

120 FERC ¶ 61,188
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. TX06-2-005

ORDER DENYING REHEARING AND GRANTING AND DENYING REQUESTS
FOR CLARIFICATION

(Issued August 28, 2007)

1. The Commission issued a final order directing Sagebrush Partnership (Sagebrush) to provide interconnection and firm transmission services to Aero Energy, LLC (Aero Energy) over Sagebrush's transmission 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 (the Sagebrush Line).¹ The City of Industry (City), Aero Energy, Sagebrush, and Eurus Energy America Corporation (Eurus Energy) filed requests for rehearing of the *Final Order*.

I. Background

2. The background of this case is described in detail in the Final Order. Briefly, as relevant here, Sagebrush is a general partnership comprised of numerous partners (Partners). Each of the Partners is contractually entitled to an undivided, proportional share of the Sagebrush Line capacity to transmit electric energy 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.²

3. Aero Energy is developing a 50 MW to 120 MW wind energy project in the Tehachapi region of California (Tehachapi Project), expected to be online by December 31, 2007; Aero Energy commits to obtaining QF status for the facility. It has signed a 20-year Power Purchase Agreement (the Power Agreement) with Edison for the sale of 50 MW to 120 MW of electric energy that the Tehachapi Project will generate,

¹ *Aero Energy*, 118 FERC ¶ 61,204 (2007) (*Final Order*).

² *Aero Energy, LLC*, 115 FERC ¶ 61,128 at P 3 (2006) (*Proposed Order*).

with sales of electric energy to begin by December 31, 2007. The Power Agreement calls for Aero Energy to deliver electric energy to Edison at Edison's Vincent Substation.³

4. On August 16, 2005, Aero Energy submitted a written request to Sagebrush for transmission service. Sagebrush did not formally respond to that request.⁴ Aero Energy then filed an application under sections 210 and 211 of the Federal Power Act (FPA)⁵ requesting that the Commission direct Sagebrush and Eurus Toyowest Management LLC (Eurus Toyowest)⁶ to: (a) allow Aero Energy to interconnect with the Sagebrush Line; and (b) provide 50 MW to 120 MW of firm or non-firm transmission service for Aero Energy to deliver electric energy to Edison's Vincent Substation. The Commission issued a *Proposed Order*⁷ directing Sagebrush to interconnect with and provide non-firm transmission service to Aero Energy and directing further procedures to establish the rates, terms and conditions of the services.⁸

5. The Commission later modified the *Proposed Order* and directed Sagebrush to provide firm transmission service to the extent that firm service is available on the Sagebrush Line without adversely affecting service to existing projects.⁹ Acknowledging that individual Sagebrush Partners may already have had specific expansion plans requiring use of their firm transmission rights, the Commission provided each of them the opportunity to demonstrate that it had pre-existing contractual obligations or other specific plans that would prevent it from providing the firm transmission service to Aero Energy at a future date.¹⁰

³ *Id.* P 4.

⁴ *Proposed Order*, 115 FERC ¶ 61,128 at P 5.

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

⁶ When Aero Energy made its request, Eurus Toyowest operated the Sagebrush Line. *Proposed Order*, 115 FERC ¶ 61,128 at P 21. Eurus Toyowest no longer operates the Sagebrush Line. Eurus Energy Request for Rehearing at 2 n.4; Sagebrush Request for Rehearing at 2 n.4. Accordingly, we will not refer further to Eurus Toyowest in this order.

⁷ *Aero Energy, LLC*, 115 FERC ¶ 61,128 (2006).

⁸ *Proposed Order*, 115 FERC ¶ 61,128 at P 2.

⁹ *Aero Energy, LLC*, 116 FERC ¶ 61,149 at P 1 (2006) (*Modification Order*).

¹⁰ *Id.* P 28.

6. In response to the *Modification Order*, Sagebrush filed the Sagebrush Line System Impact Study Report (SIS), which established that an additional 120 MW of transmission capacity is available on the Sagebrush Line. It also filed an unexecuted Interconnection Agreement (IA) and an unexecuted Transmission Service Agreement (Transmission Agreement) between Sagebrush and Aero Energy.¹¹

7. In the *Final Order*, the Commission found that there is sufficient firm transmission capacity on the Sagebrush Line to accommodate Aero Energy's request for firm transmission service for now. We also found that one of the Sagebrush Partners, Caithness Sagebrush, LLC (Caithness) had shown that it had pre-existing expansion plans that, at some future date, will require up to 33 MW of firm transmission capacity, if the expansion comes on line. The Commission further found that two other Sagebrush Partners (Oasis Power Partners, LLC (Oasis), and Eurus Energy) had not shown that they had pre-existing expansion plans that will require additional transmission capacity.¹²

