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FERC Decides Aero Case

BY ROBERT SHAPIRO

The Federal Energy Regulatory Commission (FERC) recently made a decision in a case between wind developers Aero Energy LLC and Sagebrush Partners that affects both the willingness of independent energy providers to finance transmission expansions or additions and the development and financing of new generation.

In an application filed at FERC by Aero, the developer asked FERC to order Sagebrush to allow Aero to move its electricity to the grid over an existing transmission line belonging to Sagebrush. The line was used by Sagebrush and a few other wind project owners to transmit electricity from their existing wind farms.

FERC initially ordered Sagebrush to let Aero connect its project to the line, but it required Sagebrush only to provide non-firm transmission service over the line on the strength of Sagebrush's claim that it had only 3 MW of excess capacity. However, after performing a system impact study, it became clear that Sagebrush had up to 120 MW of firm capacity available.

Consequently, Aero asked FERC to revisit its finding and direct Sagebrush to provide firm transmission capacity over the line. Sagebrush responded by claiming that it was entitled to the excess capacity and for FERC to allow others to use it would create a disincentive for private entities to develop, finance and construct new transmission lines at a time when new transmission was needed desperately.

In an order on rehearing, FERC appeared to side with Aero, but with a catch. The commission found that a transmission owner does not have the right to hoard transmission capacity until it needs it. To do so would overrule FERC's authority to direct a transmission provider to grant transmission service under sections 211 and 212 of the Federal Power Act.

Moreover, the commission reasoned that since the project with the transmission line was built and financed already, there is no reason to believe that ordering transmission access for the excess capacity at compensatory rates will discourage financing for future projects. The commission directed Sagebrush to provide firm service to Aero up to 120 MW or more if additional studies showed that more was available.

FERC distinguished this case from its holding in an earlier case involving Cross Sound Cable. In the Cross Sound Cable decision, FERC allowed the owners of a merchant transmission line to reassign transmission capacity in one of three ways: through direct reassignment, by posting on the company's open-access same-time information system, called OASIS, or through a default release procedure.

FERC approved this approach over the objection of ISO-New England, which claimed that the default procedure would give Cross Sound Cable the opportunity to game the system by withholding capacity. The commission noted that all of Cross Sound Cable's transmission capacity was purchased by the Long Island Power Authority (LIPA) and that it would be in LIPA's interest to sell unneeded capacity in order to reduce its costs.

In addition, the Cross Sound Cable line would be under the control of ISO-New England and, therefore, would benefit from the ISO-New England market mitigation rules. Thus, unlike the Aero case, there was no withholding of available transmission capacity from the market, and there were safeguards to prevent future withholding.

FERC added in its order on rehearing that it was possible Sagebrush already had specific expansion plans that would require the use of the excess transmission capacity. The commission gave Sagebrush the opportunity to make a filing at FERC to demonstrate that it had pre-existing contractual obligations or other specific plans that would require the use of the available firm transmission rights on the Sagebrush line.

Since the date of that order, Sagebrush submitted to the commission information on a confidential basis and Aero filed a response. The parties have continued with additional responses to each other's responses. The commission had not commented on Sagebrush's submission at press time. About the only thing that is clear at this point is that Aero will be entitled to firm transmission service at least until the date that Sagebrush completes an expansion of its wind facilities, provided it demonstrates that it had a prior commitment to do so. Whether Aero will receive the available capacity it needs to support a long-term power sale likely will depend on the strength of Sagebrush's submission of evidence of pre-existing commitments for wind development.

Another related and intriguing question, not yet raised specifically by this case, is whether Sagebrush would have to accommodate Aero or another wind developer in any new transmission capacity that Sagebrush might build if Sagebrush's expansion plans require an amount of transmission capacity that exceeds the available capacity on the existing transmission line. FERC's position on sections 211 and 212 of the Federal Power Act would suggest that the answer is yes. *– Robert Shapiro*

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