the Sagebrush Line is unable to be upgraded to allow sufficient capacity), we cannot assume that the reliability of the Sagebrush Line will be unreasonably impaired by directing Sagebrush and Eurus to provide transmission service to Aero. Additionally, Aero requests either firm or non-firm service. Non-firm service does not pose a significant threat to the reliability of the Sagebrush Line; Aero would have interruptible service and would not be guaranteed service. So receiving such service would not result in the unreasonable impairment of continued reliability.

6. Effect on Pre-existing Contracts or Rate Schedules

42. Section 211(c)(2) provides that the Commission may issue no order under section 211 that requires the transmitting utility subject to the order to transmit, during any period, electric energy that replaces electric energy required to be provided to such

⁴⁵ See Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,980-81.

⁴⁶ See *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

⁴⁷ 16 U.S.C. § 824j (b) (2000).

applicant pursuant to a contract during such period or that the utility subject to the order currently provides to the applicant under a rate schedule on file with the Commission.⁴⁸ Aero is not a customer of Sagebrush and Eurus, and Sagebrush and Eurus do not currently transmit electric energy to Aero or supply Aero with electric energy under a contract or rate schedule on file with the Commission. Therefore, this provision does not apply here.

7. Further Procedures

43. Section 212(c)(1) provides that, before issuing a final order under section 211, the Commission must issue a proposed order setting a reasonable time for the parties to agree to terms and conditions for carrying out the order, including the apportionment of and compensation for costs.⁴⁹ If the parties are able to agree within the allotted time, the Commission will issue a final order reflecting the agreed-upon terms and conditions in that agreement, if the Commission finds them acceptable. In the alternative, if the parties are unable to agree within the allotted time, the Commission will evaluate the positions of each party and prescribe the apportionment of costs, compensation, and other terms, and conditions of service, as appropriate. The Commission gives the parties 28 days to negotiate a transmission service agreement reflecting all issues upon which the parties have agreed, and to identify all issues upon which the parties have not agreed and to give their rationale for their final position on the issues on which the parties have not agreed. This rationale should include complete disclosure of any system impact studies completed by any party.

44. Under section 212(c)(1), no court may review or enforce this order, since all determinations made in this order are preliminary.⁵⁰ Consistent with 18 C.F.R. § 385.713 (2005), this order also is an interlocutory order, not subject to requests for rehearing. The proper time for parties to seek rehearing is after the Commission issues a final order.

⁴⁸ 16 U.S.C. § 824j(c)(2) (2000).

⁴⁹ 16 U.S.C. § 824k(c)(1) (2000).

⁵⁰ 16 U.S.C. § 824j(c)(1) (2000).

The Commission orders:

- (A) Sagebrush and Eurus are hereby directed to interconnect with Aero pursuant to section 210 as discussed in the body of this order.
- (B) Sagebrush and Eurus are hereby directed to provide Aero with non-firm transmission service pursuant to section 211 as discussed in the body of this order.
- (C) Aero, Sagebrush and Eurus are hereby directed to follow the procedures discussed in the body of this order.
- (D) Within 28 days, Aero, Sagebrush and Eurus shall make a filing with the Commission setting forth terms and conditions for carrying out the order, including the apportionment of and compensation for costs, as well as any system impact studies, and, addressing other matters as described in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.