8. The Commission also found that the Sagebrush Partners should curtail Aero Energy's transmission service on a *pro rata* basis. It further found that, with the exception of Caithness (with its planned expansion of 33 MW), in the future, all those requesting interconnection and transmission service on the Sagebrush Line will be responsible for the cost of performing any additional SIS necessary to establish whether there is sufficient transmission capacity on the Sagebrush Line to accommodate them.¹³ The Commission directed Aero Energy and Sagebrush to file an executed IA and an executed Transmission Agreement setting forth terms and conditions of interconnection and transmission service that are consistent with the *Final Order*.¹⁴

9. City, Eurus Energy, Aero Energy, and Sagebrush request rehearing of the *Final Order*, raising a variety of arguments discussed below.

II. Discussion

A. Jurisdiction

10. Eurus Energy argues that we cannot direct Sagebrush to provide transmission service to Aero Energy because Sagebrush does not own the Sagebrush Line, as sections 210, 211, and 212 of the FPA require. Rather, according to Eurus Energy, the Sagebrush Partners own the capacity on the Sagebrush Line and control the movement of electric

¹¹ *Final Order*, 118 FERC ¶ 61,204 at P 1.

¹² *Id.* P 3.

¹³ *Id.*

¹⁴ *Id.* Ordering Paragraph B.

energy over it.¹⁵ Eurus Energy contends that the Sagebrush Partnership Agreement commits all capacity on the Sagebrush Line to the Sagebrush Partners and that Sagebrush has no right to that capacity, and no ability to make that capacity available to others.¹⁶ Eurus Energy maintains that Sagebrush has merely a passive ownership interest in the Sagebrush Line, which is insufficient to make Sagebrush the owner of an electric facility.¹⁷

11. We have already found that Eurus Energy is incorrect on the facts. Sagebrush has title to the Sagebrush Line.¹⁸ That is, it owns a facility that is “used for the transmission of electric energy . . . in interstate commerce . . . for the sale of electric energy at wholesale.” It is, therefore, a “transmitting utility.”

12. Eurus Energy cites *Pacific Power & Light Company*;¹⁹ *El Paso Electric Company*;²⁰ *Baltimore Refuse Energy Systems Company*;²¹ *City of Vidalia, Louisiana*;²² and *Oglethorpe Power Corporation*²³ for the proposition that a passive ownership interest is not sufficient to make one an owner of an electric facility.²⁴ *Pacific*, *El Paso*, *Baltimore Energy*, *Vidalia*, and *Oglethorpe* are inapposite to the facts before us. All of those cases involve sale/lease-back arrangements where the principal business activity of the passive participants was something other than producing, selling or transmitting electric energy, and all of the passive participants were involved in the sale/leaseback arrangement solely for the tax benefits that the transaction would provide.²⁵ Sagebrush’s *sole function* is to own the Sagebrush Line. It has no other purpose. It is not tangentially

¹⁵ Eurus Energy Request for Rehearing at 5-6.

¹⁶ *Id.* at 8.

¹⁷ *Id.*

¹⁸ *Proposed Order*, 115 FERC ¶ 61,128 at P 21; *Sagebrush*, 103 FERC ¶ 61,300 at P 1, 2 (2003) (“Sagebrush owns a 46-mile, 220-kV radial line.”).

¹⁹ 3 FERC ¶ 61,119 (1978) (*Pacific*).

²⁰ 36 FERC ¶ 61,055 (1986) (*El Paso*).

²¹ 40 FERC ¶ 61,366 (1987) (*Baltimore Energy*).

²² 52 FERC ¶ 61,199 (1990) (*Vidalia*).

²³ 77 FERC ¶ 61,334 (1996) (*Oglethorpe*).

²⁴ Eurus Energy Request for Rehearing at 5-6.

²⁵ *See, e.g., Oglethorpe*, 77 FERC ¶ 61,334 at 62,490-491.

involved with the Sagebrush Line in order to achieve tax savings or to accomplish any other purpose. The Sagebrush Line is Sagebrush's only reason for existence.

13. While each of the Sagebrush Partners undoubtedly controls a share of the capacity of the Sagebrush Line, Sagebrush is the only one who *owns* the line. It is, therefore, *not* merely a passive partner, in the sense that the Commission used that term in the cases cited above; rather, it is the owner of a transmission line that transmits electric energy in interstate commerce for sale at wholesale. This makes it a transmitting utility.

B. Taking of Private Property

14. Eurus Energy argues that granting Aero Energy access to the Sagebrush Line violates the Fifth Amendment to the Constitution because it is the taking of private property for public use without just compensation.²⁶ We reject this claim. As we noted in the *Proposed Order*, 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. Here, we are conditioning our order on Sagebrush's receiving full and fair compensation for the transmission service that it provides to Aero Energy. As our order does not destroy the beneficial use of the Sagebrush Line, it is not an uncompensated taking.²⁷

C. Contract

15. Sagebrush argues that the contract allocating firm transmission on the Sagebrush Line among the Sagebrush Partners is a contract for an advance reservation of firm transmission service. Sagebrush contends that by directing Sagebrush to provide Aero Energy with firm transmission, the Commission has displaced the Sagebrush Partners' existing long-term transmission rights.²⁸ Eurus Energy submits that there is no excess capacity on the Sagebrush Line because the Sagebrush Partnership Agreement allocates all available capacity on the Sagebrush Line, including any excess capacity, to the Sagebrush Partners.²⁹

16. We disagree with Eurus and Sagebrush that Sagebrush may, by contract, deprive other entities of transmission services over the Sagebrush Line. As we stated in the *Proposed Order*, Sagebrush may not reserve to itself by contract all of the capacity of the Sagebrush Line. Were it able to do so, it would defeat the Commission's authority under

²⁶ Eurus Energy Request for Rehearing at 9-10.

²⁷ See *Proposed Order* at P 40.

²⁸ Sagebrush Request for Rehearing at 4-5.

²⁹ Eurus Energy Request for Rehearing at 7-8.

sections 211 and 212 of the FPA to direct a transmission owner or operator to provide transmission service.³⁰

D. The Public Interest

17. Sagebrush asserts that compelling developers of transmission lines to grant firm transmission access to third parties at the expense of the developers' plans for additional generation will inhibit the development of the transmission network.³¹ According to Sagebrush, even if transmission rates reflect the cost of capital, private developers will not build transmission lines if they are unable to realize their plans for expansion because they have to grant transmission access to other entities.³² Eurus Energy also argues that granting Aero Energy access to the Sagebrush Line will discourage investment in transmission facilities.³³

18. We disagree. Sagebrush's arguments are contrary to sections 210, 211, and 212 of the FPA. Congress has provided that unused capacity on a transmission line, including Sagebrush's transmission line, is subject to an order directing interconnection and transmission service so long as the order meets the statutory criteria. We have found that, as long as Sagebrush receives full and fair compensation for the transmission service that it provides to Aero Energy, and there is no impairment of reliability, providing Aero Energy with transmission service is in the public interest and is consistent with our policy of open and non-discriminatory access.³⁴ We reaffirm that finding.³⁵ Nor is there any reason to expect that an order directing Sagebrush to provide firm transmission service for Aero Energy will impede future investment in transmission facilities. As we observed in the *Proposed Order*, as long as transmission owners receive full and fair compensation for the transmission capacity that they provide, and there is no impairment of reliability,

³⁰ *Proposed Order*, 115 FERC ¶ 61,128 at P 38.

³¹ Sagebrush Request for Rehearing at 5-6.

³² *Id.*

³³ Eurus Energy Request for Rehearing at 9.

³⁴ *Modification Order*, 116 FERC ¶ 61,149 at P 21, 23; *Proposed Order*, 115 FERC ¶ 61,128 at P 16, 37-39. While we recognize that Sagebrush is a Qualifying Facility (QF), we noted in the *Proposed Order* that we have declined to grant QFs a blanket waiver of our open access or reciprocity requirements. *Proposed Order*, 115 FERC ¶ 61,128 at P 21, 39 & n.15.

³⁵ We have required that Sagebrush receive full and fair compensation for the transmission service that it provides and that the service to Aero Energy not affect the continued reliability of the Sagebrush Line. *Id.* P 2, 16.

there is no reason to believe that they will not get the financing that they need for their projects.³⁶ This is especially true where, as here, our order provides for the transmission owners to realize all of their pre-existing, specific plans for expansion.

E. Good Faith Request and Queue Position

19. Eurus Energy asserts that Aero Energy's request for transmission service failed to satisfy several of the elements of the Commission's regulations governing the contents of good faith requests for transmission service. It notes that, in its application to the Commission, Aero Energy acknowledged that its letter to Sagebrush requesting transmission service did not comply with all of those requirements.³⁷

20. Although it is true, as Aero Energy itself noted, that Aero Energy's request for transmission service omitted several of the details that the Commission's regulations require, as we observed in the *Proposed Order*, the Commission's regulations on this point are not rigid. Rather, the rule is meant to encourage the parties to exchange information and attempt to resolve transmission requests themselves before coming to the Commission.³⁸ As we also pointed out in the *Proposed Order*, it is not necessary that the parties exchange all of their information at once; rather, they may make information available to each other over time, as the information becomes available.³⁹

21. That is what Aero Energy has done here. As Aero Energy notes, it had been negotiating with Sagebrush for three years before it made its request for transmission service, and had, before making that request, provided Sagebrush with a copy of its contract with Edison. That contract contained information as to the amount of power that Aero Energy expects to transmit across the Sagebrush Line.⁴⁰

22. Other information missing from Aero Energy's request for transmission service was obvious. For example, there is only one type of service, *i.e.*, point-to-point, possible across the Sagebrush Line. Sagebrush and the Sagebrush Partners are involved with wind projects similar to and close to Aero Energy's wind project.⁴¹ They are, therefore, or should be familiar with the transmission service that Aero Energy is requesting, since all

³⁶ *Id.* P 23.

³⁷ Eurus Energy Request for Rehearing at 7, *quoting* Aero Energy Application at 8.

³⁸ *Proposed Order*, 115 FERC ¶ 61,128 at P 27.

³⁹ *Id.*

⁴⁰ *Id.* P 25. The Power Agreement provides that the initial capacity will be 50 MW, with the possibility of an additional 70 MW in the future. *Id.*

⁴¹ *Id.* P 23-28.

of the wind projects in the area will have similar transaction profiles, based primarily on prevailing wind patterns and speeds.

23. Even though Aero Energy did not include in its transmission request the hourly quantities of electric energy that it would deliver or the terms and conditions of the transmission service it was requesting, Sagebrush was aware of these matters not only from its three years of negotiations with Aero Energy, but also from its involvement with similar wind projects in the area. And it was obvious from the face of the request that this was not a request for mandatory retail wheeling prohibited under section 212(h) of the FPA.⁴²

24. Finally, Aero Energy's request for transmission service did contain significant information. Aero Energy 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 transmission service that it was requesting.⁴³ This information, together with the other information that Sagebrush should have known, was sufficient to be a good faith request. To conclude otherwise would be to exalt form over substance and impede, rather than facilitate, the transmission of electric energy.

F. Expansion Plans

25. In the *Modification Order*, the Commission gave the Sagebrush Partners the opportunity to demonstrate that they had pre-existing contractual obligations or other specific expansion plans that will require the use of firm transmission rights on the Sagebrush Line and prevent them from providing firm transmission service to Aero Energy.⁴⁴ On September 13, 2006, Oasis, Eurus Energy and Caithness responded to the *Modification Order*, and filed descriptions of wind generation expansion plans that they claimed would require additional firm transmission capacity across the Sagebrush Line.

26. Caithness filed an affidavit of its director of business management detailing dates and milestones for the construction of additional wind generation. That project will require 33 MW of additional transmission capacity over the Sagebrush Line in the future.⁴⁵

⁴² 16 U.S.C. § 824k(h) (2000).

⁴³ *Proposed Order*, 115 FERC ¶ 61,128 at P 23.

⁴⁴ *Modification Order*, 116 FERC ¶ 61,149 at P 29.

⁴⁵ Affidavit of Caithness's Director of Business Management (Caithness Affidavit) at P 7-12. Caithness requested confidential treatment for this evidence. On January 24, 2007, the Commission issued a Protective Order, upon the signing of which the Commission released Caithness's confidential information to Aero Energy and to the

27. Oasis referred to a power purchase agreement (PPA) with San Diego Gas and Electric Company (SDG&E), which, it asserts, provides for SDG&E to purchase 70 MW of power from the Oasis Project. The Oasis Project currently has a nameplate capacity of 60 MW. Eurus Energy claimed that it intended to transfer 3.85 MW of transmission capacity from Sagebrush Partner Alpha Willow for use by Sagebrush Partner Mojave to accommodate generation by the latter's currently unused wind turbines.⁴⁶

28. In the *Final Order*, the Commission found that Caithness demonstrated specific pre-existing expansion plans that will need 33 MW of transmission capacity on the Sagebrush Line and that Oasis and Eurus had not demonstrated specific, pre-existing expansion plans that will require additional transmission capacity on the Sagebrush Line.⁴⁷ Aero Energy, City, Sagebrush and Eurus Energy all challenge these conclusions.

1. Caithness

29. Caithness stated that it had a pre-existing intent to expand its generation by 33 MW, and that the expansion will occur in two phases.⁴⁸ Aero Energy maintains that the Caithness Affidavit shows that Caithness could not have intended more than the first phase of its two-phase project until after May 2006, when it likely had the results of the SIS. According to Aero Energy, Caithness's affidavit only refers to the first phase of its expansion plans.⁴⁹ Aero Energy also asserts that it is highly unlikely that Caithness had specific, pre-existing expansion plans because: (a) the SIS did not consider Caithness expansion claim; (b) the other Sagebrush Partners were unaware of the claim until after the completion of the SIS; (c) Caithness does not state that it negotiated reallocation of the original transmission allotments; and (d) until completion of the SIS, the Sagebrush Partners did not know that there was more than 420 MW of transmission capacity on the Sagebrush Line.⁵⁰

30. Aero Energy asks the Commission to grant rehearing and to find that only the first phase of Caithness' two-phase project could have pre-existed Aero Energy's request for transmission service. It also asks the Commission to find that, therefore, only the

attorney for City. *Final Order*, 118 FERC ¶ 61,204 at P 10 & n.14.

⁴⁶ *Final Order*, 118 FERC ¶ 61,204 at P 8-9.

⁴⁷ *Final Order*, 118 FERC ¶ 61,204 at P 19-21.

⁴⁸ Caithness Affidavit at P 6.

⁴⁹ Aero Energy Request for Rehearing at 8.

⁵⁰ *Id.* at 4, 8-9.

capacity associated with the expansion's first phase will receive a higher queue position than Aero Energy's requested 120 MW.⁵¹

31. The *Modification Order* provided that if any of the Sagebrush Partners demonstrated specific expansion plans, including definitive dates for expansion, that predated Aero Energy's request for transmission service, the Commission would limit Aero Energy's firm transmission service to the period before such expansion.⁵² The Sagebrush Partners did not calculate the capacity of the Sagebrush Line based on an SIS. Rather, they developed the 420 MW number by adding up the installed generating capacity, plus 10 percent.⁵³ It is very likely that Caithness viewed the 420 MW number as a conservative estimate of the Sagebrush Line's capacity. In any event, it is clear that Caithness did have specific, pre-existing expansion plans. Caithness's Affidavit states that Caithness's management approved the expansion phases for two wind projects (i.e., both phases of its expansion plans)⁵⁴ on July 18, 2005,⁵⁵ which precedes Aero Energy's August 16, 2005 request for transmission. The Caithness Affidavit further states that Caithness will place its projects into service between January 1, 2008 and January 1, 2011.⁵⁶ And the affidavit reveals that Caithness has taken firm steps to realize its expansion plans.⁵⁷ Because the Caithness Affidavit supports the conclusion that Caithness had specific expansion plans that preceded Aero Energy's request for transmission service, we will affirm our prior finding to that effect,⁵⁸ and deny rehearing on this issue.

2. Oasis

32. Sagebrush challenges the Commission's finding in the *Final Order* that Oasis did not demonstrate that it had specific, pre-existing plans to expand its generation on the

⁵¹ *Id.* at 9.

⁵² *Modification Order*, 116 FERC ¶ 61,149 at P 28.

⁵³ The allocation of the 420 MW is in Exhibit C, Sagebrush Partnership Motion to Dismiss 3/10/2006, and Exhibit A, Partnership Agreement Section 11 of the same document.

⁵⁴ The affidavit identifies the two wind projects as: (a) Caithness 251 wind; and (b) Caithness Sagebrush 20. Caithness Affidavit at P 4.

⁵⁵ *Id.* at P 8.

⁵⁶ *Id.* at P 6.

⁵⁷ *Id.* at P 7-12.

⁵⁸ *Final Order* 118 FERC ¶ 61,204 at P 22.

Sagebrush Line.⁵⁹ To demonstrate such plans, Oasis submitted a Power Purchase Agreement (PPA) between itself and SDG&E. Sagebrush argues that “Oasis’s contract to provide up to 70 MW of power to SDG&E is a clear indication that Oasis is entitled to a full 70 MW of capacity on the Sagebrush Line.”⁶⁰ We disagree.

33. The PPA provides that Oasis will sell the output of its project to SDG&E. The PPA defines “output” as all of the electric energy that the project produces, “which may, on an instantaneous basis be greater or less than the total estimated 60 MW capacity of the Project, as metered at the interconnected substation . . .”⁶¹ The PPA further provides that the upper limit of SDG&E’s purchase obligation will be 70 MW.

34. Oasis’s obligation under the PPA is to sell SDG&E 60 MW “greater or less” on an instantaneous basis, since the output of a wind generation unit is not precise. Although Oasis can sell SDG&E up to 70 MW, it does not have to. While Oasis says that it intends to start constructing an additional 10 MW of capacity in approximately the third quarter of 2007, it does not say when it formulated those plans and has not submitted definite dates or pointed to firm steps that it has taken to realize its goal.

35. Also, the PPA rates Oasis’ Project as 60 MW. Oasis has submitted nothing to indicate that it is negotiating with SDG&E to increase the rating of its Project to 70 MW. Indeed, were it to increase the capacity of its Project to 70 MW, it might, on an “instantaneous basis,” transmit more than 70 MW, which would exceed SDG&E’s purchase obligation.

36. Sagebrush has submitted nothing that calls into question our conclusion that Oasis has failed to demonstrate that it had specific expansion plans that pre-existed Aero Energy’s request for transmission service. Accordingly, we will deny rehearing of that finding.

3. Eurus Energy

37. Eurus Energy intends to transfer 3.85 MW of unused transmission capacity on the Sagebrush Line from Sagebrush Partner Alpha Willow to Sagebrush Partner Mojave. Sagebrush asks the Commission to clarify that this transfer of unused transmission capacity has firm service priority over Aero Energy’s requested firm service transmission capacity. Sagebrush argues that, if the Commission does not grant the requested clarification, then the Commission erred in finding that Eurus Energy failed to demonstrate that it had pre-existing, specific expansion plans.⁶²

⁵⁹ Oasis did not file for rehearing of the *Final Order*.

⁶⁰ Sagebrush Request for Rehearing at 13.

⁶¹ PPA at 2.

38. We did not find that Eurus Energy had no pre-existing plans to expand its generation. Rather, we found that its plans will not require any additional transmission capacity, as the 3.85 MW is already included in the original 420 MW of transmission capacity that the Sagebrush Partners had allocated among themselves.⁶³ Therefore, Eurus Energy's expansion plans will not prevent the Sagebrush Partners from accommodating Aero Energy's request for firm transmission service, and Aero Energy's transmission request will not infringe upon Eurus's firm transmission rights.

G. Method of Curtailment

1. Background

39. Under the Sagebrush Partnership Agreement, a *pro rata* basis of curtailment applies to a group of original Sagebrush Partners, while a system of Last In, First Out (LIFO) curtailment applies to newer Sagebrush Partners (Junior or LIFO Partners).⁶⁴ In the *Final Order*, the Commission directed that Sagebrush apply a *pro rata* system of curtailment to Aero Energy, rather than the LIFO system.

2. Sagebrush's Arguments

40. Sagebrush objects to Aero Energy's receiving *pro rata* curtailment status for two reasons. First, it argues that this elevates Aero Energy's transmission service rights above the rights that the Junior, or LIFO Sagebrush Partners possess.⁶⁵ According to Sagebrush, this would violate the principle of comparability.⁶⁶

41. Second, Sagebrush contends that giving Aero Energy *pro rata* curtailment status may subject Sagebrush Partners with LIFO projects to loss of income, if Sagebrush curtails their projects before it curtails Aero Energy's project. Sagebrush maintains that the Commission should take these costs into account when considering the method of curtailment for Aero Energy.

42. Sagebrush is concerned that, because of the order of curtailment, the Junior Partners will bear costs due to Aero Energy's firm transmission service. It maintains that

⁶² Sagebrush Request for Rehearing at 8-12. Eurus Energy does not, itself, raise this point in its Request for Rehearing.

⁶³ Sagebrush Request for Rehearing at 8; *Final Order*, 118 FERC ¶61,204 at P 21.

⁶⁴ The LIFO system of curtailment means that Sagebrush will curtail more junior partners before it curtails more senior partners. Sagebrush Request for Rehearing at 6.

⁶⁵ *Id.* at 6-7.

⁶⁶ *Id.* at 6.

this would conflict with section 212(a) of the FPA,⁶⁷ which requires that to the extent practicable, the applicant, rather than a transmitting utility's existing customers, pay the costs of directed transmission service.⁶⁸

3. The Commission's Response

43. Sagebrush cannot insist that Aero Energy take transmission under the terms of the Sagebrush Partnership Agreement. Aero Energy is not subject to that agreement; it is an independent entity.

44. Although *pro rata* curtailment gives Aero Energy priority over the Junior, or LIFO Sagebrush Partners if curtailment occurs, this does not violate the principle of comparability. Rather, Aero Energy, as an independent entity, is entitled to the same curtailment rights as the senior Sagebrush Partners.

45. The Junior Partners will not be bearing the costs of Aero Energy's firm transmission service. The Commission's order directing Sagebrush to provide Aero Energy with firm transmission service over the Sagebrush Line is contingent upon Aero Energy's fully and fairly compensating Sagebrush for that service.⁶⁹ This condition satisfies the requirements of section 212(a) of the FPA. If the Junior, or LIFO Partners lose income because Sagebrush curtails their projects before it curtails Aero Energy's project, that is because the Junior Partners have elected to take a lower curtailment priority under the Sagebrush Partnership Agreement, not because the Commission is imposing upon them the costs of Aero Energy's firm transmission service. We will not involve ourselves in the Sagebrush Partners' individual arrangements;⁷⁰ nor will we allow Sagebrush to extend the terms of the Sagebrush Partnership Agreement to all who would obtain transmission service over the Sagebrush Line.

H. Cost Responsibility for New SIS

46. In the *Final Order*, the Commission found that, if Caithness's projects come on line, Aero Energy must either reduce its transmission by 29 MW, pay for new upgrades to accommodate the additional 33 MW of transmission capacity, or "pay for a new SIS to demonstrate that capacity is available to serve Caithness's 33 MW expansion."⁷¹ Aero Energy argues that Caithness's new projects are lower in the queue for transmission capacity than Aero Energy's project, and that "Caithness should bear the cost of its own

⁶⁷ 16 U.S.C. § 824k (2000).

⁶⁸ Sagebrush Request for Rehearing at 8.

⁶⁹ *Proposed Order*, 115 FERC ¶ 61,128 at P 2.

⁷⁰ *Final Order*, 118 FERC ¶ 61,204 at P 32.

⁷¹ *Id.* P 35.

SIS to determine whether any of the additional 33 MW it is seeking is available on a firm basis.”⁷² Aero Energy contends that forcing it to pay for Caithness’s SIS to establish whether there is an additional 33 MW for Caithness’s projects is not consistent with the Commission’s policy that:

The Queue Position of each Interconnection Request will be used to determine the order of performing the Interconnection Studies and determination of cost responsibility for the facilities necessary to accommodate the Interconnection Request.⁷³

47. Aero Energy is mistaken. Because Caithness has demonstrated specific plans for expansion that preceded Aero Energy’s request for transmission service, its projects are higher in the transmission queue than Aero Energy’s project.⁷⁴ Once Caithness’s projects come on line, they will use 33 MW of transmission capacity. If Aero Energy wants to keep firm transmission capacity for its project, it will have to fund an SIS to determine whether the necessary transmission capacity to support its project exists on the Sagebrush Line.⁷⁵ Aero Energy will not be paying for Caithness’s SIS, but for its own. Aero Energy will properly bear the cost of a new SIS, because it will be Aero Energy, not

⁷² Aero Energy Request for Rehearing at 10-11. Aero Energy offers the alternative that the Commission might direct Caithness to reimburse Aero Energy for a portion of the SIS for which Aero Energy has already paid. *Id.* at 11-12.

⁷³ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at 30,584 (2003) (*pro forma* Large Generator Interconnection Procedures (LGIP) § 4.1); *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004); *order on reh’g and directing compliance*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d*, *National Association of Regulatory Commissioners v. FERC*, 475 F. 3d 1277 (D.C. Cir. 2007).

⁷⁴ *Modification Order*, 116 FERC ¶ 61,149 at P 28 (once a Sagebrush Partner demonstrates that it had specific expansion plans that pre-dated Aero Energy’s request for transmission service, “Aero [Energy’s] use of firm transmission service will be limited to the period before such expansion.”); *Final Order*, 118 FERC ¶ 61,204 at P 35 (Caithness’s expanded generation takes priority over Aero Energy’s project).

⁷⁵ Or Aero Energy can adopt one of the other measures that the Commission referred to in the *Final Order*, *i.e.*, reduce its transmission by 33 MW or pay for new upgrades to accommodate the additional 33 MW of transmission capacity. *Final Order*, 118 FERC ¶ 61,204 at P 35.

Caithness, that will be applying for additional firm transmission capacity.⁷⁶ The Commission's assignment to Aero Energy of the responsibility to pay for the SIS to support its project, is, therefore, consistent with the principle that the queue position of each interconnection request determines the order of performing interconnection studies and the cost responsibility for those studies.

I. Requests for Clarification

1. Good Faith Request

48. Aero Energy and City ask that the Commission clarify that the date on which the transmission owner receives a good faith request for transmission service under FPA § 213(a)⁷⁷ is the date upon which the entity requesting service is deemed to be in the transmission queue for the purposes of determining priority and cost responsibility.⁷⁸ We clarify that this is correct, except where, as here, a transmission owner can demonstrate that it has contractual obligations or other specific plans for expansion that pre-date its receipt of a good faith request for transmission service and that will prevent it from providing the requested transmission service at a future date.⁷⁹

49. Aero Energy and City argue that the exception that we have established here may allow transmission owners that receive good faith requests for transmission to accelerate their expansion efforts or contract away transmission capacity so that there is no capacity left for the entity making the good faith request.⁸⁰ We think that those concerns are unfounded. As we provided in the *Modification Order*, to obtain priority, a transmission owner would have to demonstrate that it had had specific expansion plans, including definite dates for expansion, before it received the good faith request.⁸¹

50. This is an issue of fact that we will decide on a case-by-case basis. For example, as we found in the *Final Order*, Caithness presented evidence of specific expansion plans,

⁷⁶ “. . . to the extent practicable, costs incurred in providing the wholesale transmission services and properly applicable to the provision of such services, are to be recovered from the [section 211] applicant for such [an] order” 16 U.S.C. § 834k(a) (2000).

⁷⁷ 16 U.S.C. § 8241 (2000).

⁷⁸ Aero Energy Request for Rehearing at 4-7, 12; City Request for Rehearing at 3-5.

⁷⁹ *Modification Order*, 116 FERC ¶ 61,149 at P 28; *Final Order*, 118 FERC ¶ 61,204 at P 19.

⁸⁰ Aero Energy Request for Rehearing at 6-7; City Request for Rehearing at 5.

⁸¹ *Modification Order*, 116 FERC ¶ 61,149 at P 28.

with definite dates and milestones, and the expenditure of considerable effort in meeting some of those milestones.⁸² This is the type of evidence that transmission owners will have to present in cases such as this one before we will find that their expansion plans pre-exist, and, therefore, have a higher place in the transmission queue than a later-received request for transmission service.

2. Transfer of Unused Transmission Capacity from Alpha Willow to Mojave

51. Sagebrush asks the Commission to clarify that the 3.85 MW of unused transmission capacity that Eurus Energy intends to transfer from Alpha Willow to Mojave has firm transmission service priority over Aero Energy's right to transmission service. In the *Final Order*, the Commission recognized that the 420 MW of transmission capacity that the Sagebrush Partners have already allocated to themselves includes the unused 3.85 MW of transmission capacity that Eurus Energy intends to transfer from Alpha Willow to Mojave.⁸³

52. The Commission clarifies that Eurus Energy may transfer the 3.85 MW of unused transmission capacity from Alpha Willow to Mojave whenever it wishes to do so. The Commission noted in the *Final Order* that the SIS took the 3.85 MW of unused transmission capacity into account when it established that the Sagebrush Line can accommodate Aero Energy's requested 120 MW of firm transmission capacity.⁸⁴

53. The SIS shows that, at present, approximately 370 MW of power is flowing on the Sagebrush Line into the Vincent Substation. The additional 120 MW that Aero Energy requires, plus the currently-flowing 370 MW, would increase the flow on the Line into the Vincent Substation to approximately 490 MW. The maximum line loading that the SIS used was 494 MW, which will accommodate *both* Aero Energy's requested 120 MW of transmission capacity *and* Mojave's use of 3.85 MW of transmission capacity.⁸⁵

54. Therefore, even though neither Alpha Willow nor Mojave are yet using the 3.85 MW of transmission capacity, the transmission capacity on the Sagebrush Line is adequate for both Aero and Mojave to use the Sagebrush Line for now; the only constraint will begin when Caithness adds its 33 MW of planned expansion. Accordingly, there is no need to grant Mojave's firm transmission priority over Aero Energy's transmission service.

⁸² *Final Order*, 118 FERC ¶ 61,204 at P 19.

⁸³ *Id.* P. 21.

⁸⁴ *Id.* at P 21-22.

⁸⁵ *Id.* at 22.

3. City's Place in Transmission Queue

55. City states that on June 30, 2006, it submitted a good faith request for 20 MW of transmission service to Sagebrush, which refused its request. City asks that we clarify that it has a higher position in the transmission queue than Oasis or the recipient of Eurus Energy's unused 3.85 MW of transmission capacity.⁸⁶ We will deny this request for clarification.

56. This proceeding concerns Aero Energy's request for transmission service on the Sagebrush Line. City's position in the transmission queue is not an issue before us. City made its request to Sagebrush before the Commission made its determination regarding the queue position of the Sagebrush Partners' expansion plans in the *Final Order*. City may either repeat its request to Sagebrush for 20 MW of transmission capacity on the Sagebrush Line, now that the Commission has determined the queue position of the Sagebrush Partners' expansion plans, or file a request with the Commission for an order directing transmission on the Sagebrush Line.

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) The requests for clarification are hereby granted and denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁸⁶ City Request for Rehearing at 5-6.